Liberty Tree

Vol. 26, No. 4 — April 2024

# To be or not to be ... Constitutional

## Part I

By Dick Greb

There's a funny thing about the tax honesty movement that nobody but me has seemed to notice. Virtually nobody — but me again, seemingly — believes that the tax laws are unconstitutional. Now, I find that a bit funny because it would seem the odds would favor a little stronger showing than that. But, in most of my years involved in the tax movement — and that's been quite a few (even before the moniker "tax honesty" was coined), I've met very few indeed that believe as I now do. I qualify it with 'now' because I, like most of them, once believed that the tax laws were constitutional. Unlike most of them, however, I came to believe otherwise some years ago. In the course of this series, I will be exploring the reasons I came to change my mind about it.

Before I get into that, though, it will be useful to consider the premises on which the belief in constitutionality is founded. First, and most importantly, the belief is based on the premise that the tax laws were, and continue to be, written so as to exclude citizens, whether completely or only to some degree. Unfortunately, the executive branch (for the most part represented by the I.R.S.) misapplies the law so as to collect it from them anyway. Indeed, those who believe in constitutionality of the tax laws (who I will call the "*cons*") believe them to be so ***only because*** they exclude the citizen. That is, if the citizen were taxed the way the government tries to convince the public that they are, then most *cons* would wholeheartedly believe the laws were unconstitutional.

### Technical constitutionality

But, if Congress recognized that an income tax on the citizens was unconstitutional, then why is it written in such a way that most citizens believe it applies to them? I don't think it would be a stretch to say here that intentional deception on the part of Congress is the reason most often claimed. The *cons* believe that while Congress wrote the laws to be *technically* constitutional — by *excluding* citizens, they crafted them in such a way as to deceive said citizens into believing that they were required to pay them anyway. That is, Congress went to great lengths to conceal the fact that the tax was not meant to apply to citizens. So much so, that only a few are able to understand the technical subtlety of it. The end result of this chain of events is that Congress, in order to protect the constitutional rights of the citizenry not to be subject to an oppressive income tax, wrote the laws to exclude them, while at the same time, *defrauding* them by concealing that fact behind a veil of legalese mumbo-jumbo. In other words, they defrauded them in order to protect their rights. Of course, any Congress that would deceive the citizenry into paying a tax that they didn't really owe, would not think twice about enacting a law to make them owe it. And that's the rub.

What is the benefit of such an elaborate deception, if those you intend to deceive are so unaware that they don't realize the new tax being extracted from them is unconstitutional? It's much easier to forget the subtleties and just write the law to tax them in that case. Especially when it all ultimately falls in the lap of the Supreme Court. If the Supreme Court says the law is constitutional, then by golly, it most certainly is, and that's all there is to it. This, my friends, is the very heart of the beautiful simplicity of my own belief. So, let me repeat it. If the Supreme Court says the law is constitutional, then by golly, it most certainly *is*, and that's all there is to it. That's the only support Congress needs.

(Continued on page 2)

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(Continued from page 1)

## What would the court do?

So the question comes down to whether Congress believes that the Supreme Court will back their play in extracting income taxes from citizens. If they believe it will, then all they need do is enact it plainly. But — and this is a rather big but — even if they don't believe that, then what benefit could ever come from technical constitutionality when the majority of people with standing to challenge the validity of the law would be those who were intentionally deceived into paying it? Can't you just imagine someone who's been paying the tax because the law *appeared* to obligate them to do so, finally getting his challenge to the payment of the unconstitutional tax in front of the highest court in the land, and the United States government says: "Nyah! Nyah! It's not unconstitutional because you didn't really owe it. We just made you think you did. Ha! Ha! Ha! Sucker!"

But all joking aside, when do you play that technical constitutionality trump card? If technicality is not going to be argued against the sucker specifically challenging the application of the tax to him (that is, if the deception is not to be revealed), then when do you use it? I mean, once you let the cat out of the bag, a literal flood of lawsuits would hit the courts. So, not only is it a one-shot deal (since once acknowledged, the game's over), but the resultant back-lash would likely negate any earlier benefits of the taxes collected by way of the deception, not to mention a flood of ill-will that would give Congress a good flushing out. Realistically then, the government has no choice but to take the position that the income tax against citizens is constitutional. And of course, that is their position, and it always has been. The truth is, there's no situation where technical constitutionality is beneficial to the government, and that makes it pretty useless, motivation-wise. But, in the end, it's useless because if the Supreme Court is willing to uphold the tax against a citizen challenging its constitutionality, when the only factor which makes it technically legitimate is never presented, nor decided, then it's completely unnecessary in the first place.

## Why bother?

Don't forget that the effort involved solely in the deception is formidable. Just the crafting of the laws involves a lot of forethought. I mean, any piece of legislation as intricate as the Internal Revenue Code (although I recognize that it was written in many pieces) takes years of study and drafting. But the whole idea of the deception requires not just *that* considerable forethought, it adds *another* layer of effort, figuring out a way to write it in a way which technically complies with the Constitution while deceiving the suckers. Yet, given the lack of payoff for technical constitutionality, why bother? If the judiciary is willing to back government's unconstitutional impositions, then no further deception is warranted, nor even useful. Ultimately, the continued existence of the income tax, and indeed, all of our current level of oppression rests in the hands of nine black-robed liberty thieves, who seem to like it just fine. In the end, it takes no more for tyranny to prosper than collusion between the legislative and the judicial branches of government. Certainly, the executive branch can't be relied upon to rein itself in from the use of extra-constitutional powers usurped by an obliging Congress.

The real point to all of this is that since the courts can be relied upon to stand behind the government's encroachments on God-given rights, there's no reason to go to the trouble of fabricating the lie. It's much simpler to just write the laws to obligate citizens, and rely on the courts to uphold their validity. No complicated conspiracy of petty executive branch bureaucrats needed. No secret language or codes. In fact, leaving even a hard-to-find loophole allowing anyone to be free would be counter-productive. Since technical constitutionality isn't necessary, the obvious incentive for Congress is to extend the reach of the tax to *everything*, with well-placed confidence that the judiciary — up to and including the Supreme Court — will put their stamps of approval all over it.

## Just try, try again

This leads to the next point, which is that given this incentive to write the law so as to obligate everybody and everything, and the lack of any conceivable incentive to exclude its operation upon citizens, knowing as they must that the Supremes would be behind them, there is absolutely no reason to believe that Congress did, in fact, exclude them. And as a testament to Congress' confidence in the Supremes, we can look to President Taft's address of June 16, 1909:

> [I]t is now proposed *to make up the deficit by the imposition of a general income tax, in form and substance of almost exactly the*

(Continued on page 3)

(Continued from page 2)

*same character as, that which in the case of Pollock v. Farmer's Loan and Trust Company was held by the Supreme Court to be a direct tax*, and therefore not within the power of the Federal Government to impose unless apportioned among the several States according to population.

... *The decision of the Supreme Court in the income-tax cases deprived the National Government of a power which, by reason of previous decisions of the court, it was generally supposed that government had. It is undoubtedly a power the National Government ought to have.* It might be indispensable to the Nation's life in great crises....

I therefore recommend to the Congress that both Houses, by a two-thirds vote, shall propose an amendment to the Constitution conferring the power to levy an income tax upon the National Government without apportionment among the States in proportion to population.

*This course is much to be preferred to the one proposed of reenacting a law once judicially declared to be unconstitutional. For the Congress to assume that the court will reverse itself, and to enact legislation on such an assumption, will not strengthen popular confidence in the stability of judicial construction of the Constitution.* It is much wiser policy to accept the decision and remedy the defect by amendment in due and regular course.[1]

Taft's speech was occasioned by the Senate's proposal to enact another income tax no different than the one found unconstitutional 15 years earlier, figuring that the court would reverse itself this time around. Now, it should be noted that at this point in time, two of the four dissenting *Pollock* justices — that is, those who wanted to uphold the tax — were gone, and Taft had not yet had the opportunity to elevate White to Chief Justice, nor to appoint half of the remaining justices. And yet, for some reason, the Senate believed the court would back them up this time. Notice too that Taft didn't deny that was a possibility, but merely felt that the end result would be a weakening of public confidence in the proclamations of the judicial branch. And so, he advocated for continuing with the amendment process before attempting another run at an income tax.

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## News flash: Congress doesn't agree

We also need to consider this issue from the opposite perspective. As I've shown above, even if Congress agreed with the *cons*' position that a tax on the income of citizens was unconstitutional, there is still no incentive for them to exclude them from the tax by means of technical constitutionality. They could derive absolutely no benefit from doing so. But the fact of the matter is that Congress *doesn't* agree with the *cons*' position! They never have. Congress has always considered it constitutional to tax the income of citizens — as well as the income of resident aliens, and any income of non-resident aliens that can be tied to the United States.

The above quote from Taft shows that Congress not only believed that the Supremes would reverse their condemnation of the income tax as being direct — and therefore, unconstitutional without apportionment — from the *Pollock* case, but also that Congress treated such tax as indirect. Indeed, *every income tax ever enacted was imposed as an indirect tax*, despite the fact that the income tax is by its very nature a direct tax. Since I addressed this issue at length in my series on the *Pollock* cases,[2] I won't elaborate on it further here. But, the bottom line is that the purported rationale for excluding citizens doesn't even exist in reality.

