
The Liberty Tree,
St. John's Campus Annapolis, Maryland

THE LIBERTY TREE

Vol. 26, No. 10 — Autumn 2024

To be or not to be …
Constitutional: Part VI

By Dick Greb

This current series has been examining the myth of 'technical constitutionality,' the false theory that claims that the income tax laws are constitutional because Congress wrote them such that citizens are not made subject to the tax except in special circumstances, but concealed that fact behind any number of technicalities which various patriots have claimed to uncover over the decades.

In the first two installments, I showed why the theory is false, both from the logical and historical perspectives. In the following installments, I laid out various ways that the theory negatively affects the movement. Primary among these negative consequences is the wasting of precious resources in various ways. Competition between the many divergent theories underlying the exclusion of citizens wastes time and energy fighting each other rather than the common enemy — the legislature which enacted the laws imposing the taxes upon us. It also makes enemies out of those — such as employers — who should in fact be our allies, since they are also being oppressed by those very same laws. It squanders opportunities that might otherwise exist for obtaining favorable judicial outcomes, by tainting cases with insupportable false arguments. And it makes it harder to recruit new patriots into the Tax Honesty movement, due to the necessity of convincing such potential proselytes of dubious propositions that are presented as esoteric, but ultimately are simply false.

The last installment began an examination of the underlying characteristic of 'income' that makes it unsuitable for use as the subject of a constitutional tax. *Income* is simply another name for *gain* or *profit*, and the calculation for *profit* is *receipts minus expenses*. But the amount of expenses offsetting any particular amount of receipts is known only by the individual to whom they apply, and the 5th Amendment prohibits the government from forcing any such individual to testify against themselves. Now, with a government that stayed within the bounds of its constitutional authority, that would be the end of the matter. Unfortunately, our government is not one of those, and instead violated the limits of its lawful powers in order to enact the 2nd plank of the Communist Manifesto — a heavy and progressive income tax — against we the people of the United States.

Production of evidence, not incrimination

We left off in the last installment looking at the requirement to file sworn returns, and how such requirement obviously violates the 5th Amendment, which prohibits the government from compelling a person to be a witness *against himself* — in other words, *for the government*. We saw that the Fourth Circuit Court of Appeals — in an appeal from the conviction of a bootlegger for failure to file an income tax return — recognized that, "There can be no question that ***one who files a return under oath is a witness*** within the meaning of the Amendment,"[1] and overturned his conviction. Yet, it should come as no surprise that the government wasn't happy with that result and appealed the case to the Supreme Court. There, rather than uphold their sworn duty to support the Constitution, the black-robed liberty thieves chose

(Continued on page 2)

[1] *Sullivan v. United States*, 15 F.2d 809, 812 (4th Cir. 1926). Emphases added and internal citations removed throughout.

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(Continued from page 1)
to undermine it instead, thereby condemning we the people to generations of Inquisition-style demands for personal private information about ourselves.

> As the defendant's income was taxed, the statute of course required a return. In the decision that this was contrary to the Constitution we are of opinion that ***the protection of the Fifth Amendment was pressed too far***. If the form of return provided called for ***answers that the defendant was privileged from making*** he could have raised the objection in the return, but ***could not on that account refuse to make any return at all***. We are not called on to decide what, if anything, he might have withheld. Most of the items warranted no complaint. ***It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime***. But if the defendant desired to test that or any other point ***he should have tested it in the return so that it could be passed upon***. ***He could not draw a conjurer's circle around the whole matter*** by his own declaration that ***to write any word upon the government blank would bring him into danger of the law***. In this case the defendant did not even make a declaration, he simply abstained from making a return.[2]

This "conjurer's circle" diatribe by the renowned judge Oliver Wendell Holmes has become somewhat of the cornerstone for cases dealing with the 5th Amendment as regards income tax returns. And of course, why wouldn't it? It normalizes the destruction of the amendment's protection against being compelled to be a witness against oneself. Thus, it was exactly the fraudulent pretext necessary to allow the government's unconstitutional practice of such compulsory testimony to continue, without which the income tax simply couldn't be implemented.

Sophistry, my dear Watson

So, where did our Oliver Holmes (no Sherlock, for sure) go wrong? First, he equated the "protection of the Fifth Amendment" with "answers that the defendant was privileged from making." That is, he degraded the *right* not to be a witness — that is, the *right to remain silent* — down to the lower *privilege* of merely not incriminating oneself. This is a common theme throughout 5th Amendment jurisprudence. This is partly because a majority of the cases dealing with the subject arose from grand jury proceedings, where the right not to be a witness has been deemed not to apply, but the privilege against incriminating oneself has been so graciously upheld. And to be sure, Sullivan's pleadings show that he also framed his defense in that narrower sense:

> Section 223 of the Revenue Act of 1921, in so far as it requires an income tax return of one whose income is derived from a violation of the criminal law, is in conflict with the Fifth Amendment. The obvious intent of the Fifth Amendment is that no one shall be compelled to be the means of exposing his own criminality. This privilege is for the protection of the innocent as well as the guilty, and is intended to prevent for all time anything in the nature of inquisitorial proceedings to compel confession of crime. Such protection is an essential part of the liberties of a free people and should be jealously guarded from encroachment by the legislative branch of the government.[3]

Even so, the question before the Supremes was clearly whether Sullivan could be required to file a return, when the court below clearly admitted "that one who files a return under oath is a witness within the meaning of the Amendment." In other words, could Sullivan be compelled to be a witness for the government — that is, *against himself*? Holmes, answering for the court, said Sullivan could "not refuse to make any return at all."

