



# Supreme Court Considers Scope of Congress's Sixteenth Amendment Income Taxing Power in *Moore v. United States*

January 8, 2024

On December 9, 2023, the Supreme Court heard [oral argument](#) in *Moore v. United States*, an appeal challenging a one-time “[Mandatory Repatriation Tax](#)” (MRT) on U.S. shareholders of a foreign corporation for accumulated, but undistributed, earnings of the corporation. The taxpayers [ask](#) the Court to invalidate the MRT as a tax on “unrealized” income because the [Sixteenth Amendment](#), they argue, has a realization requirement, meaning that the taxpayer must [receive or enjoy](#) an economic gain for earnings to qualify as income. The government [argues](#) that the Sixteenth Amendment contains no such realization requirement and that other taxes Congress has enacted would be invalidated should the Court agree with the taxpayers’ interpretation.

*Moore* has attracted attention from Congress, tax law practitioners, and the general public over how a broad ruling from the Court could expand or constrain Congress’s power to tax income under the Sixteenth Amendment. This Legal Sidebar provides an overview of the constitutional jurisprudence at issue in this case, as well as a discussion of the specific facts and arguments raised in *Moore*, including the Justices’ questioning at oral argument. It also highlights concerns the case has generated. The Sidebar concludes by discussing the potential implications of *Moore* for Congress.

## Legal Background

[Article I, Section 8, Clause 1](#) of the U.S. Constitution authorizes Congress “[t]o lay and collect Taxes, Duties, Imposts and Excises.” [Section 2, Clause 3](#) and [Section 9, Clause 4](#) of Article I limit this power, however, so that “direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers” and “[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census.” Thus, under the “[rule of apportionment](#)” applicable to direct taxes, amounts raised by a direct tax must be divided among the states according to each state’s population.

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The Constitution contains no further definition of “direct tax.” In 1895, the Supreme Court held in its [two decisions](#) in *Pollock v. Farmers’ Loan & Trust Co.* that a tax on income derived from property was a direct tax requiring apportionment.

Less than two decades later and in direct response to *Pollock*’s prohibition of the unapportioned taxation on income, Congress passed and the states ratified the [Sixteenth Amendment](#). The Amendment gives Congress the power “to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.” In other words, the Sixteenth Amendment exempts income taxes from the rule of apportionment.

The Supreme Court later held in a 1920 case, *Eisner v. Macomber*, that a stock dividend—i.e., when a corporation issues new stocks to its stockholders—did not become taxable income until the stock is sold or converted, and then only to the extent that the stockholder realized a gain upon the proportion of the original investment that the stock represented. Subsequent cases [narrowed](#) the application of *Macomber*, but the Court has not overturned it.

## The Mandatory Repatriation Tax

As part of P.L. 115-97, commonly referred to as the [2017 Tax Cuts and Jobs Act](#) (TCJA), Congress enacted the [MRT](#), which taxes U.S. shareholders owning at least 10% of a U.S.-taxpayer-controlled foreign corporation. For the 2017 tax year, such U.S. shareholders had to include in their gross income their pro rata share of the foreign corporation’s “deferred foreign income” after 1986, and the shareholders were subject to a one-time tax on that income. Congress intended the MRT to [offset](#) other tax benefits in the TCJA, and it was projected to generate approximately [\\$340 billion](#) in revenue.

## *Moore v. United States*: Factual Background and the Parties’ Briefing

Charles and Kathleen Moore received [13% of the shares](#) of a corporation located in India for contributing [start-up capital](#) to the corporation in the mid-2000s. The Indian corporation [generated profits every year](#) after its founding, but instead of distributing the profits to its shareholders as dividends, it [reinvested](#) them into the business.

Per the MRT, the Moores reported their [pro rata share](#) of the Indian corporation’s deferred foreign income in their 2017 taxable income, which resulted in about [\\$15,000 in additional taxes](#). The Moores [paid](#) their MRT liability and then sued the government for a [refund](#). The U.S. District Court for the Western District of Washington [denied](#) the refund and the U.S. Court of Appeals for the Ninth Circuit [affirmed](#) the denial. The Moores then sought [review](#) by the Supreme Court, which the Court granted.

Relying principally on *Macomber* for the proposition that the Sixteenth Amendment requires income to be realized to be taxed without apportionment, the Moores [argue](#) that the MRT is an impermissible tax on unrealized income because they never received earnings from the Indian corporation; rather, its earnings were reinvested. Thus, they argue that the MRT is a [direct tax](#) on property—the shares—that requires apportionment, rather than an income tax. The Moores further argue that interpreting the Sixteenth Amendment not to include a realization requirement would render the apportionment requirement meaningless, “[opening the door](#) to unapportioned taxation of anything that Congress might deem a person’s ‘income,’ from property to growth in retirement investments to uncertain or even fictional gains.”

The government contends that the Sixteenth Amendment has [no realization requirement](#), emphasizing that the Amendment [never references](#) “realization.” The government also argues that *Macomber* has been [substantially narrowed](#) to apply only in the stock dividends context that was at issue in that case. The government further asserts that [other taxes](#) on undistributed corporate income similar to the MRT would be invalidated should the Court agree with the Moores’ interpretation.

## Concern over a Broad Ruling

*Moore* has attracted attention from tax attorneys and the general public over how a broad ruling from the Court could expand or constrain Congress's power to tax income under the Sixteenth Amendment.

Some [commentary](#) on *Moore* has echoed the government's concern that a realization requirement could invalidate other taxes, leading to a [substantial loss](#) in tax revenue. Other commentary expresses concern that the lack of a realization requirement could leave Congress's income-taxing power [unrestrained](#), paving the way for a "[wealth tax](#)."