To show that Congress believed citizens were fair game, we will look at some passages from debates in the House of Representatives. The subject of the debate was H.R. 21214, a bill introduced on March 2, 1912, and a precursor to the income tax ultimately enacted in 1913. I found an interesting summary of the history of this bill embedded in a law review article written by a couple lawyers examining the legislative history of the definitions for business expenses, losses and bad debts:

(Continued on page 4)

1. Congressional Record – Senate, June 16, 1909, page 3344. Emphases added and internal citations omitted throughout.
2. See https://tinyurl.com/ykexnf3z.

(Continued from page 3)

After the Supreme Court held income taxes to be unconstitutional in *Pollock v. Farmers' Loan & Trust Co.*, a coalition of insurgent Republicans and Democrats succeeded in passing a law taxing corporate income in 1909. To avoid the provisions which had caused the Supreme Court to strike down the 1894 Income Tax Act, the Corporate Tax Act was worded as an excise tax on the right to carry on business, measured in amount by the net income of the corporation. In upholding the constitutionality of this tax in *Flint v. Stone Tracy Co.,* the Supreme Court gave the statute a broad application by defining "business" broadly as "that which occupies the time, attention and labor of men for the purpose of a livelihood and profit ... everything about which a person can be employed."

Encouraged by the broad construction of the 1909 Act and pessimistic over the fate of the pending Income Tax Amendment to the Constitution, *the same coalition attempted in 1912 to extend the "excise tax" to individuals and partnerships* as well. ... The congressional debates show that "business" was intended here to have the broad application of the Flint definition, and was to cover even profits derived from the ownership of property or from lending money to individuals or corporations. *The tax was designed to reach all but the "idle holder of idle wealth."*

... The "individual excise tax" bill of 1912 had been passed by both the House and the Senate, and had been referred to a Conference Committee when the Sixteenth Amendment was enacted. With constitu-tional obstacles thus removed, Congress abandoned the idea of an excise on profit-seeking *activities* in favor of a general tax on *net income.*

*The structure of the 1912 bill, coupled with the 1909 corporate tax law, provided the foundation for the Income Tax Act of 1913.* The new act's only substantial change shifted the tax from a levy on "doing business measured by net income" to a tax on the net income itself.

The debates on this bill highlight a major point of contention between the Republican and Democrat parties at the time. The Democrats, who sponsored the bill, opposed high protective tariffs — which Republicans generally endorsed, and so wanted to 'equalize the tax burden' by lowering tariff rates and taxing individuals for engaging in 'business.' This rift was instrumental in the breaking away of the 'progressive' faction of the Republican Party, thus clearing the way for the election of Democrat Woodrow Wilson in 1912.

H.R 21214 was approved on March 19, 1912 by a vote of 253 to 40, with 103 not voting. In the next installment, we'll look at the views of some key players in the House to see whether they support the position that Congress believed that taxing the income of citizens would be unconstitutional. In the meantime, I have posted copies of the debates from both March 16 and March 19, 1912 to the Liberty Works Radio Network website so you can also read them for yourself. An interesting side issue you'll find there is a discussion of the pending ratification of the 16th Amendment, and the anomalies of which Congress was already aware.


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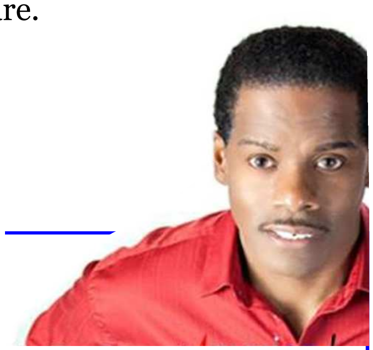

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3. "Toward a more systematic drafting and interpreting of the Internal Revenue Code: Expenses, losses and bad debts," by Layman E. Allen and Gabriel Orechkoff, *The University of Chicago Law Review*, Volume 25, No.1, Autumn 1957, pp. 22-34. Emphases added.
4. See https://tinyurl.com/bdd2xmdu.

# Liberty Tree

**Vol. 26, No. 5 — May 2024**

## To be or not to be ...
# Constitutional
## Part II

*By Dick Greb*

In this current series I'm looking into the widely held position within the Tax Honesty movement that I've dubbed 'technical constitutionality.' The central tenet of that position is 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 at the same time, they concealed that fact behind any number of technicalities which various patriots have claimed to uncover over the decades. However, it must be noted that there is very little agreement between said patriots on what this hidden mechanism for citizen non-taxability actually is, and in fact, many of their theories on the issue are mutually exclusive. About the only thing that those who believe in the constitutionality of the tax laws (who I will call the "*cons*") can agree on is that they are constitutional *only because* they exclude the citizen. That is, if citizens were taxed the way the government tries to convince the public that they are, then most *cons* would wholeheartedly agree that the laws were unconstitutional.

In the first installment, we looked at the viability of technical constitutionality as an incentive for Congress to exclude the citizens from the income tax. And we found that it provides no rational basis for such exclusion, since there is no circumstance in which it could benefit the government. Without the collusion of the courts, technical constitutionality would not prevail against a citizen's challenge to the enforcement of the tax against himself. Indeed, even **the government's** arguing it in response to such a challenge would be counterproductive to continuation of the fraud **— which is what it most certainly would be.** On the other hand, *with* the collusion of the courts, technical constitutionality becomes totally unnecessary, because if the Supreme Court says a tax on citizens is constitutional, then that's the only support Congress needs. So, with or without the collaboration of the courts, technical constitutionality serves no useful purpose.

Of course, all of this presumes that Congress understood that a tax on the income of citizens would be unconstitutional, because otherwise nobody could honestly believe that they would ever ***not*** tax them. So, in this installment, we will continue to investigate whether or not that presumption is true. We left off last time discussing a bill proposed in 1912 by House Democrats (H.R. 21214), the purpose of which was to extend the 1909 excise tax imposed on the business of corporations[1] to include individuals. Although this bill was passed by both House and Senate, the 16th Amendment was declared ratified before it could make its way through the conference committee.[2] Much of the bill was ultimately remade into the income tax enacted as part of the 1913 Tariff Act,[3] so the arguments presented in the debates on H.R. 21214 are a good reference to the mind set of Congressmen of the time.

### Democrats' golden rule

We'll concentrate mostly on Tennessee Representative Cordell Hull, who, according to House Majority Leader Oscar Underwood, "introduced the first draft of this bill and is entitled to much and most of the credit for its authorship."[4] After a brief reproach of those who opposed it, Hull

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1. 36 Stat. 11, 112, Ch. 6, § 38 (August 5, 1909).
2. A conference committee irons out the differences between versions of a bill passed by the House and Senate, and combines them into one which both houses must then repass to get the final version.
3. 38 Stat. 114, 166, Ch. 16, § II (October 3, 1913).
4. Congressional Record — March 16, 1912, page 3498.

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(Continued from page 1)
begins his initial hour-long discussion of his bill:

> Mr. Chairman, in addition to revenue the prime purpose of the pending measure is to secure justice in taxation. I therefore favor the excise tax [on individuals engaged in business] proposed as a bona fide means of raising adequate revenue and equalizing existing tax burdens. *There is no sounder rule than to require the citizen annually to pay a tax, measured by a fair and just proportion of his net gains. This golden rule of taxation has been written as nearly as possible in the measure now under consideration. This bill assumes that every American citizen is honest enough and patriotic enough to willingly bear his fair share of the tax burdens. It is expected, therefore, that this measure will encounter the opposition of those who, claiming and enjoying all the benefits of government, would shirk its burdens. The blessings and burdens of government go hand in hand. No good citizen will invoke the one and evade the other.*[5]

Remember now that this is not just some random Congressman. Hull is the main author of the bill under discussion — the bill that will eventually evolve into the income tax portion of the 1913 tariff act. So, he's not guessing at what it deals with; ***he knows*** what he intended the bill to do! And his stated intention was that "*every* American citizen ... bear his fair share of the tax burdens." That being said, however, Hull's *fair share* proposition wasn't to be accomplished solely by this new extension to individuals of the tax on business, since the $5,000 minimum income level before the tax kicked in prevented it from applying to the majority of citizens. As we will see a little later, Hull argued that said majority, consisting of the lower and middle income earners, was already paying the bulk of the tax burden, through the mechanism of high tariffs (favored by the Republicans) raising the prices of all the goods they purchased. So his proposition included the lowering of the tariff rates in conjunction with the new tax on individuals engaged in business, which would purportedly shift some of the tax burden to the higher economic classes. He continues:

> Mr. Chairman, the gross inequality of our present system of taxation constitutes a severe reflection on the intelligence and the fairness of the American people. That system, unequal as it is indefensible, is the mightiest engine of oppression imposed upon an honest yeomanry since the feudal ages. *The chief burden of all tariff and local taxes now falls upon the middle and poorer classes.* Only those more able to pay escape it. The people of small annual earnings, not exceeding $1,500 to $2,000, including the small landowner, pay the great bulk of our local and customhouse taxation. ... *Most large owners of real estate and concealed personalty pay nominal taxes in proportion to their ability.*[6]


Cordell Hull, the progressive Tennessee Representative credited with primary authorship of the first income tax bill after the 16th Amendment was declared ratified. Hull loved taxing everyone as much as he loved globalist government. He helped create the UN, and was called "the Father of the United Nations" by Franklin D. Roosevelt .

