

# Why No One is Required to File Tax Returns

**REFORMING TAX LAWS USING  
OUR FIFTH AMENDMENT RIGHTS**

**2<sup>ND</sup> EDITION**

***BY WILLIAM CONKLIN***



Fullerton, CA U.S.A.

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A portion of the sale of this copy of *Why No One Is Required to File Tax Returns* benefits certain non-profit organizations and their efforts to educate the public about tax matters and other issues relevant to the American people.

# Table of Contents

<b>Publisher’s Preface</b> .....	<b>vii</b>
<b>Foreword</b> .....	<b>xi</b>
<b>Introduction</b> .....	<b>xvi</b>
<b>Chapter 1: My Story</b> .....	<b>1</b>
The Church of World Peace .....	2
Tavery v. United States.....	4
When You File a Return, You Waive Your Rights.....	5
The Achilles Heel of the Federal Income Tax Code.....	5
A \$50,000 Reward.....	6
A New Strategy—An Unsigned Tax Return .....	6
A Bad Ruling.....	7
Heads, I Win—Tails, I Win .....	7
Either Filing Is Voluntary, or It Is Compulsory .....	8
The IRS Says Filing Is Voluntary.....	8
<b>Chapter 2: The Fifth Amendment</b> .....	<b>9</b>
The Miranda Warning .....	9
Coercion to Waive Fifth Amendment Rights .....	10
<b>Chapter 3: The Tax Return and the Privacy Act Notice</b> .....	<b>11</b>
The Conditioning of Americans.....	12
The Privacy Act .....	12
Filing a Return Is Voluntary .....	13
Filing a Return Provides Information to Be Used Against You.....	14
Keeping Fear Alive.....	15
<b>Chapter 4: What Do the Attorneys Say?</b> .....	<b>16</b>
The Curtis Letter.....	16
<b>Chapter 5: My Challenge Offer</b> .....	<b>19</b>
My \$50,000 Challenge.....	19
Melvin Belli Tries to Collect.....	19

<b>Chapter 5: My Challenge Offer (cont'd)</b>	
William Cohen Tries to Collect.....	20
Others Are Still Trying to Collect.....	21
What Statute Makes a Taxpayer Liable to Pay? .....	21
My New \$200,000 Challenge .....	21
<b>Chapter 6: My Tenth Circuit Case.....</b>	<b>22</b>
Forcing the First Amendment Issue in Court.....	22
A New Insight on the Problem.....	26
I Filed an Unsigned Return with a Challenge to the IRS .....	26
I Filed a Second Unsigned Return.....	27
I Sued the IRS—Again .....	28
The Court Rules in Opposition to the U.S. Supreme Court.....	29
The Judge Answers a Question I Did Not Ask .....	29
I Appeal to the Supreme Court .....	30
<b>Chapter 7: More Cases.....</b>	<b>40</b>
Tavery vs. United States.....	40
Conklin vs. United States .....	41
United States v. Paul Robbins.....	43
<b>Chapter 8: The Internal Revenue Code .....</b>	<b>45</b>
Section 6012.....	45
Section 6020(B).....	45
The Meaning of “Shall” .....	46
Section 6012 and the Meaning of “Shall” .....	47
Section 6020(b) and the Meaning of “Shall” .....	48
<b>Chapter 9: The IRS and Criminal Prosecutions.....</b>	<b>49</b>
Section 7203 and Willful Failure to File.....	49
Filing “Exempt” on a W-4 Form.....	49
The Problem of Filing a W-4 .....	49
Using Jealousy to Convict .....	50
Selective Juries .....	50
The John Cheek Case .....	50
Conclusion.....	51

## Table of Contents

<b>Chapter 10: The IRS—A Modern American Gestapo</b> .....	52
Pre-pay Your Liability .....	52
Do Not Ignore Correspondence from the IRS .....	53
Search Warrants Are Still Required .....	53
Attendance at Audits Are Not Required .....	53
<b>Chapter 11: The Summons Power of the IRS</b> .....	54
Do Not Admit to Having Books and Records.....	54
Never Ignore a Summons.....	55
<b>Chapter 12: What Can You Do About the Problem?</b> .....	59
Becoming Judgment Proof .....	59
Consulting with Tax Attorneys .....	60
If You Are An Employee .....	61
The “No Waiver of Rights” Letter .....	61
If You Are Self-Employed .....	62
The “Substitute Jurat” Approach.....	64
The “Claim for Refund” Letter.....	65
Additional Problems for the Judge .....	65
The Wrong Way to Challenge the IRS.....	66
Wrong Motives .....	66
Wrong Tactics .....	66
<b>Chapter 13: What Will Uncle Sam Do?</b> .....	67
<b>Chapter 14: Empowerment</b> .....	68
You Are Not Too Small .....	68
Give This Book to Your Attorney.....	68
<b>Conclusions</b> .....	70
<b>Frequently Asked Questions</b> .....	72
<b>On Compulsory Production of Documents</b> .....	79
The Nature of IRS Summons .....	80
The History and Development of the Fifth Amendment Right Against Self-Incrimination .....	81

