

Why Proposition 13 Is Unconstitutional

The documented legal case against fiscal conservatism

Excerpted here is a brief filed by the U.S. Labor Party as amicus curiae (friend of the court) in the legal challenge by counties, municipalities, and school districts to the constitutionality of California's Proposition 13 tax limitation measure. In the brief, Labor Party attorneys Neil Eisenberg and James Appelbaum argue that Proposition 13 (also known as the Jarvis Initiative) violates the fundamental guarantees of the U.S. Constitution and the California Constitution by undermining the ability of government to assure continued economic growth and development.

The challenge to the California initiative includes three petitioners accepted by the State Supreme Court, and a number of amicus curiae both for and against the initiative. The Labor Party's amicus brief is unique, however, in that it goes beyond the technical deficiencies of Proposition 13 under California law, and reaches the fundamental constitutional questions applicable in each state where similar measures are proposed, and which must be considered by the U.S. Supreme Court if the challenge to the California measure is appealed to that body.

It is well recognized as a constitutional principle that the state has an obligation to provide an appropriate level of services to the population. Measures of simple fiscal conservatism, undermining government's ability to provide the conditions necessary to generate wealth, therefore threaten the very existence of our republican form of government. On that basis, the Labor Party argues, they must fail any constitutional test.

By leave of this Court, the U.S. Labor Party files this brief as amicus curiae.

On June 6, 1978 in the California General Election, the State's voters approved Proposition 13 (the Jarvis Initiative). Proposition 13 mandates a reduction in local property tax levels, alters the basis for property assessment, forbids all new state taxation without a two-thirds vote of the State Legislature, and mandates all new local taxation be ratified by a two-thirds vote of the qualified electorate. . . .

SUMMARY OF ARGUMENT

The U.S. Labor Party as *amicus curiae* herein joins in the position of the petitioners that the Jarvis Initiative is unconstitutional and should be enjoined from enforcement. The Initiative undermines and destroys the very foundations of a constitutional state government — its ability to provide adequately for the health, safety and

welfare of its citizens; and its ability to insure continued economic growth and development.

The United States Constitution was framed to create a government, unique among western republics, based on a fundamental commitment to progress. Benjamin Franklin, George Washington and Alexander Hamilton all believed that universal natural law required government to insure the conditions for economic growth, scientific development and a productive citizenry. The constitutions of the several states reflect that commitment. The ability of government to insure the health, safety and welfare of the citizenry, the basic constitutional guarantees for progress, depends upon government fostering economic growth and thereby broadening its tax base. This requires a productive, skilled population.

The Jarvis Initiative, therefore, is not a mere proposition defining a legislative policy or action for the state — such as a specific measure to encourage the development of nuclear power within the state, a policy proposal to insure the provision of low cost credits for industrial expansion, or a specific plan for irrigation improvements to extend agriculture. The Jarvis Initiative cuts at the heart of government's taxing power, its ability to raise revenue to provide public service benefits and to insure continued economic growth. Under the guise of tax reform, the Jarvis Initiative drastically damages the very basis of government's ability to carry out its duties.

Although it is appropriate to reform the tax system, establishing a progressive taxation based upon generating increased revenues, this is not the intent or the effect of the Jarvis Initiative. The Initiative undermines the state's ability to meet its duties to the people, effectively causing the collapse of government.

The resources for advanced technology in agriculture, electronics and aerospace; the crucial educational facilities, the scientific research capabilities of the state of California determine its unique importance, not only to the economy of the United States, but to world scientific and economic development as a whole. These resources depend upon the level of public services provided by the state to maintain the productivity and creativity of its people. The very existence of state government rests upon its ability to provide these necessary public services. It is already quite clear that the Jarvis Initiative makes the fulfilment of that obligation by the state impossible.

It would be clearly unconstitutional for the state legislature to pass measures causing its own collapse or dissolution, or the dissolution of the other branches of government. Such measures are equally unconstitutional

when they are enacted by the Jarvis Initiative. In fact this fundamental premise is now the law of the state of California which limits such initiatives merely to amending the constitution while prohibiting revising it by initiative. . . . Moreover, the Jarvis Initiative is unconstitutional because it undermines the fundamental constitutional premise upon which the sovereignty of the government of California rests — its responsibility to insure and provide for the health, safety and welfare of the population and the further development and growth of the state's economy. By undermining these fundamental duties of the state in an arbitrary and chaotic fashion, the Initiative also undermines the U.S. Constitution's guarantee to its citizens of a republican form of government, with all the privileges and immunities pertaining thereto.