Notice he mentions that the rich folks don't contribute to the tax burden in proportion to their *ability to pay*. Of course, this goes back to his comment above that *good* citizens will willingly consent to paying an annual tax "measured by a fair and *just proportion of his net gains*." In other words, Hull (and the Democrats in general, as well as the 'progressive' Republicans) believe it is a *sound* rule that the government has a right to some percentage — to be determined by them, of course — of all gains of all citizens all the time. You may also have noticed the striking similarity between Hull's golden rule of taxation and the communist credo "To each according to his needs and from each according to his ability."

## Giving you the 'business'

Keep in mind that the only factor that prevents *all* individuals from the burden of this tax on 'doing business' is the $5,000 threshold. If not for that, nearly everybody would be paying it. Naturally, this threshold encourages acceptance by the short-sighted majority for this tax-the-rich

(Continued on page 3)

5. Ibid.
6. Ibid.

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scheme, while insuring that Congress can, anytime it desires, simply lower the threshold to include more and more citizens in the tax. And what is their definition of 'doing business'? Hull explains:

> Mr. Chairman, the scope of the application of the proposed tax must necessarily be determined by the comprehensiveness of the term "business" as defined in the act. The Supreme Court has laid down its tax-meaning definition as follows:
>
> *Everything* about which a person can be employed; all activities which occupy the time, attention, and labor of persons for the purpose of a livelihood or profit.
>
> How could this definition be more comprehensive? *The Supreme Court thus wrote into the Flint decision the broadest meaning of the term "business" for the purpose of making it the subject of an excise tax. No definition of business given in any other sense is so wide in its scope.* First, it embraces "everything about which a person can be employed"; second, it embraces all activities engaged in by a person "for the purpose of a livelihood or profit." *All the court decisions and textbook writers say that the term "business," as correctly defined in this bill "in its broadest sense includes nearly all the affairs in which either an individual or a corporation can be actors."*
>
> In ascertaining whether the proposed tax applies to a person the only inquiry is whether that person is engaged in such activities as come within the phrase "carrying on or doing business." If so, he is liable for the tax whether such activities are few or many, frequent or infrequent, narrow or broad, or relate to real estate or invested personalty which can not be taxed in itself or as to its income. Whether a person is "doing business" must depend on the special facts of each case. I agree that the mere ownership of property unaccompanied by any activities in the sense above defined would not bring such owner within the application of the proposed law. *However, the most casual reflection must convince one that the number or class of persons who would escape taxation would be remote.*[7]

Clearly, this bill meant to tax individuals engaged in business. And not just specific businesses — such as privileged or government-controlled businesses or occupations, but any and all businesses "in which an individual or corporation can be actors." As he makes clear, the application of the tax was as comprehensive as was possible.

## Taxing the right to work

Hull even addressed the complaint — made by a Representative on a separate bill to reduce sugar tariffs — that this tax on business would ultimately be a tax on the right to work:

> Mr. HULL. ... The gentleman from Massachusetts [Mr. McCall] in his report on the sugar bill makes the following statement concerning the proposed bill:
>
> It would treat the right to work and its necessity as a franchise, the exercise of which should be taxed.
>
> ... Let us compare for a moment the proposed tax with the present unspeakable Republican high-tariff tax. *Our Republican tariff tax*, for the benefit of the Sugar Trust, the Steel Trust, the Beef Trust, the Woolen Trust, and hundreds of other favored and fattened creatures of privilege, *ruthlessly exacts of every citizen, including the millions who are in a state of poverty and hunger, a tax upon every bite of food he eats and upon every garment of clothing he wears. According to the logic of the gentleman from Massachusetts, the Republican high-tariff tax treats the right to "eat" and to "wear clothes" as a franchise and places a heavy tax on its exercise,* thereby creating the present high cost of living. [Applause on the Democratic side.]

Notice that Hull didn't deny that the tax was in effect a tax on the right to work, but took the position that it was an acceptable application of the taxing powers of Congress. Now, I don't see how anyone can read these comments and still honestly

*(Continued on page 4)*

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7. *Ibid*., p. 3500. Emphases added and internal citations omitted throughout.

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think that Congress believed they could not tax citizens. And that's really the point of examining these recorded debates. We need to recognize that the members of Congress who enacted the income tax believed that plundering a percentage of all the profits generated by citizens was a legitimate exercise of their power. It doesn't even matter whether they were right or wrong in that belief. It only matters that they did indeed believe it, and acted on that belief.[8]

Ultimately, this bill passed the House by a vote of 253 ayes, 40 nays, with 103 not voting.[9] However, in that last category, 84 of those were "paired," which from what I've been able to determine, is a process by which two members agree not to cast a vote without the other also voting. It can be used as a way to accommodate members who may expect to be absent for a vote, by pairing with one who would be voting the opposite way. The point is that had these pairs voted, they would have been equally distributed between the ayes and nays, leaving only 19 otherwise not voting. That's three out of every four Representatives voting to tax citizens for engaging in any activity "for the purpose of a livelihood or profit."

## Technical constitutionality Is just an illusion

In this second installment, I've presented evidence from the historic record to demonstrate that Congress did not believe the Constitution prohibited an income tax on citizens, as long as it was contrived to be on "doing business," and income was simply claimed to be the measure of the amount of tax. In reality of course, if "doing business" includes everything a man might do to generate a profit, then there is no difference between such a tax and a tax on the actual profit itself. But Congress was willing to engage in such hairsplitting in order to get the tax enacted. And although the nine black-robed liberty thieves never had to give an opinion on such nitpicking distinctions, they predictably approved the latter tax when they got the chance in the *Brushaber* case.

Does anyone honestly believe that Congress would not include citizens in the income tax if they could? Well, I've shown above that Congress believed they could. In addition, I've shown that Congress had every confidence that the Supremes would endorse their legislation. And so, there is absolutely no purpose nor incentive for them to engage in technical constitutionality. It is nothing more than a popular — but unfortunately, a self-destructive — myth of the Tax Honesty movement.

In the next installment, we'll look into how this specious myth has affected the Tax Honesty movement. Don't miss it!


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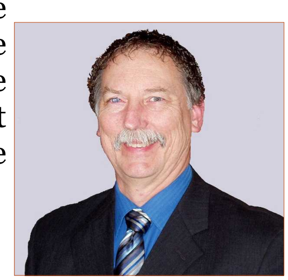

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8. Although we looked only at Hull's comments, I've posted the entire 42 pages of House debate so those interested can read it in its entirety. See https://tinyurl.com/bdd2xmdu.
9. Congressional Record — March 19, 1912, page 3637.

Liberty Tree

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# To be or not to be ... Constitutional

## Part III

By Dick Greb

In this current series I'm examining the pernicious — but widely held — position promoted throughout the Tax Honesty movement that I've dubbed 'technical constitutionality.' The central tenet of that position is 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. Yet there is very little agreement between said patriots on what this hidden mechanism for citizen non-taxability actually is, and in fact, many of their theories on the issue are mutually exclusive. About the only thing that those who believe in the constitutionality of the tax laws (who I will call the "*cons*") can agree on is that they are constitutional *only because* they exclude the citizen. That is, if citizens were taxed the way the government tries to convince the public that they are, then most cons would wholeheartedly agree that the laws were *un*constitutional, thereby in effect converting them into "*uncons*." As you will see, this is an important point.

In part one, we found that technical constitutionality provides no rational basis as an incentive for Congress to exclude the citizens from the income tax, because there is no circumstance in which it could benefit the government. If a citizen were to challenge the constitutionality of the enforcement of the tax against himself, then technical constitutionality is certainly no defense against the challenge. In fact, it would be just the opposite. It would be an admission that he was correct, not to mention that it would entail admitting to the fraud perpetrated against him (and everyone else). Indeed, the government's only option is to argue the constitutionality of the tax *as it is applied to that challenger*, thereby denying the existence of any technical subtleties that exclude him from its operation. And if the courts were willing to collude with the prosecutors to uphold the tax against such a challenge on the basis of (nudge, nudge, wink, wink) unrevealed technicalities, then the charade becomes totally unnecessary anyway. As long as the government can count on the collusion of the courts (and they do pay their salaries, after all), it's much easier to simply apply the tax to the citizenry — whether that be constitutional or not — and let the courts uphold it.

In part two of this series we looked at the comments of Representative Cordell Hull, who authored a bill to extend the tax on "doing business" as a corporation to individual citizens as well. He declared that his 'golden rule' of taxation was to "require [*every American citizen*] annually to pay a tax, measured by a fair and just proportion of his net gains."[1] The definition of 'doing business' for purposes of the tax was "***everything*** about which a person can be employed; ***all activities*** which occupy the time, attention, and labor of persons ***for the purpose of a livelihood or profit***."[2] Thus Hull, as well as the three out of every four of the rest of the Representatives who voted to pass this bill, explicitly did not intend to exclude citizens from this tax. And the fact that this bill was the immediate forerunner of the income tax enacted October 3, 1913, which was also passed by these same Representatives, shows that the latter tax was likewise not intended to exclude citizens.

