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

THE LIBERTY TREE

Vol. 27, No. 1 — Winter 2025

To be or not to be …

Constitutional: Part VII

By Dick Greb

In this current series, we've been exploring the myth of 'technical constitutionality.' This pervasive theory falsely 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 last installment we began looking at how the courts have routinely undermined the protections of the 5th Amendment against being compelled to be a witness against ourselves, especially in the context of the filing of income tax returns. Most notably, the Supremes, speaking through Justice Oliver Wendell Holmes stated:

> 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***. … ***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***.[1]

We discovered that Holmes' declaration was ultimately rooted in a purported balancing act between 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."[2] And yet, no balancing act is necessary when it comes to returns, because the United States is not entitled to the testimony of any citizen *with respect to himself*, which is precisely what such returns are, as acknowledged by the 4th Circuit Court of Appeals:

> There can be no question that one who files a return under oath is a witness within the meaning of the Amendment.[3]

Therefore, since one who files a return under oath is a witness, and the 5th Amendment prohibits the government from compelling any person to be a witness *against himself* — that is, *for the government* — the requirement to file returns — i.e., Internal Revenue Code § 6012(a) — is unconstitutional on its face. It really is as simple as that, notwithstanding any pronouncements from black-robed liberty thieves who say otherwise.

Every man a king

Now, even though we've determined that the principles Holmes relied upon should never have been applied in the first place, the last installment ended with the discovery that the principle quoted from the *Mason* case above derives from England where kings ruled over their subjects in a feudal system. Justice Mahon Pitney actually spelled it out in a case dealing with grand juries from 1919, quoting from a 300-year old case from jolly olde England:

> '***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***.'[4]

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[1] *United States v. Sullivan*, 274 U.S. 259, 263 (1927). Emphases added and internal citations removed throughout.
[2] *Mason v. United States*, 244 U. S. 362, 364 (1917).
[3] *Sullivan v. United States*, 15 F.2d 809, 812 (4th Cir. 1926).
[4] *Blair v. United States*, 250 U.S. 273, 279 (1919).

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Since those who administer our government think of themselves as our *rulers* rather than our *agents*,[5] they naturally glommed onto the kingly prerogative for themselves. However, in an instructive decision from 1793, Supreme Court Chief Justice John Jay rightly distinguished between the political situations here and in England:

> It will be sufficient to observe briefly, that the sovereignties in Europe, and particularly in England, exist on feudal principles. That system considers the Prince as the sovereign, and the people as his subjects; … ***No such ideas obtain here***; at the Revolution***, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects*** (unless the African slaves among us may be so called) and have none to govern but themselves; ***the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty.***
>
> From the differences existing between feudal sovereignties and Governments founded on compacts, it necessarily follows that their respective prerogatives must differ. ***Sovereignty is the right to govern***; a nation or State-sovereign is the person or persons in whom that resides. In Europe the sovereignty is generally ascribed to the Prince; ***here it rests with the people***; there, the sovereign actually administers the Government; here, never in a single instance; ***our Governors are the agents of the people***, and at most stand in the same relation to their sovereign, in which regents in Europe stand to their sovereigns. Their Princes have personal powers, dignities, and pre-eminences, our rulers have none but official; ***nor do they partake in the sovereignty otherwise, or in any other capacity, than as private citizens***.[6]

Thus, even if a king has a right to the testimony of his subjects, in America, each of us are kings — but we have no subjects from whom to demand that right. The public — which is merely the collection of all individuals — can possess no greater rights than the equal rights of each individual. Therefore, despite Justice Vinson's declaration in *United States v. Bryan*[7] — that "***the public … has a right to every man's evidence***" — the opposite is actually true. The public can have no right to any man's testimony. Certainly the public might request someone's testimony, but they cannot rightfully demand it; and just as certainly, they cannot rightfully punish anyone who declines such a request.

Right to remain silent

Having established that the public has no right to any man's testimony, it is just as clear that since our government is one of delegated powers, the government also can have no right to any man's testimony. After all, if none of us individually have the right to demand the testimony of any other person, then the government — which is merely our agent, possessing only those powers that have been delegated to it from us — can have no such right either. After all, we can't possibly delegate powers that we don't possess ourselves.

Again, it is this lack of power that the 5th Amendment describes — the government is prohibited from compelling anyone to be a witness against himself. Chief Justice Earl Warren rightly characterized the practical effect of that prohibition in the now famous *Miranda* case, as a "right to remain silent."

> Prior to any questioning, the person must be warned that he has a ***right to remain silent***, that ***any statement he does make may be used as evidence against him*** …[8]

Notice that Warren admits that "*any* statement … may be used as evidence *against him*." No distinction was made between incriminating or non-incriminating statements, because no distinction exists in this context. Both types of statements ***may be used*** by the prosecution against you. It matters not whether it actually *will* be used, only whether it is permissible to use it. If the testimony *may be used*, it *cannot be compelled*. Likewise, it doesn't matter whether the testimony is incriminating or not — which really only concerns the *likelihood* that it *will* be used — because non-incriminatory testimony still *may* be used, and so, neither can be compelled.