<b>On Compulsory Production of Documents (cont'd)</b>	
The Fifth Amendment and Books and Records .....	82
The Fifth Amendment and Corporations and Partnerships.....	83
The Fifth Amendment and Evidence.....	84
The Fifth Amendment and Personal Records .....	90
The Fifth Amendment and Civil Proceedings.....	91
The Fifth Amendment and Tax Returns .....	92
<b>On the Meaning of Certain Words and Phrases from the IRS Code ...</b>	<b>94</b>
“Liable for a Tax Imposed” vs. “Tax Liability” .....	105
Conclusion.....	106
<b>On the Definition of Income.....</b>	<b>108</b>
26 USC §61 and Grammar.....	108
The Sixteenth Amendment and Grammar.....	110
<b>On the Liability for Tax .....</b>	<b>111</b>
Section 4401 .....	116
<b>U.S. v. Argomaniz .....</b>	<b>127</b>
<b>U.S. v. Sharp.....</b>	<b>141</b>
<b>U.S. v. Robbins .....</b>	<b>149</b>
<b>About the Author .....</b>	<b>152</b>
<b>Other Davidson Press Publications .....</b>	<b>153</b>

# Publisher's Preface

by Charles Welty, Publisher

There is an often quoted statement in the Bible by Jesus in regards to the subject of paying taxes. In the well-known story from the Gospel of Matthew<sup>1</sup> (quoted by the judge in *U.S. vs. Amon*, page 25<sup>2</sup>), the religious leaders and hypocrites had gathered to try to trap Jesus into making a politically incorrect statement about the payment of taxes.

<sup>15</sup>Then the Pharisees went and planned how to trap Jesus in conversation. <sup>16</sup>They sent their disciples to him along with the Herodians. They said, "Teacher, we know that you are sincere and that you teach the way of God truthfully. You don't favor any individual, for you pay no attention to external appearance. <sup>17</sup>So tell us what you think. Is it lawful to pay taxes to Caesar or not?"

<sup>18</sup>But Jesus recognized their wickedness and said, "Why are you testing me, you hypocrites? <sup>19</sup>Show me the coin used for the tax." They brought him a denarius. <sup>20</sup>Then he asked them, "Whose face and name is this?" <sup>21</sup>They said to him, "Caesar's." So he said to them, "Then give back to Caesar the things that are Caesar's, and to God the things that are God's."

<sup>22</sup>When they heard this, they were amazed. Then they left him and went away.<sup>3</sup>

One of the remarkable elements to this story is that Jesus never spoke against paying taxes. He just wanted to see that everyone got his

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<sup>1</sup>The story is recorded in Matthew 22:15-22 as well as in Mark 12:13-17 and Luke 20:20-26.

<sup>2</sup>*U.S. vs. Amon*, 669 F.2d 1351 (1981)

<sup>3</sup>*International Standard Version New Testament, Release 1.2*, (Fullerton, CA: Davidson Press), 2000, Matthew 22:15-22.

just due—both God and Caesar. And even more, the fundamental question as to who owes what and how much—and to whom (or to Whom) it is owed—has been overlooked by most commentators. The reason for this oversight has to do with a mistranslation in the text. The problem is with one of the verbs in Matthew 22:21.<sup>4</sup> Note how the verb is translated as “give back” in the International Standard Version in the citation above. But note how some other translations erroneously translate the verb in the citations below:

Render therefore to Caesar the things that are Caesar’s, and to God the things that are God’s. —NKJ<sup>5</sup>

Give to Caesar what is Caesar’s, and to God what is God’s. —NIV<sup>6</sup>

Give to Caesar what belongs to him. But everything that belongs to God must be given to God.” —NLT<sup>7</sup>

Give therefore to the emperor the things that are the emperor’s, and to God the things that are God’s. —NRSV<sup>8</sup>

You see, the versions of the Bible above have translated the operative verb as “to render” or “to give.” That is to say, the presumption is that Caesar and God are to be “given to” in the same fashion. But only the International Standard Version brings forth the marvelously subtle elements of the Greek verb here. The proper word choice is not “give” but rather “give back.” And there is a world of difference.

Jesus was saying that everything belongs to God in the first place. In a very real sense, God is “owed” everything that we have. He is our source. But in the Roman world, Caesar was God. In these passages, to “give back” is the proper translation in regards to obligations to God and to Caesar for the audience to whom Jesus was speaking.

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<sup>4</sup>See also Mark 12:17 and Luke 20:25.

