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THE LIBERTY TREE

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To be or not to be … Constitutional: Part IX

By Dick Greb

In this current series, we've been looking at the false myth 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, which I've dubbed 'technical constitutionality.' Early installments showed that from both the logical and historical standpoints, the theory falls short of the truth, but unfortunately for the health of the tax movement, it is nevertheless widely accepted as true. After a few installments examining the negative results of this acceptance of the myth, we began to explore how the 5th Amendment's prohibition against compelled testimony works to invalidate the government's attempts to tax *profits* — that is, *income*. This is because the calculation of *profits* requires subtracting *expenses* from *receipts*, and yet the government has no legitimate means to determine any person's expenses except by compelling him to testify *against himself* — that is, *for the government*. To be sure, even compelling others to testify against you (by way of Form W-2, for example) is problematic, since such reporting also compels the person submitting the form to testify against himself at the same time.

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Thus, it can be seen that the Achilles' heel of the income tax system is that it can't work without forcing you to reveal all sorts of personal and financial information about yourself, the very thing that the 5th Amendment prohibits. And yet, in total disregard of their oaths to uphold the Constitution, Congress has enacted (unconstitutional) statutes purporting to require the filing of such sworn testimony, the Internal Revenue Service enforces that illegitimate requirement, while the black-robed liberty thieves wrongly uphold the whole shameful scheme. One of the main tactics for this end-run around our right to remain silent is the corralling of any 5th Amendment claims into a claim of the *privilege against self-incrimination*, rather than the more comprehensive *right against compelled testimony*. While the privilege applies in circumstances where you are already a witness (after waiving your right not to testify, for example), the right protects you from becoming a witness in the first place.

To get a clear picture of the difference between the effects of the privilege and the right, consider the situation that exists in a courtroom. The prosecutor presents all of his witnesses against the accused to establish the facts of the case. But he does not — and indeed, ***cannot*** — call the accused as one of his witnesses. The court, as well as everyone else involved in the trial, understands that the 5th Amendment prohibits him from doing so. The accused may volunteer to testify in his own defense (thereby waiving his right not to testify), and would be subjected to cross-examination by the prosecution at that point. But still, his *privilege not to incriminate*

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himself would remain with respect to any answers that would do so. In such a case, the court reserves to itself the right to decide whether the answer called for would be likely to incriminate the accused, and to require a response if it decides against him.

It's this dynamic which underlies the government's channeling of all 5th Amendment claims into that of the privilege, because then it gets to decide whether or not you have to answer. On the other hand, claims of the right against compelled testimony require no such decisions to be made, because the right doesn't distinguish between incriminating or non-incriminating testimony; it prohibits compelling testimony of all types.

Back to the summons

In the last installment we discussed a court case involving a Save-A-Patriot Fellowship member from whom the Internal Revenue Service was attempting to obtain testimony and documentary evidence by means of an administrative summons. This 'Mr. Smith' (as we are calling him here), with the help of SAPF paralegal Jim Kerr, successfully challenged the enforcement of the summons against him based upon the 5th Amendment's prohibition against compelled testimony. At least it was successful insofar as the district court judge upheld Smith's claim with respect to any personal testimony and the production of documents created by himself. However, the judge erred in distinguishing documents created by third-parties (such as bank statements and receipts for money orders). And on that point Mr. Smith appealed the decision of the district court.

Now, before proceeding on to an account of that appeal, it needs to be mentioned that Judge Bartell, the district court judge hearing the case, did not come out directly and agree with Smith's position. In fact, in his memorandum, he first claimed:

> A taxpayer must assert the privilege as to each question asked or document requested and ***may not rest on a "blanket assertion" of the right*** against self-incrimination.[1]

And yet, he contradicted himself on that very point a few pages later of that same document:

> ***[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.[2]

So, since Smith asserted his claim against compelled testimony as a *blanket claim*, and Bartell acknowledged that he "properly asserted" his claim, then obviously he accepted that blanket claim as a valid one. Therefore, despite Bartell's attempts to waffle on his decision, by his refusal to acknowledge that Smith's claim was against *compelled testimony* and ***not*** *self-incrimination*, the end result, of course, was still that Smith's position substantially prevailed. However, Bartell still wrongly ordered Smith to produce third-party records in his possession, and so Mr. Smith appealed that error to the Third Circuit Court of Appeals.

