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To be or not to be …

Constitutional: Part VIII

By Dick Greb

In this current series, we've been examining the myth of 'technical constitutionality,' the widely adopted, yet nevertheless false theory 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. In the last installment we looked at some ways the courts have narrowed the protections of the 5th Amendment against being compelled to be a witness against ourselves, while not yet eliminating it in the courtroom setting. I ended that installment with the mention of a court case in which a Save-A-Patriot Fellowship member prevailed using the arguments I've laid out in this series. My late friend Jim Kerr, who was our paralegal at the time, was working with the member (who I will call Mr. Smith) to defend against an attempt to find him in contempt for refusing to participate in an IRS inquisition otherwise known as an administrative summons.

A word about summonses

In § 7602 of the Internal Revenue Code, Congress enacted a statute which purports to authorize the Secretary of the Treasury or his delegate to examine books and witnesses:

> § 7602. Examination of books and witnesses
>
> (a) Authority to summon, etc. ***For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax*** or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, ***or collecting any such liability***, the Secretary is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) ***To summon the person liable for tax*** or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, ***to appear before the Secretary*** at a time and place named in the summons ***and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry***; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.
>
> (b) Purpose may include inquiry into offense ***The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into <u>any offense</u> connected with the administration or enforcement of the internal revenue laws.***

This statute is so obviously unconstitutional that it's hard to believe even our corrupted judicial system hasn't yet struck it down in all the years it's been used to oppress the citizenry. It explicitly claims to authorize the government to *compel you to appear and testify against yourself*! It could hardly be more blatant than that. Well, at least until you get down to subsection (b) where you're told that you can be compelled to testify in connection with crimes you may have committed!

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Playing games

Notwithstanding the obvious repugnance of this authority to our Constitution, the standard practice — within the Fellowship (and in the wider Tax Movement generally) — upon receiving one of these administrative summonses was to appear at the designated time and place, and answer each and every question asked with a 5th Amendment objection. It was deemed necessary to allow each question to be asked, and to assert the objection in response, so as to avoid what was called a '*blanket* 5th Amendment claim.' Such a *blanket claim* was considered by the government to be illegitimate, and would often result in a trip to the District Court for a Show Cause hearing why the court shouldn't enforce the summons. This dynamic eventually turned into a sort of cat-and-mouse game, where the IRS agent would try to get you to slip up and make a blanket claim. This usually took the form of asking, after repeated separate claims having already been made, whether you were going to make such claims for every question. If you fell for the trap and said that you would, that would be the end of the meeting, and you could expect to be dragged into court for your show cause hearing. On the other hand, if you maintained the silly charade by explaining that you would need to hear each question to be certain of your answer, then the agent would soon get tired of playing the game, and let you be on your way.

Arguing the right

Now, this stupid song-and-dance routine was often effective to thwart a summons and avoid the enforcement hearing, but when Fellowship member Mr. Smith received his summons, he declined the invitation to appear and so ultimately got dragged into court to defend his decision. Since this occurred after I had written the article "Compelled evidence" for the Reasonable Action newsletter,[1] in preparing Mr. Smith's answer to the show cause order, Jim consulted with me about how the 5th Amendment issue might be better incorporated into our standard summons response.

Ultimately, we simply added the following statement, with two Supreme Court cases to support it:

> Moreover, Defendant is not required to be a witness against himself. The Supreme Court stated, in *United States v. White*:
>
> The constitutional privilege against self-incrimination ... is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him. Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided. The prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law.
>
> ... and ...
>
> Second, it held that respondent's act of producing the subpoenaed records would have 'communicative aspects of its own.' The turning over of the subpoenaed documents to the grand jury would admit their existence and authenticity. Accordingly, responent was entitled to assert his Fifth Amendment privilege rather than produce the subpoenaed documents.[2]

That rather modest addition triggered District Court Judge Harvey Bartle, III to order supplemental briefing on the issue. In fact, if it had not been included, the case would almost certainly have been lost immediately. According to the judge, in his Memorandum disposing of the case:

> [Smith] has challenged the enforceability of the summons on several grounds. However, ***his arguments that the summons was issued without legitimate purpose and that it did not comply with all procedural regulations required by the Code are patently without merit and require no further discussion***. We therefore turn to [Smith]'s contention that he is excused from complying with the summons based on his Fifth Amendment privilege against self-incrimination.[3]

As you can see, Bartle considered the 5th Amendment

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[1] See *Reasonable Action*, #245, Winter 2004, "Compelled Evidence (or, Why don't we just bring back the Inquisition?)." It can also be found at https://tinyurl.com/jzjyhwtp.

