No. 03-1709

In the Supreme Court of the United States

UNION ELECTRIC COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

In order to acquire some of the funds necessary to decontaminate and decommission uranium enrichment facilities operated by the Department of Energy (DOE), Congress imposed a special assessment on those domestic utilities that had purchased uranium enrichment services either directly from DOE or in the secondary market. See 42 U.S.C. 2297g, 2297g-1. The question presented is as follows:

Whether the special assessment constitutes a "direct tax" that violates the Constitution, Article I, Section 2, Clause 3, and Article I, Section 9, Clause 4, because it is not apportioned among the States on the basis of population.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 363 F.3d 1292. The opinion of the Court of Federal Claims (Pet. App. 26a-35a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 2004. The petition for a writ of certiorari was filed on June 24, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Energy Policy Act of 1992 (EPACT), Pub. L. No. 102-486, 106 Stat. 2776, establishes a "comprehensive national energy policy" that addresses, *inter alia*, "solutions to our nuclear waste and uranium enrich-

ment problems." H.R. Rep. No. 474, 102d Cong., 2d Sess. Pt. 1, at 132 (1992). Among those problems was contamination at uranium enrichment facilities operated by the Department of Energy (DOE). See *id.* Pt. 8, at 77-78; Pet. App. 2a. Beginning in the 1960s, the government had offered commercial uranium enrichment services to utility companies for use in power generation. See *Commonwealth Edison Co.* v. *United States*, 271 F.3d 1327, 1331 (Fed. Cir. 2001), cert. denied, 535 U.S. 1096 (2002).[1]

DOE offered uranium enrichment services to utilities under an arrangement by which the purchasers furnished low-grade uranium, DOE processed the uranium, and DOE then returned the enriched uranium to the utilities. See *Florida Power & Light Co.* v. *United States*, 307 F.3d 1364, 1371-1372 (Fed. Cir. 2002) (describing enrichment process). The enrichment services were measured in terms of "separative work units" (SWUs), which "measure[] the amount of energy required for the enrichment of each utility's uranium" to the desired level. *Id.* at 1372. Utilities were charged a fee calculated by multiplying the number of SWUs they received by the unit price in the contract. See *Commonwealth Edison*, 271 F.3d at 1331. The unit pricing varied somewhat from contract to contract but was generally established by reference to the price in effect at the time the service was rendered, and in some

[1] As the court of appeals in this case noted (Pet. App. 2a), Federal Circuit opinions in other recent cases have discussed in detail the history and purposes of EPACT. See *Yankee Atomic Elec. Co.* v. *United States*, 112 F.3d 1569, 1572 (Fed. Cir. 1997), cert. denied, 524 U.S. 951 (1998); *Commonwealth Edison*, 271 F.3d at 1330-1336; see also *Maine Yankee Atomic Power Co.* v. *United States*, 271 F.3d 1357, 1360-1361 (Fed. Cir. 2001) (Friedman, J., concurring), cert. denied, 535 U.S. 1095 (2002).

cases was contractually capped at a maximum price. *Ibid.*

In enacting EPACT, Congress determined that domestic utilities that had benefitted from DOE's uranium enrichment services should contribute a portion of the cost of decontaminating the facilities where that enrichment was conducted. See H.R. Rep. No. 474, *supra*, Pt. 8, at 77-78; 138 Cong. Rec. 32,073 (1992) (remarks of Rep. Sharp). EPACT established the Uranium Enrichment Decontamination and Decommissioning Fund (Fund) to accumulate and disburse the money needed to decontaminate those facilities. See 42 U.S.C. 2297g, 2297g-1. Under the Act, the federal government will absorb approximately 68% of the decontamination costs through annual appropriations to the Fund. See 42 U.S.C. 2297g-1(a), (b)(2), (c), and (d); *Commonwealth Edison*, 271 F.3d at 1333.