The appeal

Now, remember that the government lost on two of the three categories of evidence they were trying to coerce out of Smith, and so originally it filed notice that it planned to appeal the decision. Soon thereafter, however, it withdrew the notice, thereby abandoning its appeal. Smith, on the other hand, pressed on with his appeal, and presented the following summary of his arguments in his opening brief:

> The United States District Court for the Eastern District of Pennsylvania never reached the crucial question, in its final decision and order, necessary to arrive at a just decision in keeping with the letter and intent of the Fifth Amendment of the United States Constitution: can a citizen be compelled to give testimony against himself?
>
> One aspect of these Fifth Amendment protections is that a person cannot be compelled to produce and thereby authenticate documents, because that act of production constitutes a type of compelled testimony against himself. This situation does not change merely because the documents requested were prepared by some third party. The authentication of documents, being a part of the foundation which must be established to introduce such documents into evidence, must be accomplished by some witness. If [Smith] is forced to produce the documents, the only other witness who could possibly authenticate them would be the government officer to whom they were provided. However, such officer could only authenticate them through [Smith]'s act of production.
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> As such, compelling a person to produce docu-

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[1] *Memorandum* of Judge Harvey Bartle, III, (September 11, 2006), page 3.
[2] *Ibid*., page 10.

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> ments in his possession — even those prepared by third parties — still constitutes compelled testimony against oneself which the Fifth Amendment prohibits. Moreover, documents prepared by third parties, such as bank statements, can always — and indeed, should — be obtained from the parties that prepared said documents, whereby said third parties would provide the authentication instead. That process would preserve [Smith]'s guaranteed protection against being compelled to be a witness against himself.

Avoiding the question

On March 30, 2007, the 3rd Circuit court ordered the United States to submit its response to Smith's brief by April 26, but rather than answer the argument, the government instead withdrew the summons that precipitated the original case, so that it could move to dismiss the appeal for mootness. In other words, they claimed that since the summons was no longer pending, there was no longer any controversy relating to its enforcement with which the court could be concerned.

Smith opposed the motion to dismiss on the grounds that to allow the government to weasel out of a decision on the merits by its unilateral action would allow the illegal compelling of testimony to continue as standard practice. It would also enable the IRS to merely issue another summons against Smith any time in the future, thereby necessitating the repetition of the whole process, including the expense of fighting the action again.

Unfortunately, the court granted the motion to dismiss, ordered the lower court to vacate its order enforcing the summons, and — no doubt as a sop to Smith for perpetrating such a travesty against him — ordered the government to pay the costs he incurred in defending himself against the summons enforcement and in prosecuting his appeal.

So, while the end result was favorable for Smith — which results should be able to be replicated for others in the same circumstances — the core issue was avoided by the government like the plague. Other than the acknowledgment that the IRS' summons power would be greatly restricted if held to constitutional limitations, the government attorneys never actually gave any sort of rebuttal to the argument against compelled testimony. Just as conspicuously, neither court addressed the issue in that context either, although the briefs filed in the case explicitly argued the point. One can only hope that if more people argue that isolated issue of the right against compelled testimony — rather than a privilege against self-incrimination — the courts will eventually have no choice but to address the issue.

What are the odds?

Shifting our focus now from what the future could possibly hold, I want to look back and consider the genesis of this idea of technical constitutionality. Can it be mere coincidence that so many people — that is, those who have taken such a keen interest in the workings of the tax laws that they actually read and study them — can come to a conclusion so divorced from reality? What are the odds? And it's not like they all came to the same conclusion either. That's another anomaly of technical constitutionality: so many different theories exist to explain the manner in which the alleged fraud was executed — many of them mutually exclusive, so obviously, not all could be true (and

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indeed, for the reasons already discussed, none actually are).