The most important point for the health of the

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1. Congressional Record — March 16, 1912, page 3498. Emphases added and internal citations omitted throughout.
2. *Ibid.*, p. 3500.

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(Continued from page 1)
tax movement in my opinion is to recognize the simple fact that there is ***nothing*** to support the theory that Congress intended to exclude the citizens from being taxed, nor that the Supreme Court ever considered such taxation of citizens to be unconstitutional *per se*. Therefore, any theory that involves hidden sections or deceptive definitions, or concealed adhesion contracts or anything other than the fact that all three branches of our government believe that income taxes on citizens (and everyone else for that matter) are proper and necessary and highly desirable, is simply a waste of time and energy. Its existence ends up acting as a drain on available resources, which could otherwise go into productive channels. The bottom line is that 'technical constitutionality' is nothing but an illusion. Unfortunately, it's an illusion that has caused, and continues to cause, immense harm to the Tax Honesty movement. And that's what I want to cover in this installment.

## What's the harm in a little make-believe?

As just mentioned, a significant amount of damage to the movement occurs as a result of dissipation of effort and resources. Many patriots over the years have claimed to discover the hidden mechanism by which Congress secretly excluded the citizens from taxability. And they are often able to convince others to join their 'camps' and adopt their ideas. Yet, since very few of these patriots agree on what the hidden mechanism is — and in fact, many of their positions are mutually exclusive — the result is any number of camps that are at best simply at odds with the rest, but at worst, actively opposing each other.

Consider this in the context of the movement as a whole. As with any other 'cause,' there are only so many people who will care enough to ever become actively involved. Behind this smallest group though, there will often be a larger group who will provide support — financial and otherwise — to the active participants. This group will likely include family, friends and acquaintances of the inner group. Beyond these two groups are those who support the cause in *theory*, or in *spirit*, but do not contribute to it, and then those who neither support nor oppose the cause. Beyond that are the mirror image groups who oppose the cause.

## A house divided

The point is that there are only a finite number of people available to effect the goals of the cause. So, consider a situation where there were just two *camps*, which espoused mutually exclusive mechanisms of untaxability. It's easy to see that these two groups would necessarily be working at cross-purposes to each other. In other words, much of each camp's limited resources would be expended countering the effects of the other camp. This while the ultimate goal of both camps is actually the same — ending income taxes on citizens. What a waste!

Throw in a third camp and now each has the effects of *two* other camps to counter. And on and on it goes. The more camps, the more slices that must be cut from the same pie (that is, from the finite number of people willing to get involved), meaning each slice will need to be made smaller to accommodate them all. And at the same time that the slices get smaller, the number of 'erroneous' effects that will need to be countered gets larger. The situation hardly improves even when the camps are somewhat in harmony, because each will still use some part of its limited resources duplicating the efforts of the others to some degree.

You should be able to see that this diffusion of effort and resources is a direct result of the idea of technical constitutionality, which by its nature virtually guarantees that there will be many different theories of how it all works. And if you've honestly considered the information I've presented in this series, you should now be able to recognize that those theories have no basis in reality. Thus, the situation is even worse than the examples given above. While the efforts of the Tax Honesty movement are indeed being dissipated by the factionalization of the whole, the greatest damage is being done because *all of these technical constitutionality theories are false in the first place*.

## Courting disaster

Naturally, the impact of this situation is huge, and manifests itself in a number of ways. The first one to consider is what happens in the courts. It's certainly no secret that the Tax Honesty movement has had very little success in court. Of course, with the corruption that exists in our judicial system, that's no real surprise. Yet, pleas of corruption are too often used to avoid any examination into the viability or correctness of the position being asserted, and so become nothing more than a mask to cover an invalid position. But incorrect positions don't deserve to prevail, and it's

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not corruption when they don't. And every lost case becomes yet another precedent for the next person to overcome.

That being said, the movement has had some success in certain cases, but most of those dealt with procedural problems within the actions taken by the Internal Revenue Service. Certainly the IRS makes many mistakes — intentionally or not — and challenges on those grounds should, and often do prevail. These wins are sometimes shown as proof of effectiveness, but by neglecting to distinguish the nature of the cases, the extent of said effectiveness can be exaggerated.

The other category of cases where there has been a few wins — but very few, to be sure — deal with so-called *Cheek* defenses. These types of cases arise as a defense to willful failure (to file or pay) charges, and their sole purpose is to negate 'willfulness' which is an essential element of those crimes. I discussed such cases in depth back in 2013, so I won't go through it all again here, but it would probably be beneficial to go back and read the article as a refresher.[3] There are two main points to be considered in such cases: first, a win by means of a *Cheek* defense *will* prevent conviction, but such wins are increasingly less likely as time goes on. This is because the second point is that the defense is most often based on the premise that you had a good-faith — albeit a *mistaken* — belief that the laws did not apply to you, and juries become harder to convince that someone could still believe positions that have lost in the courts so many times before. So, even in the slim chance that you do win, that result in no way supports the truth of the underlying belief. In fact, many times the defendant *stipulates* going into the trial that the belief was indeed mistaken.

In my *Cheek* article, I pointed out that the black-robed liberty thieves have historically pigeon-holed *Cheek* defenses into the restrictive area of *textual* inapplicability of the laws — that is, the laws do not apply to the defendant because *the text of the law somehow excludes or exempts them*. In other words, they were effectively limited to mistaken beliefs of technical constitutionality. On the other hand, the Supremes explicitly rejected any argument that claimed the inapplicability of the laws because they were believed to be unconstitutional, despite having said back in 1886:

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; ***it is, in legal contemplation, as inoperative as though it had never been passed.***[4]

However, in his separate opinion concurring in judgment, Justice Scalia denounced the position espoused by the majority:

> It seems to me that today's opinion squarely reverses that long-established statutory construction when it says that a good-faith erroneous belief in the unconstitutionality of a tax law is no defense. ***It is quite impossible to say that a statute which one believes unconstitutional represents a "known legal duty***."[5]

Scalia also mentioned in the course of oral arguments that he wasn't the only Supreme to hold that view:

> ***[L]ike some of the other justices, I don't see the basis for drawing that line.***
>
> But you don't — you don't stop short of saying that belief that the Supreme Court has misinterpreted the statute is — is not a good‑faith defense. Suppose he doesn't think that the Constitution entitles him to say that wages are not income, but that simply ***the Supreme Court got it wrong when it said that under the Internal Revenue Code wages are*** not [sic] ***income and said, you know, gee, the Supreme Court said that, but they misinterpreted the statute***.[6]

*(Continued on page 4)*

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3. See "On the other Cheek" in the March 2013 issue of Liberty Tree: https://tinyurl.com/2crqbfmj..
4. *Norton v. Shelby County*, 118 U.S. 425, 442 (1886).
5. *Cheek v. U.S.*, 498 U.S. 192, 207 (1991).
6. *Cheek v. United States*, United States Supreme Court Official Transcript (October 3, 1990), 1990 WL 601341, at page 11. Bear in mind that since this is a transcript, "--" indicates a pause, so the repetition seen afterward is simply a result of that common habit when speaking off the cuff.

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**"Truth has a sharp and uncomfortable edge, but in the long run it is more useful than the comforts of illusion." — *unknown***

Unfortunately, nobody ever took up the mantle and pursued the chance to establish the proper expanded understanding of 'known legal duty.' By the time I wrote about it in 2013, only Scalia and Kennedy remained on the bench, and now both of them are also gone. So, whatever "other justices" Scalia spoke of above, they're history now too. Nevertheless, Scalia's acknowledgment that a good-faith belief in unconstitutionality mitigates willfulness remains just as true as ever. And so, it may still be possible to get a favorable ruling from the present court, but going in with the knowledge that at least one of the nine was on your side died with Antonin Scalia.

The real point to this discussion of the *Cheek* case is to recognize that the government, in arguing it and others like it, have steered such defenses away from true (and therefore viable) positions — unconstitutionality of the law, for example, or previous wrong decisions of the courts, and towards false (and thus, unviable) positions based upon technical constitutionality. Coincidence? I think not. But more on that later.

Now, although at the time I wrote the *Cheek* article I was already aware of the problems with technical constitutionality — as well as various 'non-taxability' theories which are off-shoots of it — it didn't occur to me then that technical constitutionality was actually the narrow classification into which the court was corralling such defenses. That recognition didn't come to me until I was writing this article. But I did recognize that since *Cheek* defenses depended on being able to convince a jury of a good-faith belief in non-taxability, presenting rebuttals to the various theories could undermine someone's ability to be convincing. Therefore, I held my tongue. But, it turns out there's really never a good time to disabuse people of long-held beliefs. Yet ultimately, at some point it must be done, because as has been said, "Truth has a sharp and uncomfortable edge, but in the long run it is more useful than the comforts of illusion."

In further installments, we'll continue with our examination of the different ways that the erroneous theory of technical constitutionality has impaired — and continues to impair — the effectiveness of the ultimate goals of the Tax Honesty movement. We'll also ponder a bit on some possible origins of the theory, so you won't want to miss the rest of this series. Stay tuned.