The remaining 32% (not to exceed $2.25 billion over 15 years) of the Fund's financial base is collected in annual installments (not to exceed $150 million per year, adjusted annually for inflation) from domestic utilities that had previously obtained enrichment services from the federal government. See 42 U.S.C. 2297g-1(c). The sum that a particular utility is required to contribute to the Fund is calculated by reference to "the total amount of separative work units such utility has purchased from the Department of Energy for the purpose of commercial electricity generation, before October 24, 1992." 42 U.S.C. 2297g-1(c); see Pet. App. 3a & n.3. In making that calculation, "a utility shall be considered to have purchased a separative work unit from the Department if such separative work unit was produced by the Department, but purchased by the utility from another source," 42 U.S.C. 2297g-1(c)(1); and "a utility shall not be considered to have purchased

a separative work unit from the Department if such separative work unit was purchased by the utility, but sold to another source," 42 U.S.C. 2297g-1(c)(2). The effect of the EPACT calculation mechanism is thus to "impose[] the assessment upon whichever utility company eventually uses the enrichment services." *Yankee Atomic Elec. Co.* v. *United States*, 112 F.3d 1569, 1572 (Fed. Cir. 1997), cert. denied, 524 U.S. 951 (1998). Utilities that are required to pay an assessment to the Fund may in turn treat that assessment as a "necessary and reasonable current cost of fuel" that is "fully recoverable in rates * * * in the same manner as the utility's other fuel cost." 42 U.S.C. 2297g-1(g).

2. A number of utilities, including petitioner, filed suit in the Court of Federal Claims (CFC), challenging the EPACT assessment on a variety of grounds. In *Yankee Atomic*, the court of appeals rejected the utility's contention that the assessment "violate[d] the Government's earlier contractual agreements to supply enriched uranium at fixed prices." 112 F.3d at 1571; see *id.* at 1573-1580. The court held, *inter alia*, that "the contracts between Yankee Atomic and the Government did not include an unmistakable promise that precluded the Government from later imposing an assessment upon all domestic utilities that employed the DOE's uranium enrichment services." *Id.* at 1580. The court explained that the assessment "is not a deliberate retroactive increase in the price of those contracts," but is instead "the Government's way of spreading the costs of the later discovered decontamination and decommissioning problem on all utilities that benefited from the Government's service, whether or not those services were acquired by contract from the Government." *Ibid.* This Court denied the utility's petition

for certiorari. *Yankee Atomic Electric Co.* v. *United States*, 524 U.S. 951 (1998) (No. 97-801).

In its subsequent decision in *Commonwealth Edison*, the en banc Federal Circuit held that the EPACT assessment did not effect a taking of the utility's property without just compensation, see 271 F.3d at 1338-1340, and that it did not violate the utility's right to substantive due process, see *id.* at 1341-1357. The court concluded, *inter alia*, that the retroactive nature of the assessment did not render it unconstitutional. The court explained that the utility "operate[d] in a highly regulated industry" and could therefore "expect liability for remediation costs." *Id.* at 1348. The court also observed that Commonwealth Edison was "aware of the hazardous nature of the materials" and had long recognized "that there would be decontamination and decommissioning costs arising from the operation of the uranium processing facilities." *Id.* at 1349. This Court again denied certiorari. *Commonwealth Edison Co.* v. *United States*, 535 U.S. 1096 (2002) (No. 01-1411).

3. Petitioner's challenge to the EPACT assessment had been stayed pending disposition of suits filed by other utilities. After those cases were decided by the court of appeals, petitioner conceded that six of the seven counts of its complaint should be dismissed as inconsistent with binding precedents of the Federal Circuit and of this Court. See Pet. App. 27a, 29a. Petitioner continued, however, to press its contention that the assessment was a "direct tax" within the meaning of Article I, Section 2, Clause 3, and Article I, Section 9, Clause 4 of the Constitution (the Direct Tax Clauses). Petitioner argued that the assessment, which is not apportioned among the States on the basis of population, is therefore unconstitutional. See Pet. App. 27a.

The CFC dismissed petitioner's claim under the Direct Tax Clauses. Pet. App. 26a-35a. The court found that challenge to the EPACT assessment to be foreclosed by Federal Circuit precedent. See *id.* at 32a-35a. The CFC construed the Federal Circuit's prior decisions in *Commonwealth Edison* and in *Maine Yankee Atomic Power Co.* v. *United States*, 271 F.3d 1357 (2001), cert. denied, 535 U.S. 1095 (2002), as implicitly rejecting similar Direct Tax Clause challenges raised by the plaintiffs in those cases. See Pet. App. 33a-34a.