<sup>5</sup>*The New King James Version*, (Nashville, TN: Thomas Nelson Publishers) 1998, c1982.

<sup>6</sup>*The New International Version*, (Grand Rapids, MI: Zondervan Publishing House) 1984.

<sup>7</sup>*Holy Bible, New Living Translation*, (Wheaton, IL: Tyndale House Publishers, Inc.) 1996.

<sup>8</sup>*The New Revised Standard Version*, (Nashville, TN: Thomas Nelson Publishers) 1989.



## Publisher's Preface

But America is not Rome. And the principles on which America was founded say that our money belongs to us first, as the people who earn it. And all of these rights are "inalienable," meaning that they cannot be taken away by the government. Further, in America the government's ability to govern *and* to tax is derived from the consent of the governed, i.e., from "We the People." Therefore, if Jesus were speaking these words to America today, He would say "Then give to America the things that are America's, and give back to God the things that are God's."

Note that the term "give back" is used in my example in regards to what is owed to God because everything ultimately comes from Him anyway. But I use the term "give" in regards to America (and the IRS) because the money belongs to "We the People" before it is to be handed over to our government, and that only with our consent. And I believe that consent has to be a "rightly informed" consent, by the way.

A second place in the New Testament where this issue is addressed is Matthew 17, verses 25-27 and to my mind this is even more telling. In this passage, Peter is questioned about whether Jesus pays taxes, in this case a temple tax. Before Peter could ask Him about it, Jesus asks Peter a question. He asks "From whom do kings on the earth collect tolls or tributes? From their own subjects, or from foreigners?" When he said, "From foreigners," Jesus said to him, "In that case, the subjects are exempt. However, so that we don't offend them, go to the sea and throw in a hook. Take the first fish that comes up, open its mouth, and you will find a coin. Take it and give it to them for me and you."

At issue in *Why No One Is Required to File Tax Returns* is the even deeper question of "Does the IRS have the right to compel Americans to file tax returns?" The answer, you will find, is that because the information in your tax return can and will be used against you in any criminal or tax matter that the IRS or the Department of Justice may choose to file, **our Fifth Amendment rights are the only shield we have to protect us from what has become the unreasonable search and seizures of the IRS.**

There is nothing in *Why No One Is Required to File Tax Returns* that even hints that Americans should not pay taxes. In fact, in Chapter 12:

## *Why No One Is Required to File Tax Returns*

What Can You Do About the Problem? (the section “If You Are Self-Employed” beginning on page 62), we are advised to *pre-pay* whatever taxes we may owe. The question, then, in *Why No One Is Required to File Tax Returns* is not with *paying our taxes*. The question is whether to use the Form 1040 to *report them*.

Always interesting, never dull, more than controversial, and certainly quite an eye-opening read, *Why No One Is Required to File Tax Returns* is written for the everyday working man or woman, but includes citations from federal court cases that will send most tax lawyers and CPAs to their libraries in search of confirmation of William Conklin’s theories and in review of Mr. Conklin’s six victories before the federal courts in regards to his own tax matters.

Charles Welty, Publisher  
Davidson Press, Inc.  
Fullerton, CA

# Foreword

*by Joseph Banister, former IRS Special Agent*

This book is about recovering the freedoms we have lost because of our failures to assert our rights under the Fifth Amendment. And I ought to know. I was a Special Agent for the Criminal Investigation Division of the IRS for nearly six years. That's why I was particularly interested when Davidson Press asked me to write the foreword to *Why No One Is Required to File Tax Returns*. It was not uncommon to see people freeze in fear when I showed up at their door, no matter how wide my smile or reassuring my voice. Now I believe my experience in the IRS, combined with my experience as a Certified Public Accountant (CPA) and as a licensed private investigator, uniquely qualifies me to write the foreword to Bill Conklin's book.

The author and I met a few years ago under very unusual circumstances and my life has never been the same since. Please allow me to explain how I came to meet Bill Conklin.

After earning a bachelor's degree in accounting in 1986, I spent three years as a tax specialist and financial auditor for KPMG Peat Marwick, an international accounting firm. I spent a little under two years in the venture capital industry, during which time I earned my Certified Public Accountant (CPA) certificate.

As I neared the end of my fifth year in the accounting and tax profession, I began to evaluate my options and decided to search for a job that would add a little more excitement to my daily work routine. There



Former Special Agent Joseph Banister of the IRS Criminal Investigation Division

were two potential career opportunities that fascinated me—one was a Federal Bureau of Investigation (FBI) Special Agent and the other was an Internal Revenue Service Criminal Investigation Division (IRS-CID) Special Agent. I submitted applications to both law enforcement agencies and the FBI was the first to contact me. Although I successfully completed the long and arduous FBI evaluation and background investigation process, a “hiring freeze” prevented the FBI from hiring me.