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# Liberty Tree

Vol. 26, No. 7 — July 2024

## To be or not to be ...

# Constitutional

## Part IV

*By Dick Greb*

In this current series I've been looking into the widely held erroneous position promoted throughout the Tax Honesty movement that I've dubbed 'technical constitutionality.' The central tenet of that position is 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 part one, we found that technical constitutionality provides no rational basis as an incentive for Congress to exclude the citizens from the income tax, because there is no circumstance in which it could benefit the government. As long as Congress can count on the collusion of the courts (and it usually can) to uphold the enactment of a tax on the citizenry — whether it be constitutional or not — then technical constitutionality becomes totally unnecessary, and actually counter-productive.

In part two of this series we looked at the debates in the House of Representatives for a proposed 1912 bill (H.R. 21214) to extend the tax on "doing business" as a corporation to individual citizens. We saw that Representative Cordell Hull, the author of the bill, declared that his 'golden rule' of taxation was to "require [every American citizen] annually to pay a tax, measured by a fair and just proportion of his net gains."[1] This bill, the immediate forerunner of the income tax enacted October 3, 1913 (which was also enacted by these same Representatives), explicitly applied to citizens and was passed by three out of every four Representatives, demonstrating that Congress did not subscribe to the belief that such taxes on citizens were unconstitutional. And that being so, there's no reason to believe they would exclude citizens from the tax.

In the last installment, I began laying out some of the ways 'technical constitutionality' damages the tax movement, especially the wasting of resources which are a direct result of that false theory. The 'hidden' nature of the technicalities which remove or otherwise exempt citizens from the tax creates many opposing camps, who, although they all ultimately desire the same result — no income tax on Americans — work at cross-purposes to each other. The end result is a decrease in effectiveness for all. But that's not the worst part. So, in this installment, I will begin to look at the most destructive aspect of the theory.

### Who's fighting whom?

The underlying tenets of technical constitutionality are that the laws are constitutional, and that citizens are not subject to the tax. Naturally, the first tenet presupposes the latter. That is, the laws are constitutional *because* the citizens are not subject to the tax. The how or why of the latter tenet doesn't matter for the current discussion. It's enough to simply recognize that it is part and parcel of the theory.

So, what are the consequences of these tenets in action? First, if the law excludes citizens from the operation of the tax, then *anyone who includes them must therefore be violating the law*. And the very nature of the technicalities that make the laws constitutional are obscure enough that even those who spend a lot of time investigating them — that is, for the most part, people in the tax movement — rarely agree on the mechanism by which citizens are excluded. The end result of this situation is that there are very few people who believe that the income tax doesn't apply to citizens. So, for all practical purposes, ***that makes nearly everyone an***

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1. Congressional Record — March 16, 1912, page 3498. Emphases added and internal citations omitted throughout..

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***adversary!*** To say the least, this is far from an ideal situation.

## On the job

Let's begin by looking at how that manifests in the context of earning a living. For a majority of people, that entails working for someone else. The person — be it an individual, private company or a corporation — for whom one works will most likely not agree with the *technical constitutionality* position. In fact, they might even be quite hostile to the idea. Not because they are necessarily averse to it in principle, but because they will rightly recognize that your demands — for no withholding or reporting, for example — will have a serious impact on their business. Certainly it would increase the chances that the IRS will take more interest in their affairs, which is rarely beneficial. Therefore, they would most likely insist on the withholding and reporting that the government demands, and by so doing, become *the enemy*.

In the case of trying to get a job, the likely result is simply not being offered the position. But when the situation arises with a job already held, the resulting tension will make for an uncomfortable work environment for sure. When carried to extremes, it may even result in legal action, such as suits against employers for *conversion* — that is, the misappropriation of one's money. The animosity such actions generate would make the chances for continued employment a whole lot slimmer. After all, what business is going to put up with having to pay to defend themselves against such claims? I would think very few indeed.

## On the homefront

The end result is not hard to imagine — fewer employment opportunities. Obviously, this will make things that much more difficult for the patriot involved. This is especially true if they are married with families. Not only does having a family increase their overall expenses (and thus the pressure they will be under), but it may also increase the level of hostility and resentment in the home. One's spouse will no doubt be less supportive when financial instability is constantly overshadowing their lives. This kind of strain can, and many times does, lead to the breakup of families, thereby piling hardship upon hardship. These are horrible consequences at the personal level for someone to accept, and I suspect many patriots facing such prospects have instead abandoned the movement.

This situation has adverse consequences for the movement as a whole as well. A person struggling to make ends meet will also be unlikely to have the resources to contribute to furthering the goals of the movement. People facing the breakup of their families will be less enthusiastic about pressing forward with the processes that led them into their tribulation. In other words, the continuing participation of such people will become increasingly unlikely. What I want you to see is that these repercussions, while not necessarily inevitable, are certainly a natural result of making an adversary of the person by means of whom you make your living. And making that person your adversary is in turn a natural result of a belief in *technical constitutionality*.

The fact of the matter is that rather than your adversary, these people are actually fellow victims of the same oppressive scheme of taxation as you are. Even more of a victim in some respects, because they are also forced into the involuntary servitude of being an unpaid tax collector for the government. They would undoubtedly prefer to be out from under the scheme just like you would, but wishful fantasies of benevolent Congresses who thoughtfully adhere to the Constitution even as they purposely defraud the citizenry, will not bring about the desired result.

And keep in mind that at some point the patriot will also likely come under increased scrutiny by the IRS, resulting in even more costs, including penalties, interest, late fees — often enforced by levies and liens, and in the worst cases, legal expenses and even incarceration. Not only will these extra expenses and ordeals further erode tranquillity in the home, they will also necessarily cut into the funds which might otherwise be made available to help fund the movement. Indeed, as the costs of participation increases, participation itself will decrease, and the movement will instead suffer as a result.

## The infernal Internal Revenue Service

This brings us to the most important aspect of the consequences of the false theory of technical constitutionality — how it affects the movement's struggle against the government. Returning to the premise established above — that being, if the law excludes citizens from the operation of the tax, then *anyone who includes them must therefore be violating the law* — who would be the adversary? Naturally, the IRS would top that list. They are, after all, the most prominent proponent of income taxes being applicable to citizens. They are right there on the front lines, grabbing property right and left, imposing fines and penalties, and prosecuting those who refuse to go along with their schemes. And since they have no qualms about taking such actions against citizens, according to our premise, ***they***

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*must be violating the law*! Therefore, the fight must rightly begin with them.

In the June 2010 *Liberty Tree*,[2] I wrote about the position of the IRS in the scheme of things. I suggest going back and reading the whole article, but here is an excerpt:

> [T]he IRS began as the Office of the Commissioner of Internal Revenue way back on July 1, 1862. The office was established as the executive branch's arm for assessing and collecting internal taxes, and so Congress gave it all the powers deemed necessary to carry those responsibilities into effect. Not only does this include such enforcement powers as assessing penalties and interest for violations of tax provisions, but also the power of distraint (i.e., levy and seizure) to get the money it claims is owed. For purposes of this discussion, the extent of these powers — that is, whether they can be used against citizens or anyone else — is irrelevant. My point here is only that Congress created the IRS for those purposes, and the IRS operates under the authority thus granted.
>
> Another aspect built into the operation of the IRS is that all of your so-called due process with respect to their claims against you is channeled into specific and narrow paths.

For purposes of that article, I disregarded whether or not the powers of the IRS extended to citizens, but in the present discussion, it is a central point. After all, it's a deciding factor in whether or not they are violating the law, and therefore whether they should be the primary focus of the tax movement's efforts. That is, if the law is written so as to *exclude* citizens, then the IRS *is* violating the law when they enforce it against citizens; conversely, if the law was written to *include* citizens, then the IRS *is not* violating the law when they do so. That is why the issue of *technical constitutionality* is so important, and why recognizing that it is a fallacy is critical to the health of the tax movement.

In the first two installments of this series I've shown that there is neither logical reason nor historical evidence to support the notion of *technical constitutionality*. Congress explicitly claimed to have the power and the desire to tax citizens, and if you examine the statutes they've enacted, you will clearly see that is exactly what they've done. Here's the relevant portion of the first income tax after the purported ratification of the 16th Amendment:

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> That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year ***to every citizen of the United States, whether residing at home or abroad***, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided; and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere.[3]

Can you read that passage and honestly believe that Congress did not levy the income tax on citizens? And if Congress imposed the tax on citizens, then the IRS is not violating that law when they enforce it against said citizens.[4] So, who's really your adversary here?