POINT I:

The Jarvis Initiative is unconstitutional under the U.S. Constitution and the Constitution of the State of California in that it undermines the ability of the State of California to provide adequately for the health, welfare and safety of the population. The sovereignty of the State rests upon its duty to provide appropriately for the health and welfare of the population.

It is a well-accepted general principle that the paramount duty of state government is to safeguard the health, safety and welfare of its population This principle is derived from the spirit and intention of the U.S. Constitution.

The Constitution, framed on the principles of universal natural law, was designed to create a government capable of directing and expanding trade and commerce, encouraging the development of manufactures and the discoveries of science, and thereby providing for an increasingly educated, skillful and creative population. As Alexander Hamilton wrote in the *Federalist*,

“Under a vigorous national government, the natural strength and resources of the country, directed to a common interest, would baffle all combinations of European jealousy to restrain our growth. This situation would even take away the motive for such combinations, by inducing an impracticability of success. An active commerce, an extensive navigation, a flourishing marine, would then be the inevitable offspring of moral and physical necessity. We might defy the little arts of little politicians to control, or vary, the irresistible and unchangeable course of nature.” Alexander Hamilton, *The Federalist*, Number XI.

To this end, it was endowed with the powers necessary and proper to carry out its functions.

“This is one of those truths, which, to a correct and unprejudiced mind, carries its own evidence along with it; and may be obscured, but cannot be made plainer by argument or reasoning. It rests upon axioms as simple as they are universal — the *means* ought to be proportioned to the *end*; the persons from whose agency the attainment of any *end* is expected, ought to possess the *means* by which it is to be attained.” Alexander Hamilton, *The Federalist*, Number XXIII.

The constitutions of the states, subject to the approval of the U.S. Congress at the time of admission to the Union, perforce express similar sentiments, particularly in their definition of state responsibilities under the Tenth Amendment to the United States Constitution. Chief Justice John Jay, referring to the Preamble to the Constitution, definitively described the relationship between the state constitutions and the federal constitution as follows:

“Here we see people acting, as sovereigns of the whole country; and in the language of sovereignty, establishing a constitution, by which it was *their will*, that the state governments should be bound, and to which the state constitutions should be made to conform.” *Chisholm v. State of Georgia*, 3 Dall, 419

The Constitution of the state of California founds the sovereignty of that state upon its duty to provide for the “protection, security, and benefit of the people.” (Cal. Const. ART. I § 2)

These constitutionally mandated duties and powers, as well as the natural law commitment to progress embodied in our republican form of government and the U.S. Constitution make it inescapably clear that the state legislature cannot be forced to divest itself of its Tenth Amendment police powers, at the behest of an initiative passed by the voters. Article IV, Section 1 of the California constitution indicates clearly that the initiative power reserved to the people is the power to adopt a statute or an amendment to the constitution. It is not a power sufficiently broad to permit an alteration in the form of our government or in the fundamental responsibilities and duties of the state legislature.

The fundamental and basic nature of the duty of the state to provide for the health and welfare of its citizens is well understood. As well it is clear that the standard by which the appropriateness of the level of public services provided must be measured is the growth of the economy as a whole. Chief Justice Hughes, of the United States Supreme Court, examined the question closely in *Home Building and Loan Association v. Blaisdell*, supra. His view still stands:

“It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare Where, in earlier days, it was thought that only the concerns of individuals or classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the *use of reasonable means to safeguard the economic structure upon which the good of all depends*.”

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation of the framers, which the conditions and outlook of their time would have placed upon them, carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning — “We must never forget that it is a *constitution* we are

expounding' constitution intended to endure for ages to come and consequently to be adapted to the various crises of human affairs.'

Blaisdell, supra at 442 (emphasis added).