And these people are not idiots or psychopaths. I've encountered many good people over the years that are sincere and devote considerable time and effort in study and contemplation of the Constitution and founding principles. Yet, almost every one of them has come to the conclusion that the income tax was Constitutional: some perhaps who believed it Constitutional because the Supreme Court decided that it was; and the rest because it was deceptively written so as to conceal the fact that the tax did not apply to them, and thereby *technically* Constitutional. To be honest, I can't remember one who had concluded otherwise. What makes this situation even harder to comprehend is that it wasn't always this way.

Whatever happened to 5th Amendment returns?

In the early years of the Patriot Movement, 5th Amendment considerations concerning the filing of tax returns played a significant role. To be sure, there were plenty of other issues also vying for prominence, including the illegality of the Federal Reserve system and fiat money, fraudulent banking and credit creation schemes, among others. As far back as the 1960's and '70's, patriots like Arthur Porth and Jerome Daly[3] were submitting tax returns which contained constitutional objections to the filing of such returns and to income taxes in general, but which revealed no financial information. Indeed, even John Kotmair filed '5th Amendment returns' in the mid-70's. In fact, it's my understanding that it was just such returns which resulted in the 'failure to file' charges that were used to railroad him into prison. Much to the chagrin of the IRS, I'm sure, John used the time he was incarcerated at Maxwell to work on plans that would eventually lead to his founding the Save-A-Patriot Fellowship.

However, somewhere along the line, in the years between those two events, the idea of technical constitutionality infiltrated the tax movement. Major players came to believe the tax laws were written in favor of the citizens, and were simply being misapplied by the IRS, and by the government in general. Irwin Schiff, whose book "How Anyone Can Stop Paying Income Taxes" was the impetus for my becoming involved in the tax movement, advocated that idea by at least 1982. As far as I've been able to determine, by the time he founded the Fellowship in 1984, John advocated it as well. And because of their influence, and that of others involved in the movement whom I encountered, I came to believe that idea too. Indeed, since pretty much every major figure in the movement advocated some form of technical constitutionality by that point in time, the movement as a whole was solidly on that track. That is to say, it had unfortunately been diverted onto its present less productive and ultimately self-destructive course.

In closing out this installment, I'm going to leave you with an excerpt from an article I wrote for the July 2017 *Liberty Tree*, titled "Land of the free, Home of the slave — which are you learning to live in?"

> As baseball legend Satchel Paige is attributed with saying, "It's not what you don't know that hurts you. It's what you know that just isn't so." The miseducated folks believe things that simply aren't true, and when they act on such mistaken beliefs, chances are the results will seldom be what they wanted to accomplish. Indeed, it is more likely that the results will favor those who were responsible for the miseducation. In fact, it's no real stretch to conclude that such results were a principal goal of the miseducation from the start.
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> A corollary of Paige's observation is that believing things that just aren't so also has the potential of hurting others. Someone who sincerely believes a falsehood is likely to pass that misinformation on to his family, friends and acquaintances, thereby influencing them to likewise believe a lie. And on and on that cycle might go. Keep in mind that I'm talking here about people who are honest and sincere in their beliefs, but are mistaken nonetheless. Sincerity is no substitute for truth, but it may indeed make a lie more believable. Because, after all, who can paint a more appealing argument than one who is convinced it's the truth? And of course, that's a big part of the danger.

That article was an introduction of sorts to some of the points I've tried to bring out in this current series. Your reading assignment, if you care to accept it, will be to go to the LWRN website and read the whole article.[4] If you do, you'll get a clue as to the direction the final installment will be heading. Stay tuned!

[3] Jerome Daly made a name for himself in the *Credit River Decision*. He successfully thwarted a bank's attempt to repossess his house by convincing a jury that the bank didn't actually provide any 'consideration' (that is, something of value) in the mortgage transaction, since it created the funds out of thin air, by merely entering a credit upon their books.

[4] https://tinyurl.com/ecf7bp68