4. The court of appeals affirmed. Pet. App. 1a-25a.

a. The court of appeals disagreed with the CFC's holding that consideration of petitioner's constitutional claim was foreclosed by circuit precedent. Pet. App. 6a-9a. The court observed that "the direct tax issue was not specifically argued in *Yankee Atomic* or *Commonwealth Edison*." *Id.* at 7a. The court held that, "[e]ven if *Maine Yankee* were viewed as implicitly rejecting the direct tax argument, * * * the disposition of an issue by an earlier decision does not bind later panels of this court unless the earlier opinion explicitly addressed and decided the issue." *Id.* at 8a-9a. The court accordingly considered the merits of petitioner's constitutional claim. See *id.* at 9a.

b. On the merits, the court of appeals identified two independent bases for its conclusion that the EPACT assessment is not a "direct tax" within the meaning of the pertinent constitutional provisions. First, the court construed this Court's decisions to establish that "the only impermissible direct tax on personal property is a general tax on broad classes of personal property." Pet. App. 18a. The court stated that, unlike the tax on income from personal property that was struck down in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895) (*Pollock II*), the EPACT assessment "is not a

general tax on the whole of one's personal property or even a tax on a broad class of personal property. Rather, it is a carefully tailored tax, * * * levied upon only one particular kind of personal property, government-enriched uranium. It therefore is not a direct tax." Pet. App. 19a.

As an "alternative reason why the EPACT special assessments are not direct taxes," the court of appeals held that the "tax at issue here is clearly an excise." Pet. App. 19a. That is so, the court stated, both because the EPACT assessment "taxes consumables," *id.* at 20a, and because "its incidence falls on a particular activity related to property—here the purchase of enrichment services or enriched uranium—as opposed to the ownership of property," *id.* at 21a. The court observed, in the latter regard, that "[t]he EPACT tax was not imposed on the mere ownership of enriched uranium. Rather, the tax was limited to purchases of government enrichment services or government-enriched uranium 'for the purpose of [domestic] commercial electricity generation' prior to October 24, 1992." *Id.* at 22a (quoting 42 U.S.C. 2297g-1(c)). The court of appeals concluded that the assessment "is indistinguishable from taxes on carriages, tobacco, yachts and other types of personal property that have long been accepted as excise taxes." *Id.* at 23a.[2]

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[2] Citing cases in which this Court had rejected similar arguments, the court of appeals also rejected petitioner's contention that, because the EPACT tax operates retroactively and is therefore unavoidable, it cannot be an excise tax. Pet. App. 23a-24a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The core premise of petitioner's constitutional challenge is the assertion that the EPACT assessment is a tax on "property" that is "imposed by reason of ownership." Pet. 11. That premise is incorrect. To help fund decontamination and decommissioning of the government's uranium enrichment facilities, EPACT assessed utilities for their prior use of DOE's enrichment services. See *Yankee Atomic*, 112 F.3d at 1575-1577; *Commonwealth Edison*, 271 F.3d at 1329-1330. The assessment imposed on each domestic utility is calculated by reference to the total amount of SWUs that the utility had purchased (directly or indirectly) from DOE before October 24, 1992. 42 U.S.C. 2297g-1(c); see *Commonwealth Edison*, 271 F.3d at 1333. That method of calculating the EPACT assessment reflects Congress's judgment that "the allocation of costs of cleaning up these plants * * * should be based on benefits received from the [enrichment] program." H.R. Rep. No. 474, *supra*, Pt. 1, at 144; see *Commonwealth Edison*, 271 F.3d at 1342; *Yankee Atomic*, 112 F.3d at 1575.[3]

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[3] Under the pre-EPACT legal regime, DOE was required to price the enrichment services on a cost-recovery basis; the program was not intended to be a profit-making enterprise. See 42 U.S.C. 2201(v)(B)(iii) (1988). Indeed, the House Report accompanying EPACT stated that, "[i]n the past, reliable government enrichment services offered to the private sector were accompanied by billions of dollars in taxpayer losses." H.R. Rep. No. 474, *supra*, Pt. 1, at 143. It had long been recognized, moreover, that decontamination and decommissioning of the enrichment facilities would eventually entail additional costs, see *Commonwealth*

Presumably some of the utilities that purchased SWUs from DOE before October 24, 1992, continued to own the enriched uranium as of that date. The basis for the assessment, however, is the prior receipt of benefits resulting from a federal program, not the ownership of enriched uranium on the assessment date; and the correlation between the two criteria is far from absolute. Petitioner is therefore wrong in characterizing the EPACT assessment as a tax on the ownership of property.