California is a center for the nation's advanced electronic and aerospace capabilities. The Imperial Valley and other areas within the state are representative of the most technologically advanced agriculture in the world. California has an unparalleled concentration of top level educational facilities. It is a major center for scientific research and development. As a result, its population is highly skilled, productive, and creative. The economy of the state as a whole, because of its extraordinary productive capacity and skilled population, represents a crucial resource not only for the national economy, but for the economic and scientific development of the entire world.

It is California's contribution to the national and international economy which determines the nature and level of public services which the state must provide to meet its obligations to public health, safety and welfare in Article I, sections 2 and 3 of the California constitution. The Jarvis Initiative will certainly have the effect of significantly decreasing the level and quality of public services available to the people of California. It does so, not as a part of an overall policy, deliberated upon and approved by legislative representatives, conscious of their paramount obligation to provide for the safety and happiness of the people, but rather as a single bullet, shot into the heart of the state's sovereign powers.

POINT II:

The power of taxation is fundamental to state sovereignty and cannot be undermined by initiative or referendum. The Jarvis Initiative violates the protections of the California State Constitution in that it revises rather than amends the Constitution and it concerns more than one subject.

The power of taxation is fundamental to the sovereignty of the state and cannot be undermined through the exercise of initiative or referendum. The California Constitution itself contains certain safeguards to ensure that broad and sweeping initiative or referendum measures do not create chaos in the administration of government, and do not present the people with complex measures requiring extensive knowledge and deliberation or unpalatable choices

The power of government to tax is established in Article XIII of the California Constitution, and is vested in numerous separate bodies so they may carry out their duty to provide services as required by the Constitution of California and by specific statutes. The relationship between the taxing power of government and its ability to meet its obligations to the population can hardly be questioned. In the words of Chief Justice John Marshall:

"That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed."

vs. Billings and Pittman 4 Peters 514 at 562.

Further, it is well established that limitations imposed on the taxing power of government provide a short road to chaos and disorder. Supreme Court Justice Joseph Story, in his Commentaries on the Constitution of the United States, discussed the debate on national governmental taxing powers that occurred during the framing and ratification of the United States Constitution. His views on the matter are particularly noteworthy since the founding fathers of our nation, attempting to create a government based on a commitment to scientific progress and capable of directing and developing the fragile and depressed economy of the U.S. at that time, faced a "tax revolt" not dissimilar to that which we are experiencing now. This distinctly political problem was resolved not by limiting the taxing power of government in a futile attempt to spread around the shrinking wealth of the nation, but rather by creating a government with powers sufficient to ensure the generation of additional revenues by expanding the tax base. (See Alexander Hamilton, Report on a National Bank and Report on the Subject of Manufactures, in *The Political Economy of the American Revolution*, Campaigner Publications, Inc. 1977, pages 339-442.)

Story commented:

"If, then, there is to be a real, effective national government, there must be a power of taxation co-extensive with its powers, wants and duties . . . Every government ought to contain within itself every power requisite to the full accomplishment of the objects committed to its care, and the complete execution of the trusts, for which it is responsible, free from every other control, but with a regard to the public good, and to the security of the people . . . It is impossible to foresee all the various changes in the posture, relations, and power of different nations which might affect the safety and prosperity of our own . . . The power of taxation, therefore, to be useful, must not only be adequate to all the exigencies of the nation, but it must be capable of reaching from time to time all the most productive sources . . . How is it possible, that a government half supplied and half necessitous can fulfill the purposes of its institution, or can provide for the security, advance the prosperity, or support the reputation of the commonwealth? How can it ever possess either energy or stability, dignity or credit, confidence at home, or respectability abroad? How can its administration be anything else, than a succession of expedients, temporary, impotent, and disgraceful?" Joseph Story, *Commentaries on the Constitution*, II § 930-933.

Indeed, the California courts have similarly understood the integral nature of the taxing power to the state's sovereignty and its ability to carry out its obligations to the population. The courts have held that the initiative and referendum procedures, although generally applicable to all legislative powers, are not an appropriate vehicle to alter the taxing power of government

The Jarvis Initiative in effect utilizes the reserved initiative and referendum rights of the people to enact a major budget cut, and then turns the matter over to the state legislature to pick up the pieces, with no regard for the statutory and constitutional rights of that office.