## Let's you and him fight

Congress levied the income tax on citizens, and so they should rightly be the targets of opposition. Not only are they the ones who oppress the citizens with the tax, but they are also the ones who erected the IRS as their 'champion' in any confrontations with said citizens. Quoting again from "Belly of the Beast:"

> A good way to visualize this framework that Congress has created to do its dirty work for them is a dragon. Not only does it have offensive fire breath, but it also has defensive armor-like scales that protect its body from attack. You can whack at those scales from dawn to dusk, day

(Continued on page 4)

2. See "The Belly of the Beast" in the June 2010 *Liberty Tree*: https://tinyurl.com/a5z65szf.
3. Tariff Act of October 3, 1913 [38 Stat. 114, 166; Chap. 16, Section II, Subsection A, Subdivision 1 (H.R. 3321)] "An Act To reduce tariff duties and to provide revenue for the Government, and for other purposes."
4. This is not to say that the IRS doesn't violate the laws and regulations in innumerable other ways, and for those violations, they should be held accountable. As mentioned in part 3 of this series, redress from procedural violations has been obtained in the courts, especially when not mixed in with issues of technical constitutionality, which too often contaminate the whole affair.

(Continued from page 3)

after day, but you won't get through them and you won't wear them out. That's precisely why Congress puts that IRS dragon out there in the front line of its battle to take your property; because it was specifically designed to withstand the challenges that can be brought against it.

There is an additional aspect to this scheme, beneficial to the government's cause; the very presence of the dragon and its offensive actions draw the opposition to itself. In other words, since the IRS is the force which wreaks havoc on the citizenry, they are also the likely target of retaliation. And this provides excellent cover for those who really deserve the condemnation – Congress!

Congress is the soft underbelly of the dragon, where the scales don't cover. They are the weakest link, so to speak. Congress hopes they can keep you flailing at the armor, and fleeing from the fire breath, so that you don't realize that the belly of the beast is vulnerable. It is Congress that must stand for election every few years; they must come before the people and try to justify being returned to their cushy job legislating away your freedoms. Of course, that's not quite the way they'll be putting it, but we need to recognize that's all it really is, since most of what Congress busies themselves with on a daily basis is outside their Constitutionally granted authority, and so is illegal.

Every two years, every member of the House of Representatives must stand for re-election. That means that in just one election cycle, the whole seditious bunch of them could be out on their ears. Senators, on the other hand, have six-year terms, but they're staggered so that a third of them expire every two years. That means it would take three election cycles to completely clean house there, but I'll bet that with so many of their partners-in-crime getting their walking papers, the remaining ones would probably be a little more responsive to the will of the people for whatever time they have left.

Are you getting the picture here? Congress is the group responsible for you being saddled with an income tax, not the IRS. Not only did Congress impose the tax upon you, it also created the organization you must deal with when problems occur — that is, the IRS — and the process by which you must address them. Congress enacted the anti-injunction act that forces you to pay before you can challenge the tax. It gave the IRS the power to seize your property, and gave the courts the authority to throw you in jail.

And yet, the false theory of technical constitutionality gives them a free ride. It pretends that Congress is your friend, and that those who are merely following their edicts are the ones who are oppressing you. In other words, it misdirects the efforts and resources of the tax movement away from Congress and into unproductive channels. Is it any wonder then that there has been so little progress after so much time? And something else to think about: is it possible that this state of affairs didn't happen by accident? We'll pick this thread back up in the next installment.


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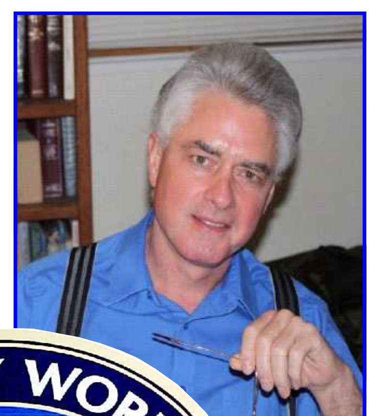

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Liberty Tree

Vol. 26, No. 8 — August 2024

# To be or not to be ... Constitutional

## Part V

By Dick Greb

This current series has been examining a false theory promoted throughout much of the Tax Honesty movement. The central tenet of that theory — which I've dubbed 'technical constitutionality' — is 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 next two installments, I laid out various ways that the theory negatively affects the movement. Primary among those effects is the diversion of focus away from the members of Congress, who are responsible for enacting the laws which do indeed levy income taxes on citizens, and towards the Internal Revenue Service, which applies those laws more or less as Congress intended (at least insofar as enforcing them against said citizens). Further, focusing on the IRS — part of the permanent bureaucracy, and thus not susceptible of being ousted by elections, helps to shelter Congress, who *can* be booted from office, from the negative attention they rightly deserve.

### Lightening the load

Another important way this false theory damages the movement is that it makes it harder to recruit new patriots into the cause. The reason is this: since the whole premise of technical constitutionality of the tax laws (the "*con*" position) depends on an understanding that an income tax on the world-wide income of citizens (which is exactly what the government claims) would be unconstitutional, that understanding must always be developed first. Only after that idea is accepted can the idea that Congress wrote the laws to exclude citizens be developed, because there would otherwise be no logical reason for them to do so. Finally, the method by which Congress accomplished technical constitutionality must be developed. And, it's important to remember that this last proposition is where there is virtually ***no agreement***! Each stage of this progression naturally requires additional effort to convince the previously unconvinced. The inevitable result is that it will also mean progressively fewer will become convinced of each new stage, thereby reducing the number of new people brought into the ranks.

So, considering that my position (which by default would be the "*uncon*" position) ends after the first stage, ***2 out of 3 of the cons' arguments never even need to be introduced!*** Once you convince a person that the tax laws — as the government claims they operate — are unconstitutional, you're done. Now, they're on your side! No crazy legalese arguments or sneaky definitions to explain. No punctuation in your name or brackets around your zip code necessary. Just the recognition that Congress, like it has done so many other times, enacted an unconstitutional law.

In other words, there's no need to spend the extra time to convince them of complicated (but most importantly, ***wrong***) theories as to how Congress allegedly avoided constitutional infirmity, it is only necessary to convince them of the fundamental constitutional problems with the income tax (of which I will address later), and get them involved in working on solutions for getting rid of bad laws. Accepting this simple truth would

*(Continued on page 2)*

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*(Continued from page 1)*

go a long way in the Tax Honesty movement achieving their goal of unburdening citizens from the income tax. And conversely, rejecting this truth will always undermine that goal.

## Con vs. uncon

What are the differences between the position that the laws are constitutional because they don't apply to citizens and the position that the laws are simply unconstitutional? ('*Cons*' and '*uncons*') Ultimately, the two positions are really just flip sides of the same coin. The only essential difference is the *cons*' rather irrational idea that Congress (or to be more precise, the dozens of Congresses since 1913) sought to protect their rights —by skillfully crafting the laws to exclude the citizens — even while simultaneously plotting to defraud them — by leading them to believe just the opposite. Of course, this disregards the fact that any Congress evil enough to deceive the public into paying a tax they didn't by law actually owe, would be evil enough to simply write the law to tax them in the first place.

More specifically, according to the con position, Congress enacted an income tax which doesn't apply to the domestic income of citizens. That is, they recognized the unconstitutionality of such an application of the tax, and avoided it, largely by a rather devious use of legal terms and definitions. For some reason though, Congress is mostly ignored by the *cons* — essentially giving them free passes concerning their refusal to rein in the IRS, and especially, their fraudulent scheme to trick them into paying taxes by use of deceptive language. Rather, they seem to concentrate almost exclusively on the IRS, whom they accuse of refusing to adhere to the limitations established by Congress, and administering the law in ways not authorized by them. Unfortunately, this is the front most heavily protected, and it is not by accident.

Congress understands that the citizen is most likely to direct his anger at the person(s) closest to the actual taking of his property, and so they created the framework by which the collection process would be accomplished, in a way which minimizes the exposure of that process to disruption. The Anti-Injunction Act (IRC § 7421) is one of many parts of that framework of sovereign immunity. The IRS is also protected by not having to stand before the people for election. Congress enjoys no such protection; this is certainly one reason why Congress might want to deflect citizens' anger away from themselves and towards the IRS. Another protection is the very structure of administrative bureaucracies — faceless employees of compartmentalized functions, one hand not knowing what the other hand is doing. All of these protections make frontal attacks on the IRS rather fruitless. Neither the administrative hoops nor the judicial crap-shoot offer much hope of justice. When citizens challenge the misadministration of the laws, the courts rule against them, claiming their arguments are frivolous, and uphold the actions of the IRS.

On the other hand, according to the *uncon* position, Congress enacted an income tax which applies to all income of citizens, whether foreign or domestic, whether earned or unearned. That is, Congress relies on previous flawed rulings of the Supreme Court to rationalize their position that the Constitution allows for just such an income tax on citizens. In other words, Congress feels entirely justified in taxing the citizenry. At the same time, the IRS is charged with enforcing the laws that Congress enacted. They understand that Congress intended (and expressed that intention in the law), to tax the citizens on their world-wide income. Therefore, they also feel entirely justified in enforcing the law according to that understanding. The judiciary, for their part, rely on the doctrine of stare decisis to justify their refusal to consider the rare constitutional challenge to the income tax; meanwhile, they are much more often confronted by cases premised on the constructions of the tax laws according to the *cons* theory, which are invariably rejected, and rightly so.

To really appreciate the irony of the situation, consider that the outward manifestations of the two scenarios above (the *con* and the *uncon*) are almost exactly the same. In both, the executive branch enforces the income tax against citizens on their domestic income. In both, the judicial branch gives such enforcement its blessing. In both, the legislative branch remains mostly quiet. However, in the development of a strategy to combat income taxes, it is important to know which of the two scenarios is true.