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[5] For more on this important issue, see "Government? Agents!" in the *Reasonable Action* newsletter, issue #248, page 3. It is also posted up at https://tinyurl.com/3vhfdp37.
[6] *Chisholm v. Georgia*, 2 U.S. 419, 471 (1793).
[7] 339 U.S. 323, 331 (1950).
[8] *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

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Blurring the lines

These considerations have no doubt played a role in the development of the government's treatment of challenges to compelled testimony. Several factors have contributed to the ultimate erosion of the 5th Amendment's protection of our right to remain silent. First and foremost is that a majority of the cases arising thereunder — especially the earlier cases whereby so-called "principles" are solidified — arose in connection with grand jury testimony. That is, they occurred under circumstances in which we the people have largely acquiesced in giving testimony. As shown above, that acquiescence was a mistake insofar as our right to remain silent is concerned, and has certainly contributed to the further erosion of that right.

In the same *Blair* case quoted above, Justice Pitney inadvertently spells out how such acquiescence could be turned around to work against our personal interests. First he gives a brief account of the situation leading to the case before him:

> They appeared before the grand jury in response to the subpoenas, were severally sworn, and were examined by counsel for the United States. Each witness, after answering preliminary questions, asked that he be informed of the object and purpose of the inquiry and against whom it was directed, whereupon ***he was informed by counsel for the United States that the inquiry was not directed against him (the witness)***.[9]

The witnesses ultimately sought to challenge the jurisdiction and authority of a federal grand jury to inquire into the conduct of a primary election campaign in Michigan for its U.S. Senator. Pitney, in deciding they had no standing to make such a challenge, inadvertently revealed why testimony before a grand jury is problematic in the context of the right to remain silent:

> The Fifth Amendment and the statutes relative to the organization of grand juries recognize such a jury as being possessed of the same powers that pertained to its British prototype, and in our system ***examination of witnesses by a grand jury need not be preceded by a formal charge against a particular individual***. It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. ***As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.***[10]

According to Pitney, despite the government counsel's claim that the inquiry was not directed against the witnesses, there could be no way to be sure of that if "the identity of the offender ... [is] developed at the conclusion of the grand jury's labors." Thus, in the end, its inquiries may very well lead to the exposition of wrong-doing on the part of witnesses, whose right to remain silent had already been abrogated. In other words, there can never be

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[9] *Blair*, at page 277.

[10] *Ibid.*, at page 282.

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any real assurance that any person's testimony couldn't be used against him, except to refuse to provide *any* testimony whatsoever in the first instance.

The prosecution calls the defendant … not!

In the big picture, the reason why 5th Amendment jurisprudence tends towards the self-incrimination aspect is two-pronged. First, that's the direction that those who want to minimize its importance channel it. Many years of indoctrination have conditioned we the people to think in terms of a *privilege* against self-incrimination rather than a *right* not to be a witness against himself (despite the prevalence of *Miranda* rights shown on the ubiquitous cop shows on TV). Even characterizing it as the right to remain silent tends to minimize the scope of what it means to be a witness, and so has led us to acquiesce in the destruction of the right in so many instances. The bottom line is that the purpose of a witness is to provide evidence, and so every activity that compels one to provide evidence violates that right — including, but not limited to, fingerprints, blood and DNA samples, voice or handwriting exemplars, documents, etc. — notwithstanding that the government would be "of opinion that the protection of the Fifth Amendment was pressed too far"[11] in such cases.

> By failing to properly associate the essential equivalence of filing returns and testifying in court, the general public has allowed the violation of the right in the one even while acknowledging the right in the other.

The second reason is that the general public fails to recognize the essential equivalence of filing returns and testifying in court. By failing to properly associate the two, they've allowed the violation of the right in the one even while acknowledging the right in the other. Has anyone ever been in a courtroom and heard the prosecuting attorney call the defendant up to the stand? Of course not! Because those prosecutors know that the government is prohibited from compelling the accused to be a witness for them. They don't get to force you to take the stand and answer non-incriminating questions, and only allow incriminating ones to go unanswered. They simply cannot compel you to be their witness at all.

Even if a prosecutor had the impropriety to attempt such a stunt, any self-respecting judge would disallow it without first thoroughly explaining the applicable right to the defendant and obtaining from him an explicit and *knowing* waiver of said right. Yet, even then, his privilege not to incriminate himself would still rightly allow him to refuse to answer any questions that would do so. All this being said, even such a judge as would prevent such a blatant direct violation of the right against being compelled to be a witness would probably still happily permit the introduction of evidence of the type mentioned above which had been forcibly compelled from the accused.

The point is that just like the prosecutor can't force you to become a witness for him by making you take the stand, Congress can't force you to become a witness for them by requiring you to file a tax return. There's no effective difference between the two situations. This functional equivalence really is the weakest link in the entire income tax scheme, but its significance has been too long ignored. But in moving forward, it behooves the Tax Honesty movement to embrace and propagate the issue as widely as possible.

We need to develop strategies to get this issue into play; not in haphazard ways, but with foresight and planning, so as to maximize our chances of favorable outcomes. Indeed, small steps have already been taken in this regard. The Fellowship presented these arguments in a district court case and its subsequent appeal to the circuit court, and came out the winner! And even though it was not in the context of tax returns, it demonstrates the viability of the argument. I'll pick up the discussion of that court case in the next installment, so stay tuned.

[11] *United States v. Sullivan*, 274 U.S. 259, 263 (1927).