Even though just the most preliminary effects of the Jarvis Initiative have been felt in the state, Governor Brown, citing the Jarvis Initiative, has cut \$388.5 million from the California state budget, a decrease of \$10.6

million from last year's budget, despite inflation. Service cuts include cuts in health and rehabilitation programs, cutbacks in child care, no cost of living increase for welfare recipients, cuts in the recreational facilities budgets, cuts in the higher education budget, cuts in highway construction, as well as no cost of living increase for state employees. Cities, towns and counties have made their own cuts in all services in anticipation of the decreased property tax collection and decreased state aid. The fact that this represents just the initial impact was best stated by Governor Brown in his message to the State Legislature, which accompanied his line item vetoes: "Proposition 13 radically restructured the financing of government in California . . . During this transition year, local government will have its revenues reduced by \$7 billion." (Governor Edmund G. Brown, Jr., July 6, 1978 message to the State Legislature.)

Basic economics should make it plain that these cuts are not merely dollar cuts in total public services provided. The people of California depend upon the state and local public services to maintain their standard of living and their productivity. The drastic budget cuts already announced directly affect the ability of the California economy to produce wealth. Therefore, the Jarvis Initiative, which has required immediate budget slashes, is also cutting away at the total taxable income and property which the economy can generate. Therefore, its immediate practical effect transcends the simple cuts in services which have already been announced, and directly circumscribes the state's ability to generate revenues to meet its obligations to the people.

The experience of New York City, under the austerity regime of the Municipal Assistance Corporation and the Emergency Financial Control Board is sadly illustrative of the causative relationship between significantly diminished public services, destruction of the productive powers of the population and a shrinking tax base. The criterion of *Chase vs. Kalber*, supra, of a measure undermining the efficacy of government, is amply met.

POINT III:

The Jarvis Initiative Violates Article IV, Section 4 of the United States Constitution

The Jarvis Initiative, by establishing permanent popular ratification of local tax measures and by imposing a special standard of two-thirds vote of the legislature for state tax measures, violates the republican form of government guaranteed to each state by the U.S. Constitution (Article IV, Section 4). The commitment to republican government as appropriate to scientific and economic growth, was a universally shared political principle of this nation's founders. In his justly famous *Federalist* Number 10, James Madison counterposes the operation of a republican government to that of a pure democracy. The latter form of government, Madison argues, is forever vulnerable to the violence of faction.

"By a faction I understand a number of citizens whether amounting to a majority or a minority of the whole, who are

united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." James Madison, *The Federalist*, No. 10.

The virtue of republicanism in combatting the destructiveness of faction is that it vests the sovereign powers of government in a body of elected representatives. These leaders, while dependent upon popular support, must exercise independent judgment in matters of fundamental policy deliberation. In this manner, the spirit of reason, and not the impulse of faction, determines policy for this nation and its individual member states.

To ensure the continued existence of republican government the Philadelphia Convention of 1787 provided for an explicit constitutional guarantee to each constituent state. Foremost in the minds of the men assembled that year in Philadelphia was the popular discontent, caused by unsettled economic conditions, which threatened to return the newly independent nation to its colonial status. The danger was addressed by James Madison: "But who can say what experiments may be produced by the caprice of particular states, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers?" (James Madison, *The Federalist*, No. 43). The near-total disregard for the effects upon the population of cuts in public services necessarily compelled by the Jarvis Initiative certainly qualifies this measure as a "caprice" with lasting and deadly consequences.

The present dormant nature of the guarantee clause of the U.S. Constitution was certainly not intended in 1787 by that group of men so especially attuned to the potential destructive character of simple majority government. Recently the U.S. Supreme Court has begun to rescue the guarantee clause from the clutches of judicial abstentionism

With respect to the Jarvis Initiative, we are not asking this court to invalidate all statutes enacted through initiative and referendum. This particular process of legislation has already been well-secured in many states. We do not contest the right of the electorate to pass laws by initiative and referendum, but assert that the Jarvis Initiative deprives the state government of its fundamental, sovereign, republican powers and as such violates Article IV, Section 4 of the U.S. Constitution.