## Who knows?

Up to this point, since it was irrelevant in determining that technical constitutionality is a false theory, the underlying bases for unconstitutionality has not been discussed — neither the *cons'* nor the *uncons*' position. But, now it's time to give some consideration to that issue. And while there are various theories to explain the

*(Continued on page 3)*

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*(Continued from page 2)*

unconstitutionality of taxing citizens on their income (some of which are as insupportable as technical constitutionality itself), I won't be spending any time here showing the error of those ways. Rather, I will just present my own version of what makes income taxes unconstitutional.

In my series on the *Brushaber* decision, I discussed the meaning of the term 'income' as it was understood in the time leading up to the 16th Amendment. For a fuller understanding, it would be beneficial to review that discussion at the link below.[1] But the short explanation is that 'income' means 'profit.' And in order to determine one's profits, one must subtract from one's receipts all the expenses incurred in the production of those receipts. In other words, *receipts* minus *expenses* equals *profits* (that is, *income*). This necessary calculation makes income a peculiar species of personal property (but it is indeed personal property).

The peculiarity arises from the fact that the elements necessary for the calculation, and likewise, the result of that calculation — that is, the *income* — are known only to the individual. An outside observer (such as the government) simply lacks the necessary knowledge to arrive at the *true and correct* result. Even if there existed some entity which could testify as to the amounts paid to any particular individual[2] — that is, the amount of *receipts*, nobody but the individual himself can know what *expenses* were incurred in the production of such receipts. Which means, of course, that the only way for the government to discover the true amount of said *expenses* — and in turn, the true amount of *income* — is to obtain that information from the individual. Unfortunately for the government, the 5th Amendment of the Constitution guarantees that:

> No person … shall be compelled in any criminal case to be a witness against himself.

In other words, there is no way for the government to independently determine the true amount of any person's *income* without violating the limitation placed upon it by the Constitution, which is the sole source of its legitimate powers. Naturally, this situation would create somewhat of a quandary for them, if not for their ever-present opposition to Constitutional restraints. And so, Congress does what it always does when faced with restrictions on their power — they simply disregard it, and do whatever they want, and the Constitution be damned! And invariably, the black-robed liberty thieves give such usurpations their stamp of approval.

## Compelling violations of your rights

It really is as simple as that. Of all the possible subjects of a tax, Congress chose one for which they have no legitimate means to ascertain its value. But apparently they were so zealous to impose an income tax that they were willing to use illegitimate means in order to make it happen. That is, they enacted a law requiring returns to be filed.

> **§ 6012. Persons required to make returns of income**
> (a) General rule.
> Returns with respect to income taxes under subtitle A shall be made by the following:
> (1)(A) Every individual having for the taxable year gross income which equals or exceeds the exemption amount, except that a return shall not be required of an individual … [whose gross income is less than the exemption amount plus the basic standard deduction applicable to such individual].

As everyone knows, the returns demanded by the IRS call for all sorts of details of ones personal affairs and finances. And, according to §6065, those returns must be signed under penalties of perjury:

> **§ 6065. Verification of returns**
> Except as otherwise provided by the Secretary, any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury.

*(Continued on page 4)*

1. https://tinyurl.com/ycn84eup. See especially Parts 6 and 7.
2. Of course, this is also problematic since the information regarding monies paid out to others is also testimony concerning the one paying it, which can in turn be used as evidence against such payer.

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Thus, these returns are unquestionably the *sworn testimony* of the person who filed them. And a person who provides sworn testimony is a witness. Indeed, providing testimony is really the sole function of witnesses. The testimony of witnesses builds the foundation of evidence from which the facts of a case are determined. The Fourth Circuit Court of Appeals recognized fairly early on the truth of the matter:

> ***There can be no question that one who files a return under oath is a witness within the meaning of the Amendment.*** The Supreme Court has held in *Boyd v. United States*, that a defendant or claimant in a proceeding by the United States to establish a forfeiture of goods for fraud upon the customs revenues, cannot be required by a court of the United States to produce his private papers and invoices for use in evidence against him. … ***It is far more clear that the 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* <u>and amount to self-incrimination if they disclose the commission of a crime</u>**.[3]

Notice that although the court didn't really expand on the idea, it still distinguished between mere testimony and self-incrimination. That is, the court recognized that *any statements made under oath* are the testimony of a witness, even when those statements don't disclose the commission of a crime. And the Fifth Amendment prohibits compelling a person *to be a witness* against himself. So, he can't be compelled to provide any testimony — that is, any statements made under oath — whatsoever, whether such testimony incriminates him in a crime or not. The phrase "against himself" is in relation to the witness, not to the testimony said witness provides. I wrote about this in greater detail in issue #245 of our *Reasonable Action* newsletter back in 2004 :

> In a criminal case, there are two parties — the prosecutor, and the defendant. The two rights enumerated [in the 5th & 6th Amendments] frame two distinct classes of witnesses with respect to an accused defendant — those whom he has the right to obtain, by compulsory process, to testify for him, in his defense; and those whom the prosecution has the authority to obtain, by compulsory process, to testify against him. Or, more simply, witnesses *for*, and witnesses *against*, the defendant.[4]

This prohibition against forcing an accused to be a prosecution witness is made abundantly clear in the context of a criminal trial, and is universally accepted and followed. Everybody knows that the defendant can't be forced to take the stand, no matter how convenient that might make it for the prosecution. That choice is solely in the hands of the accused. And yet, when it comes to income tax returns, that whole principle gets thrown under the bus.

We'll pick up on this thread in the next installment, as we look at some of the rationalizations given by the Supremes to permit this violation of our rights. So stay tuned!

3. *Sullivan v. United States*, 15 F.2d 809, 812 (4th Cir. 1926) .
4. You can read the entire article, "Compelled Evidence (or, Why don't we just bring back the Inquisition?)," at https://tinyurl.com/jzjyhwtp .


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# 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.

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(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 —
>
> > '***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.

[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).


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# 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.

(Continued on page 3)

[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).

(Continued from page 2)

### *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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(Continued from page 3)

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).

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Vol. 27, No. 2 — Spring 2025

# 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!

*(Continued on page 2)*

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(Continued from page 1)

### *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

(Continued on page 3)

[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.

(Continued from page 2)

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.

(Continued from page 3)

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!

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


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# THE LIBERTY TREE

Vol. 27, No. 3 — Summer 2025

## *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.

> [T]he 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*.

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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(Continued from page 1)

*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.
>
> As such, compelling a person to produce docu-

(Continued on page 3)

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

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*(Continued from page 2)*

> 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.
>
> 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

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

THE LIBERTY TREE

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# To be or not to be …

# Constitutional: Part X

By Dick Greb

In this current series, we've been examining the false myth I've dubbed 'technical constitutionality' — that is, the proposition 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. I've explained why the proposition fails from both the logical and historical perspectives, and have shown various ways that adherence to the theory has caused (and will continue to cause) detrimental effects to the Tax Honesty movement. I then detailed how the 5th Amendment's prohibition against compelled testimony presents a constitutional barrier to a tax on that peculiar species of personal property that is "income." To be sure, the government never flinches from violating the Constitution at every turn, despite the fact that it is solely by means of that instrument that it obtains the power to act in any capacity whatsoever. And so it is with respect to the income tax, for which it has enacted statutes that purport to compel you to testify against yourself in various ways.

Unsurprisingly, the black-robed liberty thieves in the judiciary branch have most often upheld these unconstitutional encroachments on our rights. There's a few reasons why this is so. First, many of the cases dealing with the 5th Amendment have arisen from grand jury proceedings where a person is deemed to be susceptible of compelled testimony, leaving only the privilege against self-incrimination to be argued. Second, far too many of those who assert 5th Amendment protections wrongly frame their argument as the right against self-incrimination rather than the broader right against compelled testimony of any kind, thereby giving the courts the opportunity to use a less restrictive standard — that is, whether the testimony is incriminating, rather than simply whether it was compelled. Third, even in those relatively few cases where claimants have properly asserted the right against compelled testimony, *the courts wrongly treat the claim as one against self-incrimination*, thereby once again giving them the chance to use the less restrictive standard.

These courtroom shenanigans are why it's important to always keep in mind the proper application of the 5th Amendment as it is routinely recognized in criminal trials. *In that circumstance, the prosecution is prohibited from calling the defendant as a witness.* He cannot be compelled to take the stand and provide non-incriminating testimony, forcing him to protest on a question-by-question basis when he believes the answers might incriminate him (which of course gives the judge the prerogative of deciding whether his claims will be upheld). NO! The defendant is simply protected from being forced to take the stand in the first place. And that is the position that needs to be enforced in the context of tax returns and IRS summonses.

## Whodunnit?

I left off in the last installment discussing so-called '5th Amendment returns' — the government's classification given to virtually every return containing any protest to the filing, paying, or even the existence of income taxes. In the early days of the tax movement, such returns were fairly common, but by the mid-1980's, they had mostly gone by the wayside. It was somewhere in that time period that the idea of technical constitutionality came into vogue. But the question that needs to be asked is this: where

(Continued on page 2)

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*(Continued from page 1)*

did the idea come from?