a. The EPACT assessment applies to a utility that purchased SWUs from DOE before October 24, 1992, even if the utility had already used the enriched uranium to generate electric power before the assessment date. After a utility has used enriched uranium to produce electricity, it no longer owns the enriched uranium, but instead owns spent nuclear fuel. See, *e.g.*, *General Elec. Uranium Mgmt. Corp.* v. *United States Dep't of Energy*, 764 F.2d 896, 897 & n.2 (D.C. Cir. 1985). Under the plain terms of EPACT, however, a utility that purchased enrichment services from DOE could not avoid the assessment by demonstrating that it had used the enriched uranium to generate electricity, and therefore ceased to own the enriched uranium itself, before October 24, 1992. See 42 U.S.C. 2297g-1(c) (calculating the special assessment by reference to "the total amount of separative work units such utility has *purchased* from the Department of Energy for the purpose of commercial electricity generation, before

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Edison, 271 F.3d at 1349; p. 5, *supra*; yet "the prices charged in the Government's past uranium enrichment contracts had not accounted for the problem," *Yankee Atomic*, 112 F.3d at 1572. It is therefore clear that DOE's pre-EPACT enrichment services to utilities entailed the provision of a government *benefit*, not simply the execution of an ordinary commercial transaction.

October 24, 1992," without regard to the utility's *ownership* of enriched uranium on the assessment date) (emphasis added). The applicability of Section 2297g-1(c) to that scenario refutes petitioner's contention (Pet. 23-24) that the EPACT assessment "applies by its express terms only to the utilities that *owned* government-enriched uranium materials on the assessment date."

As petitioner explains (Pet. 6 n.5, 24 n.15), if a utility purchased enrichment services from DOE, and resold the enriched uranium to another utility before October 24, 1992, the EPACT assessment is generally placed upon the transferee rather than the transferor utility. See 42 U.S.C. 2297g-1(c)(1) and (2). Contrary to petitioner's contention (Pet. 24 n.15), however, that feature of the statute does not mean that the assessment is "based on the ownership of the property on a specific date." The transferee utility in that situation remains liable for the assessment even if it used the enriched uranium to generate electricity, and therefore ceased to own it, before October 24, 1992. Rather, imposition of the EPACT assessment on the transferee utility in that scenario reflects Congress's decision to impose the assessment on "the ultimate beneficiary of the DOE's services." *Yankee Atomic*, 112 F.3d at 1575. That the EPACT assessment may be triggered by indirect as well as direct receipt of DOE's enrichment services does not alter the fact that it is the receipt of those services, not the ownership of property, that is the subject of the tax.

b. Even if a utility owned enriched uranium on October 24, 1992, it is not subject to the EPACT assessment unless the relevant enrichment services were provided by DOE. Because the assessment is calculated by reference to the amount of SWUs that a

utility has purchased (either directly or indirectly) "from the Department of Energy" (42 U.S.C. 2297g-1(c)), the assessment does not apply to "domestic utilities that purchased enriched uranium from foreign sources." Pet. App. 4a; see H.R. Rep. No. 474, *supra*, Pt. 8, at 76 (noting that "the DOE enrichment program has suffered from rising competition from other countries").[4] The effect of the statutory method of calculation is that two domestic utilities that owned physically equivalent stocks of enriched uranium on October 24, 1992, may be treated differently for purposes of the EPACT assessment, based on their use of different suppliers of enrichment services. That fact further refutes petitioner's contention that the EPACT assessment is imposed on the basis of ownership of property.[5]

2. Even if the EPACT assessment were triggered by a utility's ownership of DOE-enriched uranium on

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[4] The inapplicability of the assessment to those utilities follows logically from the purpose of the assessment, which is to place part of the costs of decontaminating and decommissioning DOE's facilities on those who previously benefitted from DOE's services.

[5] As noted above (see p. 10, *supra*), petitioner contends that the EPACT assessment "applies by its express terms only to the utilities that *owned* government-enriched uranium materials on the assessment date." Pet. 23-24. Petitioner's characterization of the assessment's coverage is inaccurate. See pp. 9-10, *supra*. Even if that description of the statutory scheme were factually correct, however, petitioner's reference to "*government-enriched* uranium materials" would be revealing. *Qua* property, "government-enriched" uranium is no different from uranium enriched to an equivalent degree by one of DOE's foreign competitors. The fact that EPACT distinguishes between government-enriched and other enriched uranium demonstrates that the assessment is not imposed on the basis of ownership of particular property, but rather on the basis of a utility's receipt of services from a particular provider.

the assessment date, as petitioner contends, the court of appeals' decision upholding the tax would not warrant this Court's review.

a. In *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171 (1796), this Court considered and rejected a constitutional challenge to an unapportioned federal tax levied "upon all carriages for the conveyance of persons, which shall be kept by or for any person, for his or her own use, or to be let out to hire, or for the conveying of passengers." Act of June 5, 1794, ch. 45, § 1, 1 Stat. 373-374; see Pet. App. 11a. The tax was imposed on "every person having or keeping a carriage or carriages, which, by this act, is or are made subject to the payment of duty." § 3, 1 Stat. 374.