The nature of the judiciary gives it a paramount responsibility for enforcing the above section of the U.S. Constitution. We rely upon Justice Douglas' view in *Baker vs. Carr*, supra, that the Courts may adjudicate a controversy under Article IV, Section 4 of the U.S. Constitution. Frequently in this nation's history, state and federal courts have been called upon to check abuses of popular government. For this reason the Supreme Court of the United States has been equipped with the power of judicial review as the essential means to safeguard the enduring principles of constitutional government against the potential destructiveness of popular caprice. The standards for republicanism established by the Constitutional Convention in 1787 are really only the beginning point of an evolution of the concept. As Professor Arthur Bonfield points out, the present criteria for republicanism must be more expansive than that of our ancestors.

“Here are two types of rights which are so fundamental that all republican states must protect them against private action, both in fact and in law. In the first group are those rights derived from the state constitution and its laws . . . The second type of fundamental rights that the state has an affirmative duty to safeguard against private action, both in fact and in law, are those without which a person could not live in this society. That is past the implied obligation of the state to keep peace, it must insure that each person has access to those things that are essential to his existence in our culture.” 46 Minn. Law Rev. 566

This demonstrates the second aspect of the Jarvis Initiative’s contravention of the guarantee clause. Not only does the Jarvis Initiative deprive the legislature of its sovereign authority but it will prevent the legislature from exercising that authority to sustain the necessary services mandated by the state constitution and its laws.

Thus it places special restrictions upon the passage of taxation legislation, both statewide and locally.

CONCLUSION

The Jarvis Initiative presents basic and fundamental issues of public policy which must be resolved if our system of government is to survive. In our constitutional scheme of republican government, the founding fathers planned that the Judiciary, as the branch of government most impervious to public pressure, would be the guardian of the fundamental interests of our nation. It is in this light that the current challenges to the constitutionality and effect of the Jarvis Initiative must be viewed.

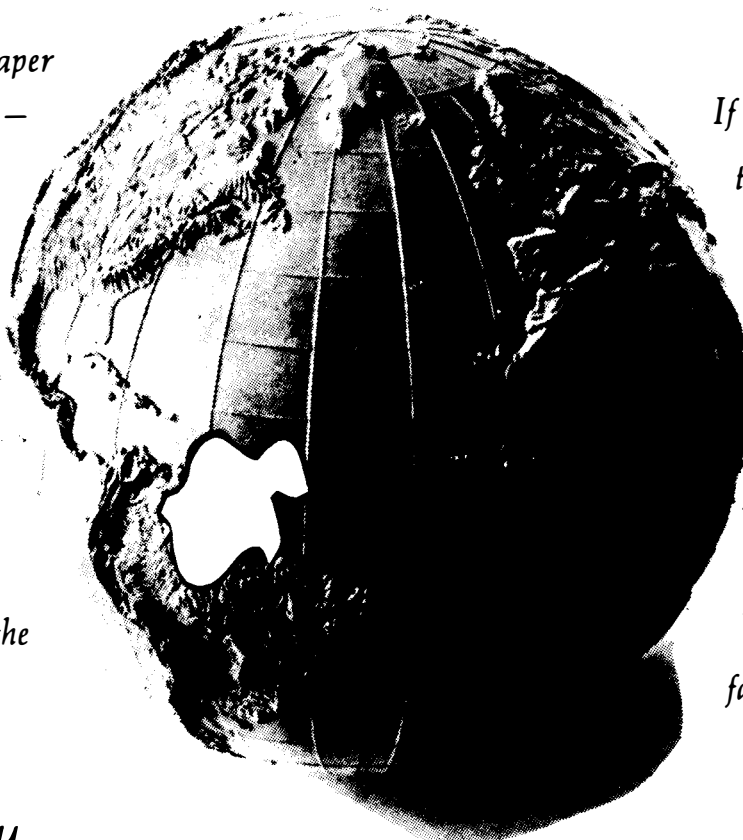
We therefore respectfully urge this Court to find the Jarvis Initiative unconstitutional and to enjoin its effect.