[2] *Brief in Support of Defendant's Answer to Court Order to Show Cause*, page 3. The first quote is from *United States v. White*, 322 U.S. 694, 698 (1944); the second is from *United States v. Doe*, 465 U.S. 605, 609 (1984).

[3] *Memorandum* of Judge Harvey Bartle, III, (September 11, 2006), page 4.

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claim the only viable argument presented. Anyway, the government got the first crack at the issue. The United States Attorney, no doubt unaccustomed to dealing with the right not to be compelled to testify, resorted to arguing about the privilege against self-incrimination.

> If Mr. [Smith] cannot show "substantial hazards of self-incrimination," the Fifth Amendment cannot serve as a defense to his non-compliance with the summons. ... As the Supreme Court held decades ago, the Fifth Amendment does [sic] serve to excuse a failure to file an income tax return. *Sullivan v. United States*. At this point in time, Mr. [Smith] has articulated no grounds and made no showing on which the Court can ascertain the validity of any Fifth Amendment claim.[4]

[I]f taxpayers such as Mr. [Smith] were permitted to use this privilege as a general shield from the IRS summons power, that power would be rendered useless ...

Notice that he relied on Justice Holmes' incorrect decision from the *Sullivan* case[5] to support his bogus arguments. However, he did recognize that the position we were advocating would be detrimental to the IRS:

> Otherwise, ***if taxpayers such as Mr. [Smith] were permitted to use this privilege as a general shield from the IRS summons power, that power would be rendered useless*** in carrying out the Congressional mandate to determine, assess, and collect all Internal Revenue taxes.[6]

Of course, this is a tacit acknowledgment that the summons power was unconstitutional on its face. And perhaps this is why he never addressed the right not to be compelled to be a witness in his court-ordered brief. Unfortunately for him, Smith did address it — and even changed the name of his court-ordered response to reflect that (see footnotes 4 and 8).

The arguments laid out in that brief were substantially those I've presented throughout the last several installments of this series, and were summed up with this:

> As already discussed above, Defendant's claim of his right not to be compelled to be a witness against himself is different from a claim of privilege against self-incrimination. Incrimination only enters the picture in situations where the government has a right to the testimony of a witness, and as shown above, it has no right to Defendant's testimony with respect to a summons issued in an investigation of him. Therefore, contrary to Plaintiffs' argument, and the case law cited by them, a showing of substantial danger of incriminating himself need not be made by Defendant. In the matter of the IRS' investigation against him, Defendant can not be forced to be a witness for the government (that is, *against* himself).
>
> ... Considering this argument in the context of a criminal trial clarifies the issue. The criminal defendant can not be forced to take the stand for the prosecution, and then be forced to answer all of the prosecutor's questions, unless the answer to any particular one can be shown to incriminate him. Absolutely not. The accused can not be forced to take the stand in the first place.[7] Likewise, Defendant here can not properly be forced to testify for the government, whether or not such testimony incriminates him.[8]

As for the concern that the summons power would be useless, Smith argued:

> First, the IRS' power to summons persons other than the taxpayer to testify is unaffected by 5th Amendment considerations, except where, as noted above, their testimony would incriminate themselves. But most important is the fact that the Constitution is the supreme law of the land, and Congress may not abrogate its limitations and protections merely by enacting laws which violate it. They, like all government agents, employees, and officers, are beholden to the Constitution, by which they have been delegated all the power they wield. They must exercise their mandated functions within the restrictions established by that instrument, and if they

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[4] *Plaintiffs' Brief Re Defendant's Claim of Fifth Amendment Privilege Against Self-Incrimination*, pages 2 and 6.
[5] *United States v. Sullivan*, 274 U.S. 259, 263 (1927). For a detailed exposition of that decision, see Part 6 of this series, in the Autumn 2024 Liberty Tree: https://tinyurl.com/2rwdp9vt.
[6] *Plaintiffs' Brief* , page 4.
[7] Of course, one becomes a witness as soon as one takes the stand and takes the oath.
[8] *Defendant's Response to Plaintiffs' Brief Re Defendant's Claim of Fifth Amendment Right Against Compelled Testimony*, pages 8 and 10.