All three Justices who participated in *Hylton* agreed that the challenged duty was an indirect rather than a direct tax and was therefore constitutional, notwithstanding the failure of Congress to apportion the tax among the States on the basis of population. See Pet. App. 11a-12a (summarizing individual opinions in *Hylton*). Those opinions indicate that the Framers regarded taxes levied on specific categories of consumable personal property as indirect. See *ibid.* Each of the three Justices in *Hylton*, moreover, relied in part on the fact that any effort to apportion the carriage tax would have been unjust and impractical "because the number of carriages in a state did not necessarily correlate to the state's population." *Id.* at 12a. That observation would be equally applicable to a tax levied on ownership of enriched uranium.[6]

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[6] Petitioner contends (Pet. 26) that the purpose of the Direct Tax Clauses was to prevent Congress from imposing a tax "on only one particular kind of property * * * that happened to be more prevalent in some regions of the Nation than in others." The

Petitioner characterizes *Hylton* as involving a tax on the "use" rather than the "ownership" of property. See Pet. 14 n.10, 23. Although dicta in subsequent decisions have suggested that a distinction between use and ownership may be relevant to the constitutional analysis (see pp. 16-17, *infra*), none of the Justices in *Hylton* relied on (or alluded to) that distinction. Rather, each of the three Justices who participated in *Hylton* referred to the challenged duty as a "tax on carriages." See 3 U.S. (3 Dall.) at 173, 174, 175 (opinion of Chase, J.); *id.* at 179, 180 (opinion of Paterson, J.); *id.* at 182, 183 (opinion of Iredell, J.); see also *Pollock II*, 158 U.S. at 627 ("What was decided in the *Hylton case* was, then, that a tax on carriages was an excise, and, therefore, an indirect tax.").

Other early decisions of this Court likewise construed the constitutional term "direct tax" to apply only to a narrow category of federal levies. In *Springer* v. *United States*, 102 U.S. 586 (1881), for example, the

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Justices in *Hylton*, however, specifically considered the possibility that the number of carriages per person might be greater in some States than in others. See 3 U.S. (3 Dall.) at 174 (opinion of Chase, J.); *id.* at 179 (opinion of Paterson, J.); *id.* at 181-182 (opinion of Iredell, J.). The Justices did not infer from that prospect that the carriage tax was unconstitutional or even constitutionally suspect. Rather, they treated the likelihood that carriages were not uniformly distributed among the States as an additional basis for characterizing the challenged tax as indirect. See *id.* at 174 (opinion of Chase, J.) (stating that "[t]he rule of *apportionment* is only to be adopted in *such* cases where it can reasonably apply," and concluding that "a tax *on carriages* cannot be laid by the rule of *apportionment*, without very great inequality and injustice"); *id.* at 179 (opinion of Paterson, J.) ("A tax on carriages, if apportioned, would be oppressive and pernicious."); *id.* at 182 (opinion of Iredell, J.) (apportionment of carriage tax "is too manifestly absurd to be supported").

Court sustained the federal Civil War Income Tax against the contention that it was an impermissible unapportioned direct tax. The Court reviewed its prior decisions in the area (see *id.* at 599-602) and concluded that "*direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate." *Id.* at 602; see *Veazie Bank* v. *Fenno*, 75 U.S. (8 Wall.) 533, 544-546 (1869); *Scholey* v. *Rew*, 90 U.S. (23 Wall.) 331, 347-348 (1875). The EPACT assessment, even if regarded as a tax on the ownership of DOE-enriched uranium, clearly would not fall within either of those categories.

b. Subsequently, in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895) (*Pollock I*), and in *Pollock II*, this Court articulated a somewhat more expansive conception of the "direct tax[es]" that are subject to the constitutional apportionment requirement. In *Pollock I*, the Court held that the Income Tax Act of 1894, ch. 349, 28 Stat. 509, was unconstitutional as applied to income derived from real property, on the ground that such a tax was indistinguishable for purposes of the Direct Tax Clauses from a tax levied on the real estate itself. 157 U.S. at 581. On rehearing in *Pollock II*, the Court held that the 1894 Act was also unconstitutional as applied to income derived from personal property. The Court concluded that the Direct Tax Clauses bar Congress from levying "a general unapportioned tax, imposed upon all property owners as a body for or in respect of their property." 158 U.S. at 627.