Eighteen *amicus curiae* briefs have been filed [in support of the government](#), while twenty-two have been filed [in support of the Moores](#). Three *amicus curiae* briefs [support neither party](#). The briefs represent the perspectives of states, taxpayers, tax law practitioners, academia, and think tanks.

## Oral Argument

As a threshold matter, at oral argument the Justices pressed both parties on their definitions of income and realization. Upon questioning from Justice Clarence Thomas, the Moores' attorney [defined](#) realization to be "receipt" or "enjoyment of an economic gain such that the taxpayer can put that gain to his or her own uses and benefits." Justice Elena Kagan [asked](#) the Moores' attorney to opine on *Macomber*'s definition of realization: "That which precedes from the property is severed from the capital, is received or drawn by the recipient, that is, the taxpayer, for his separate use." While [acknowledging](#) that the Court has not applied the *Macomber* definition in all contexts, the Moores' attorney [stood by](#) the general proposition that *Macomber* imposes a realization requirement.

In its briefing, the government put forward a [definition](#) of income as economic gain between two points in time. The Moores' attorney argued [against](#) that definition because, "if the time is set at a person's birth or many decades in the past, that could reach some or potentially all of their property." Justices Samuel Alito and Amy Coney Barrett [questioned](#) the [logical extent](#) of the definition and if it would allow for an income tax on [appreciation](#) of an asset's value. Justice Thomas asked whether Congress could tax an increase in the value of [real property](#), while Justice Neil Gorsuch asked about the possibility of a tax on [retirement investment accounts](#). Justice Brett Kavanaugh, on the other hand, expressed that some of the hypothetical taxes presented by other Justices are "[farfetched](#)" since "members of Congress want to get reelected." In response to questioning about its definition of income, the government [clarified](#) that the Court [need not adopt](#) a definition of income as economic gain and expressed apprehension regarding a definition for all purposes. The government agreed that some of the hypotheticals presented by the Justices "are [unlikely](#) to ever come to pass" since Congress frequently chooses to tax based on realization because of administrative practicalities.

Justice Sonia Sotomayor expressed [hesitancy](#) for coming up with a definition "that applies to every piece of property and every way in which people gain wealth," later [stating](#) that "nobody's happy with anybody's definition of anything." Justice Ketanji Brown Jackson asked [if Congress or the Court has the authority](#) to define what constitutes realization.

Some of the Justices asked the Moores' counsel to distinguish between the MRT and other taxes conceded to be constitutional. Justice Kagan specifically asked for a distinction between the MRT and [four kinds of taxing methods](#) that Congress has enacted and that have been raised in briefing as comparable to the MRT:

1. the tax on U.S. shareholders of a U.S.-controlled foreign corporation ([Subpart F](#));
2. the [tax](#) on shareholders' pro rata shares of an [S corporation's](#) items of income;

3. the [tax](#) on partners' distributive shares of a partnership's income; and
4. taxing on an [accrual basis](#), where the [right to receive payment](#)—not the actual receipt—determines inclusion in gross income.

Some of the Justices questioned whether the Court needs to decide if there is a realization requirement to resolve the case. Justice Sotomayor [suggested](#) two possibilities for a narrow ruling: “[F]irst, we can say there is a realization requirement, and, here, it was realized because the corporation realized it. . . . or we could . . . assume that there’s a realization requirement . . . and it was met here.” The government [stressed the importance](#) of adopting the latter option, which Justice Kavanaugh [paraphrased](#) earlier as, “[E]ven assuming or leaving open whether realization is a constitutional requirement, there was realized income here to the [corporation], and then it’s attributed to the shareholders in a manner consistent with how Congress has done that and this Court has allowed.”

Justices [Sotomayor](#), [Barrett](#), [Kavanaugh](#), and [Gorsuch](#) asked if the issue, rather than being about the Sixteenth Amendment, is whether Congress permissibly attributed corporate income to individual shareholders with the MRT. The Moores’ attorney maintained that the case is about [the Sixteenth Amendment, not attribution](#). The government [argued](#) that the Court does not need to resolve whether the Sixteenth Amendment requires realization, but that the Court could find Congress [permissibly](#) attributed foreign corporate earnings to U.S. shareholders under a reasonability standard. Justice Gorsuch asked the government for some [factors](#) for the Court to consider in deciding if Congress permissibly attributes corporate earnings to a shareholder. The government listed some, stressing “the taxpayer’s [overall relationship](#) to the income . . . and the entity.”

## Considerations for Congress

*Moore* has attracted attention from Congress about how a potential realization requirement could implicate other current taxing schemes. On a request from Ranking Member Richard E. Neal, [a letter from the Chief of Staff of the Joint Committee on Taxation](#) identified provisions in the Tax Code that could be affected by a ruling for the Moores holding that the Sixteenth Amendment has a realization requirement. A [CRS In Focus](#) examined the potential economic implications of the case.

Much of the oral argument focused on the role of Congress. Justice Jackson asked [if Congress has the authority](#) to define what constitutes realization. Other Justices acknowledged Congress’s [authority](#) to [attribute](#) corporate income to individuals. The government’s counsel stated that Congress frequently taxes based on realization, not because it is a constitutional requirement, but because of “[administrative practicalities](#),” since it is easier to calculate tax liability on a realization event. Justice Kavanaugh suggested that [political and electoral considerations](#) would caution Congress away from more far-reaching taxes.

## Author Information

Justin C. Chung  
Legislative Attorney

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