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THURSDAY, JANUARY 11, 1978

LEADING U.S. BUSINESS DAILY CALLS FOR CUTOFF OF NUCLEAR COOPERATION WITH INDIA

JAN. 11 - THE WALL STREET JOURNAL, A LEADING U.S. BUSINESS DAILY, DENUNCIATION OF THE CARTER VISIT TO INDIA, IN A SCATHING INCIDENT, AND ABOVE ALL HIS COSMETIC CONCESSION THAT HE WOULD AUTHORIZE SUPPLY OF ONE SHIPMENT OF ENRICHED URANIUM TO INDIA, FOR FUELING NUCLEAR COOPERATION COLDLY AND BLUNTLY AS THE CANADIANS DID AFTER THE INDIAN EXPLOSION. THE JOURNAL CONCLUDES "IT IS EASY ENOUGH TO BELIEVE THAT MR. CARTER DOESN'T NOTICE MIKES AND POLICY INTACT DESPITE THE HEAVY WATER SHIPMENT. BUT ON THE OTHER HAND, PERHAPS IT WAS NOT THE INDIANS WHO WERE INTENDED TO OVERHEAR THE OPEN MIKE. PERHAPS THE CANDIDATE CARTER WHO PROMISED NEVER TO TELL US A LIE WAS USING THE PLOT TO MISLEAD THE AMERICAN PEOPLE."

WHAT IS REALLY GOING ON?

WHILE THE DUST HAS NOT YET SETTLED ON THE CARTER TRIP, BRITISH PRIME MINISTER JAMES CALLAGHAN HAS ARRIVED IN INDIA TO SUPPOSEDLY EVOLVE THE COMPROMISE FORMULA TO BRING INDIA INTO AN ACCEPTABLE STATUS ON THE NON-PROLIFERATION QUESTION, WHILE THE U.S. STATE DEPARTMENT TODAY ADAMANTLY DENIED ANY TRUTH TO THE STORY THAT CALLAGHAN HAS SUCCEEDED WHERE CARTER HAS FAILED, AS PRESENTED BY THE LONDON TIMES. THE CALLAGHAN TRIP HAS OSTENSIBLY TWO GOALS. ONE IS TO ARRIVE AT A COMPROMISE AGREEMENT WITHOUT TOTALLY DISPLEASING TO PAKISTAN AT THIS TIME. TODAY'S LONDON DAILY TELEGRAPH ADDS THAT CALLAGHAN HOPES TO TAKE DESAI'S SECRET PROMISES AND CONTRACTED FRENCH NUCLEAR REPROCESSING PLANT. CALLAGHAN ARRIVED IN PAKISTAN JAN. 11, ONE DAY AFTER THE NEW YORK TIMES ANNOUNCED THAT FRANCE HAS REQUESTED THE PAKISTAN'S CONSIDER ALTERATIONS IN CURRENT CONTRACTS.

MIDWEST COLD FREEZES OHIO COAL STOCKPILES

JAN. 11 - AS THE NATIONAL STRIKE OF U.S. COAL MINER AND COAL-HANDLING MACHINERY, A SPOKESMAN FOR THE ELECTRIC UTILITY TOLD THIS NEWS SERVICE FOR THE CUSTOMERS HAVE BEEN ASKED TO VOLUNTARILY CUT BY THAT THEY REGARD THE SITUATION AS "CRITICAL." THE UTILITIES AFFECTED ALL EXPECT TO HAVE TO A DAY, HOWEVER A SECOND COLD FREEZE IS PRE-ALTERNATIVE USED LAST WINTER DURING SEVERAL WEEKENDS. THE ONGOING MINEWORKERS' STRIKE IN FRESH COAL TO REPLACE FROZEN COAL. THE OHIO STATE ENERGY OFFICE DURING TV COAL DELIVERIES TO RESIDENTIAL USERS

A SPOKESMAN FOR THE U.S. DEPARTMENT WILL DO NOTHING IN THE PRESENT SITUATION. HE ADDED THAT THE STATE DEPARTMENT HAS BEEN SHUT DOWN AND UNTIL THEN THE GOVERNMENT CONSERVATIVE BRITISH FIRING OPPOSITION

TOM KING: BRITISH GOVERNMENT OF HIS D

363-1141

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