Even if the EPACT assessment were properly characterized as a tax on ownership of DOE-enriched uranium, it would be fully consistent with the rule announced in *Pollock II*. As the court of appeals in the instant case explained, "[t]hroughout the *Pollock II*

opinion the Court was careful to describe the income tax at issue as a general tax on the whole of an individual's personal property." Pet. App. 16a; see *id.* at 16a-17a (citing relevant passages from *Pollock II* opinion). Because the EPACT assessment "is not a general tax on the whole of one's personal property or even a tax on a broad class of personal property," *id.* at 19a, the decision in *Pollock II* provides no support for petitioner's contention that the assessment is a prohibited direct tax.[7]

In *Patton* v. *Brady*, 184 U.S. 608 (1902), decided just seven years after the *Pollock* cases, this Court held that an unapportioned federal tax on tobacco was a permissible excise rather than a direct tax. The Court did not (as petitioner contends, see Pet. 23) suggest that the tax was valid because it was imposed on the sale rather than the ownership of tobacco. Rather, while noting that the tax was "placed upon articles which 'were at the time of the passage of this act held and intended for sale,'" 184 U.S. at 623, the Court distinguished the *Pollock* decisions on the ground that the challenged tax was "not a tax upon property as such

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[7] In significant respects, this Court's decisions in *Pollock I* and *Pollock II* are no longer good law. The specific limitations announced by the Court on Congress's power to tax incomes were superseded by the Sixteenth Amendment. Quite apart from that Amendment, moreover, the proposition that a tax on income is constitutionally equivalent to a tax on the land from which the income is derived was later rejected in *New York ex rel. Cohn* v. *Graves*, 300 U.S. 308, 312-314 (1937). The Court in *Pollock I* also held that intergovernmental immunity barred Congress from taxing interest derived from state and municipal bonds. See 157 U.S. at 583-586. In *South Carolina* v. *Baker*, 485 U.S. 505, 524 (1988), this Court "confirm[ed] that subsequent case law has overruled the holding in *Pollock* that state bond interest is immune from a nondiscriminatory federal tax."

but upon certain kinds of property, having reference to their origin and their intended use," *id.* at 619. That same characterization would apply here, even if the EPACT assessment were properly regarded as a tax on enriched uranium. The assessment is not a tax on "property as such" (*ibid.*), and it is determined by reference both to the origin of the enriched uranium (since it is triggered by the purchase of SWUs "from the Department of Energy") and to its intended use (since the assessment applies only to SWUs purchased "for the purpose of commercial electricity generation"). 42 U.S.C. 2297g-1(c); see Pet. App. 22a.

c. Petitioner relies (see Pet. 16-17, 21-24) on dicta from various decisions suggesting a possible constitutional distinction between taxes on the "use" of specific personal property and taxes imposed solely on the basis of "ownership Petitioner identifies no case, however, in which this Court or any court of appeals has relied on that distinction in striking down a federal tax statute.[8]

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[8] Even assuming that *Eisner* v. *Macomber*, 252 U.S. 189 (1920), remains good law, petitioner's reliance (Pet. 14, 17) on that decision is misplaced. In *Eisner*, the Court struck down a federal tax imposed on a shareholder's receipt of a corporate stock dividend. See 252 U.S. at 200-201. The bulk of the Court's analysis addressed the question whether a stockholder's share of the corporations's profits was "income" within the meaning of the Sixteenth Amendment, and the Court concluded that it was not. See *id.* at 205-217. The tax at issue in *Eisner* was not imposed on specific personal property owned by the taxpayer; rather, the dividend represented an undifferentiated share of the total assets of the corporation. See *id.* at 219. *Eisner* therefore would not cast doubt on the constitutionality of a tax on enriched uranium, even if the EPACT assessment were properly so characterized.

This Court's decision in *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U.S. 288 (1921) (see Pet. 22, 24), is also inapposite. That case involved a state rather than a federal tax and

There is consequently no basis for petitioner's contention that the court of appeals' reasoning in this case is contrary to a settled understanding of the coverage of the Direct Tax Clauses. In any event, the EPACT assessment is not based solely on the ownership of enriched uranium. Rather, it is imposed on utilities that have benefitted from DOE's enrichment services by purchasing SWUs from the agency for the purpose of generating electric power.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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accordingly presented no question under the Direct Tax Clauses. See 255 U.S. at 294-295; Pet. App. 12a-13a n.8.