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cannot, then their only remedy is to convince the citizens of this country to amend the Constitution, so as to allow it. But, until such time, Congress, as well as the rest of the government, must act within the confines of the restrictions manifested in the Bill of Rights.[9]

Mostly right, but still partly wrong

Judge Bartel was surprisingly receptive to Smith's position, seeing as how up to that point in time, there had never been a favorable ruling on a *blanket* 5th Amendment claim (to my knowledge, at least). And yet, here he was, acknowledging the truth of that position:

> ***[Smith] has properly asserted his Fifth Amendment privilege against self-incrimination with respect to oral testimony sought by the IRS summons as well as with respect to the production of documents that he himself may have prepared.*** Absent the grant of statutory use immunity, [Smith] does not have to produce those records. On the other hand, as noted above, [***Smith] may not successfully invoke a Fifth Amendment privilege against the production of documents in his possession,*** such as bank statements and receipts for money orders, ***which were prepared by third-parties***.[10]

As you can see, when it came to the production of documents, Bartle began to stray from the proper path. For documents created by Smith himself, Bartle recognized that handing them over to the IRS would also constitute testimonial communication, and so such documents would likewise be protected from disclosure. But he wrongly distinguished documents created by third-parties (such as banks, the Post Office, etc.) as not falling within that protection:

> A taxpayer, for example, cannot prohibit the enforcement of a summons for his tax records in the hands of his accountant or even his lawyer (or, by logical extension, other third parties) because it is not the taxpayer who is being compelled to produce them and therefore the production is not the taxpayer's own testimonial communication. The taxpayer in that circumstance is not being asked to admit the existence or possession of the documents or to authenticate them. ***Similarly, a taxpayer makes no testimonial communication when he produces documents in his own possession which were created by third-parties.*** This category of documents includes bank statements and documents required by the government to be prepared, such as W-2 reports. We see no reason why it would not also include receipts from postal money orders, which are documents created by the post office, the entity that issued the money orders. ***Such documents are not prepared by the taxpayer, and possession and production by the taxpayer does not serve to authenticate them.*** Thus, to the extent that the IRS has summonsed documents prepared by third-parties, such as bank statements and postal money order receipts, [Smith] may not shield their production by invoking the Fifth Amendment privilege against self-incrimination.[11]

To support his first contention, Bartle cites *Fisher v. U.S.,*[12] a case brought by a man trying to prevent his lawyer from producing documents to the IRS in response to a summons. Bartle recognized that it is the *act of production* of the summoned documents that calls for testimonial communication, and in the *Fisher* case, that act was to be performed by the attorney, and not Fisher himself. That was the deciding factor, not the fact that the documents were created by a third party (the documents in question there were created by Fisher's accountant, and subsequently given to the attorney to obtain legal advice on the matter). Indeed, in the *Doe* case cited in Mr. Smith's brief, such third-party documents as "telephone records" and "all records pertaining to four bank accounts" had been subpoenaed. And yet, the court found the act of production to be a testimonial communication. Likewise, the third-party documents sought in Mr. Smith's summons should also have been protected from disclosure.

Notwithstanding the erroneous decision on the third-party documents, Mr. Smith, Jim and I were rightly pleased with the outcome of the enforcement hearing. After all, in the face of the government's explicit acknowledgment that if Mr. Smith's position were upheld, it would render the summons power useless, the court still had enough integrity to uphold his *blanket claim* of the right not to be compelled to be a witness against oneself for the two most important categories of evidence. Even so, Smith was ready and willing to continue pressing the issue, so we prepared an appeal of that portion of the District Court's decision for which the summons was allowed to be enforced. We will pick up on that appeal case in the next installment, so stay tuned!

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[9] *Ibid.*, page 12.
[10] *Memorandum*, page 10.
[11] *Memorandum*, page 7.
[12] *Fisher v. U.S.*, 425 U.S. 391 (1976).