Yet, it should be noted that Holmes never denied the fact established by the lower court that "written statements under oath in the return of the taxpayer in answer to questions propounded on forms issued by the Commissioner of Internal Revenue, are the *testimony of a witness*."[4] Thus, the Supremes claimed that despite the 5th Amendment's specific prohibition against compelling any person to testify against himself, the government could indeed compel him to testify by means of requiring the filing of a tax return anyway.

In a ridiculous attempt to mitigate his seditious opposition to the Constitution, Holmes deigns to allow a man to assert a claim of privilege to any particular question on the return itself, "so that it

(Continued on page 3)

[2] *United States v. Sullivan*, 274 U.S. 259, 263 (1927).
[3] *U.S. v. Sullivan*, at page 261.
[4] *Sullivan v. U.S.*, at page 812.

(Continued from page 2)

could be passed upon" by the courts. It must be remembered that this privilege referred to is the *privilege* against self-incrimination — in those situations where you can be compelled to be a witness against others, and not the *right* against being compelled to be a witness against yourself. Obviously, it would be an "extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man" to be compelled to be a witness against himself — by requiring the filing of a return under oath — in order to assert his right not to be a witness against himself.

In the balance

Holmes' comment on the courts passing upon claims of incrimination cite a case from a decade earlier concerning contempt convictions against a person who refused to answer certain questions posed by a grand jury in the investigation of gambling charges against other people.[5] The Supremes decided that it was up to the courts to decide whether the answer to any particular question could be incriminating to the person being asked the question. If they decided it couldn't, then the person could be compelled; if it could, then the person would be excused from answering. In his decision in that case, Justice James McReynolds quoted from a case from 1807 decided by Chief Justice John Marshall:

> Chief Justice Marshall announced the applicable doctrine as follows: 'When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The ***principle which entitles the United States to the testimony of every citizen***, and ***the principle by which every witness is privileged not to accuse himself***, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable extent, and according to the true intention of ***the rule and of the exception to that rule***, by observing that course which it is conceived courts have generally observed. It is this: When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness.[6]

This proclamation by Marshall arose in a case associated with the trial of Aaron Burr for treason, with respect to whether his secretary — Mr. Willie — could be made to testify before a grand jury about a letter he allegedly wrote for Burr. Once again, the issue at hand is whether a *witness* could be excused from answering questions that might implicate himself in a crime. Before starting in on his balancing act, Marshall set out the first principle in a way that helps to clarify the comparison:

> It is a settled maxim of law that no man is bound to criminate himself. This maxim forms ***one exception to the general rule***, which declares that ***every person is compellable to bear testimony in a court of justice***.[7]

As you can see, the 'principle' that the government is "entitled to the testimony of every citizen" is just a rephrasing of the previously adduced general rule that "every person is compellable to bear testimony." But, is that really true? Well, of course not! The 5th Amendment specifically excludes any person from being compelled to testify against himself. So, a more accurate way of stating said rule

(Continued on page 4)

[5] *Mason v. United States*, 244 U. S. 362 (1917).
[6] *Mason*, at page 364.
[7] *U.S. v. Burr, In Re. Willie*, Federal Case No. 14,692e; 25 Fed. Cas. 38, 39.

(Continued from page 3)

would be that "every person is compellable to bear testimony against other persons." Therefore, that general rule or principle had no bearing on such a situation as existed in the *Sullivan* case. As such, Holmes was completely wrong in his declaration that "the protection of the Fifth Amendment was pressed too far" by Sullivan, as upheld by the circuit court. Indeed, every person could and should "draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank" would compel him to testify against himself, and thereby violate the protection which the 5th Amendment guarantees.

Our government claims the power to compel the testimony of every person based on the historical claims of the kings of England!

It's good to be king!

Now, even though this 'general rule' doesn't apply to the situation we are discussing, I think it's instructive to consider from whence it arose. Justice Mahon Pitney gave a bit of background for it in another case dealing with grand juries from 1919:

> Long before the separation of the American Colonies from the mother country, ***compulsion of witnesses to appear and testify had become established in England***. ... When it was that grand juries first resorted to compulsory process for witnesses is not clear. But as early as 1612, in the *Countess of Shrewsbury's Case*, Lord Bacon is reported to have declared that —
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> > '***All subjects***, without distinction of degrees, ***owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery***.'[8]

So there you have it. Our government claims the power to compel the testimony of every person based on the historical claims of the kings of England! Since you owe the king your knowledge, what right do you have to welsh on your debt by refusing to give it to him?[9] It's important to recognize here that Bacon makes no distinction between your deeds and your knowledge, and so, according to the aforementioned 'general rule,' the government must therefore be entitled to the *deeds* of every citizen, as well as your *testimony*. Viewing it in this light reveals the incompatibility of the rule with American principles of liberty.

Perhaps to try to soften the concept of a debt owed to the king, the rhetoric eventually evolved into a debt to society. Justice Pitney continued:

> [I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are ***public duties which every person*** within the jurisdiction of the government ***is bound to perform*** upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. ***The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public***.[10]

This idea of a public duty was reiterated by Chief Justice Fred Vinson in *United States v. Bryan*:[11]

> For more than three centuries it has now been recognized as a fundamental maxim that ***the public*** (in the words sanctioned by Lord Hardwicke) ***has a right to every man's evidence***.

Yet where did the public get this "right" to every man's evidence? And by what principle does the public obtain the "right" to the sacrifice of the individual? Along those same lines, where does the government get such rights? We will consider these issues as we continue to investigate the underpinnings of the government's so-called general rule that *entitles* them to your testimony. Watch for it in the next installment.

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[8] *Blair v. United States*, 250 U.S. 273, 279 (1919).
[9] In this sense, being jailed for contempt for refusing to testify could be considered a version of debtor's prison.
[10] *Blair*, at page 281.
[11] 339 U.S. 323, 331 (1950).