Well, I must confess that the answer to this question continues to elude me. Many of the patriots who were involved in the movement at that time have gone on to their final reward, and unfortunately I hadn't begun my search until after they were gone. Recently however, I was given access to a veritable treasure trove of audio and video recordings from the early years of the tax movement. Unfortunately, although listening to these recordings has helped to establish a time line of sorts to the arguments in vogue through the period, I have yet to determine a particular vector for the introduction of technical constitutionality. But, I still have quite a few tapes to review, so perhaps clues are yet to be discovered. So far, my impression from listening to these recordings is that those who advocated theories of technical constitutionality had probably been influenced by others — that is, none have claimed to be the originator of the idea that the laws were written not to apply to citizens, only that they had come to that understanding.

Just think about it for a minute. Does *the government* benefit by the people who oppose it being misdirected? Or dispersed in their energies? Remember, even small amounts of energy when channeled together and wisely directed can be very effective, so *the government* has an interest in preventing its opponents from achieving that synergy.

**Cui bono?**

We may never discover the identity of the specific individual who diverted the course of the tax movement into unproductive and destructive channels. I suppose we will just have to be content with knowing that ultimately he will be called to account for his sins at the judgment seat of Jesus Christ himself. But in the mean time, I think we could probably come up with a pretty good hypothesis about the larger group who may be behind it all. After all, if we consider the question above — cui bono? (that is, who benefits?) — the probabilities narrow considerably. Who has the most to gain from the situation that has developed? I think the most obvious answer to that question is: *the government.*

Just think about it for a minute. Does *the government* benefit by the people who oppose it being misdirected? Or dispersed in their energies? Remember, even small amounts of energy when channeled together and wisely directed can be very effective, so *the government* has an interest in preventing its opponents from achieving that synergy. On the other hand, consider how it uses that method to further its own agenda. Quoting again from my article in the April 2017 issue of *Liberty Tree*:

> [W]hen change is desired, like ***when somebody starts getting too close to an uncomfortable truth*** perhaps, ***it is still sometimes possible to induce error by gently nudging them into new false beliefs***. As long as the new ones are close in many respects to their currently held beliefs, the natural resistance can be minimized. Here again is an advantage of taking the long view of things, and being willing and able to bide ones time to achieve ones goals. A well-placed mole, who ingratiates himself into a position of influence in an organization (or even someone in such a position who has been unwittingly influenced by an outside change agent), can start bumping them slightly off their course, in gradual (perhaps imperceptible at the time) steps. Eventually, that small deviation accomplishes a complete change of direction.[1]

And again:

> This dynamic easily translates into the long-range plans of the shadow government. It has an interest in spreading misinformation, but unlike the sincere dupes just discussed, the malicious individuals at the beginning of the chain know they are telling lies. Their job is to convince the first round of (preferably influential) dupes, who will then carry their program forward unwittingly.
>
> There are certain forces at play that make this initial work easier than it might at first seem. One is through secret operations like COINTELPRO, where for decades, government agents provocateur infiltrated groups which the government considered subversive. And even though this particular project

*(Continued on page 3)*

[1] "Land of the free, Home of the slave — which are you learning to live in?," page 2; *Liberty Tree*, July 2017.

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*(Continued from page 2)*

was eventually revealed, that's no reason to think that the same type of thing is not still going on.[2]

### Government varmints

The recognition that all the detrimental effects of technical constitutionality that I've mentioned in this current series turn out to be advantageous for the government should rightly make us suspicious of its involvement. Infiltration operations into movements and organizations characterized by the government as being subversive — such as COINTELPRO — have now been openly admitted. And even though cursory looks at declassified documents from that specific program didn't reveal any references to the tax protest movement in particular, there's no reason to believe that it didn't happen. In fact, in a 1981 speech given in Atlanta,[3] John Kotmair claimed he was told by an FBI agent that there were indeed moles in the movement! John just passed over this revelation in his speech, so he may never have given much thought to the idea that such moles operate via a two-way street. That is, they are just as likely to introduce false ideas into a movement as they are to provide intelligence about the movement out to their government handlers.[4] The possibility of such government infiltration and diversionary tactics should make each of us in the tax movement re-examine the positions we hold (and especially those we advocate to others) to ensure they are based in reality and not just wishful thinking. After all, do we really want to be pushing their agenda for them, whether knowingly or unknowingly?

### Show me yours

So dear readers, in the course of this current series (along with many other *Liberty Tree* articles and series over the years), I've laid out the foundation for my repudiation of the theory of technical constitutionality. I've shown what the people who enacted the income tax explicitly stated about their intent in doing so. I've shown that there's no advantage to the government to secretly exclude citizens from the tax while defrauding them into paying it anyway, as well as the significant advantages they obtain by the reliance of the tax movement on the false theory of technical constitutionality. And I've shown that the law itself (going all the way back to the early income tax acts) does not actually exclude them. So, if despite all this evidence to the contrary, you still believe that technical constitutionality is true, then what exactly do you base that belief on? What evidence can you bring to the table to show that Congress believed it was unconstitutional to tax citizens? Or that, even if they did so believe, that they wrote the law so as to exclude them, rather than simply taxing

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[2] *Ibid*., page 1.

[3] The audio of this speech will soon be put into rotation with the 'Just The Facts' seminars on Liberty Works Radio Network. Check the program schedule at: https://tinyurl.com/3r3j8fya for days and times of "Kotmair Archives."

[4] Good examples of this are the FBI-induced Michigan militia kidnapping plot and the January 6, 2020 "fed-surrection" in Washington, D.C., both of which were orchestrated by undercover government operatives. In a recent interview, the author of a book dealing with the Oklahoma City bombing spoke about a similar incarnation of government spying programs active at that time: PATCON, which specifically targeted patriot organizations.

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them anyway? What mechanism in the law itself can you provide that explicitly precludes the application to citizens? Just as importantly, can you refute any of the evidence I've provided to prove the theory wrong? Because after all, as expounded by John Stuart Mills, that's the real test of validity of a proposition. Going back to my article "The Whole Truth" in the September 2013 issue of *Liberty Tree*:[5]

> In our search for the whole truth, it's all too easy to fall into the trap of dismissing those with whom we disagree. After all, if they disagree with us, then obviously they must be wrong! But ultimately, such dismissal will seriously hamper us in our search, because exposure to those whose views oppose our own is a necessary part of cementing our understanding of an issue. It's been said that the biggest obstacle to learning something is the belief that you already know it. Mills says:
>
>> He who knows only his own side of the case, knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion. The rational position for him would be suspension of judgment, and unless he contents himself with that, he is either led by authority, or adopts, like the generality of the world, the side to which he feels most inclination.[6]

Now you have just such a contrary view to compare to your own, so you can weigh them in the balance, rather than merely choosing the view you prefer. Also, if you have evidence that you believe I've overlooked, or that proves any aspect of technical constitutionality, feel free to email me at the Fellowship[7] and enlighten me. I will be happy to consider anything you care to send (even if I don't personally respond to every one). And since it's my intention to devote some future articles to discussion of other positions that fall within the category of technical constitutionality, perhaps your submission will provide a basis for one of them (anonymously, of course).

**Insanity is ...**

I hope that everybody reading this will consider the overall state of the tax movement today, and compare that to the state of it whenever you first got involved with it, however long ago that might be. Do you honestly believe that any significant progress has been made in that time? Are there more people involved? Are we winning more court cases? Preventing a greater number of adverse IRS actions? From my personal perspective, the answer to each of these questions is a resounding "No." If anything, the movement has regressed from the time I got involved over 40 years ago, at least insofar as involvement. As for the rest, I've seen no appreciable change one way or the other, since there were very few wins throughout the whole period to begin with.

Isn't it about time to re-evaluate our efforts to see if improvements should be made? If we continue doing what has not worked to our advantage in almost half a century, then should we expect that next week, or next month, or even next year, the situation will reverse itself and will start bearing fruit? The definition of *insanity* is said to be *repeating the same thing over and over, and expecting different results*. When should we start trying a more sane approach? Should we wait until even more of us have aged out of the fight?

I sincerely believe that technical constitutionality was introduced into the tax movement by government infiltrators for the express purpose of diverting it into the unproductive avenues it has followed for the past five decades. At the time, major players recognized that filing returns meant giving up their rights. And so, they were pressing hard on the issue. They were insisting that the government show them how they could file a return without waiving any of their rights — "signing their rights away," as they called it. Of course, the government never could show them how it would be possible to do so. However, according to John Kotmair, in his interview titled "Creature from Maxwell,"[8] they *were* willing to throw Arthur J. Porth into a mental institution for refusing to stop asking the question. Perhaps he was getting a little too close for comfort. I say it's time to make them feel the heat once again.

[5] See https://tinyurl.com/yc3hzzwa.

[6] John Stuart Mill, *On Liberty*, Chapter 2, "On the liberty of thought and discussion," lines 793–802.

[7] Send your information to: greb@save-a-patriot.org. Include "tech. const." in the subject line so it doesn't get overlooked.

[8] This interview about the founding of the Save-A-Patriot Fellowship can also be heard in the rotation of 'Kotmair Archives' on LWRN.