The IRS-CID called me in August of 1993 and offered me a position. I was a little hesitant to accept an offer to work as a Special Agent for the IRS but as I researched more about the job, it became more appealing. I learned that IRS-CID Special Agents investigated criminal violations of federal income tax and money laundering laws, carried firearms, executed search warrants and arrest warrants, and had an unparalleled reputation as financial investigators. I decided to accept the IRS offer. I began to work for the IRS in November of 1993.

I found the first three years of my career in the IRS-CID to be extremely rewarding. My case work consisted of investigations of high-level illegal drug smugglers, money launderers, and tax evaders. I worked very hard and moved up quickly within the agency. During my tenure at the IRS, I was picked to be the Asset Forfeiture Coordinator (AFC) and the Organized Crime Drug Enforcement Task Force (OCDETF) Coordinator for the Central California District. I enjoyed my job immensely and truly believed that I was using my financial skills to help my country.

My job satisfaction was at its peak in December, 1996, when I was listening to a talk radio show and heard a woman named Devvy Kidd claim that she had overwhelming evidence that the filing of federal income tax returns was a voluntary exercise and that most Americans were not liable to pay the federal income tax. Of course, at the time I heard Ms. Kidd make these claims, I thought her remarks were outrageous and unbelievable. Filing a federal income tax return is *voluntary*? Most Americans are *not liable* for the federal income tax? Please!

Ms. Kidd offered a couple of booklets that she said proved her claims were true. Believing that I could quickly disprove her outrageous claims, I ordered her booklets and began investigating those claims in January, 1997. I should point out, however, that I did not attempt to con-

## Foreword

duct an official IRS investigation. Instead, I conducted an informal private investigation on my own time and at my own expense.

Although I began my investigation as an extreme skeptic, I was amazed at the amount of detail Ms. Kidd provided—detail that, with some investigation on my part, I was able to verify. I spent many months reading other books and magazines to attempt to confirm or deny the evidence that she provided to support those claims.

One of the claims that intrigued me the most was that the filing of federal income tax returns was voluntary. Ms. Kidd based her claim primarily on the work and research of Bill Conklin, the author of this book. There were two aspects about Bill Conklin's work that I found interesting from an investigator's point of view. First, Conklin had prepared a press release (with a contact telephone number and address) announcing the evidence supporting his claim that the filing of a federal income tax return was voluntary. Second, he had actually litigated the issue in the federal courts.

As I thought more about the implications of Conklin's claim, I realized that I could some day be investigating someone for failing to file a federal income tax return. Therefore, the only ethical thing for me to do would be to determine whether or not there was any truth to Conklin's claim. One day in December, 1997, I took the day off and called the telephone number on Conklin's press release, fully expecting that the number had been disconnected or was no longer in service. I left a message telling him that I had read about his claims and that he might find the reason for my inquiry interesting.

Bill Conklin returned my call within a few hours and we had a very pleasant conversation. I told him that I made my living as an IRS-CID Special Agent but that I was not calling in that capacity. I further explained that I was very skeptical about his voluntary tax return claim but that I wanted to learn more. Conklin explained his research in greater detail and offered to send me a package of information supporting his claim. Among the items in the package was a draft version of *Why No One Is Required to File Tax Returns*. The thrust of Conklin's research and litigation was that the Fifth Amendment to the U.S. Constitution prevented the government from compelling people to be a witness against themselves in a criminal case. In other words, Conklin's position was

that the government cannot require people to provide testimony (on a document such as an income tax return) without violating their Fifth Amendment rights.

As I studied the documents Conklin had sent to me as well as other documents I had obtained independently, I considered how the rights acknowledged in the Fifth Amendment to the Constitution affected the way I did my job as a criminal investigator. I recalled how each and every time I attempted to speak to the target of one of my investigations, I was required to inform them that they could refuse to provide me with any statements or documents based on their rights under the Fifth Amendment.

In many cases, people refused to speak with me or provide me with any documents and their refusal to do so was well within their rights. People could, however, voluntarily waive their rights and agree to speak with me or provide me with documents. Statements and documents provided voluntarily were perfectly legal to use against someone in a criminal case. In short, there was no doubt in my mind that the Fifth Amendment was a significant factor to be considered when the government sought to obtain information from citizens, even if that information was contained on an income tax return.

I am thankful that I decided to investigate the validity of Bill Conklin's claims and the very important issues he has raised relating to our Fifth Amendment rights. Bill Conklin has made tremendous sacrifices in his quest to inform the American people about the precious rights acknowledged in the Bill of Rights. In fact, Bill Conklin's information and evidence was so compelling that it prompted me to investigate a number of other claims and allegations relating to the federal income tax.

After completing my investigation of the basis for, and the administration of, the federal income tax, I concluded that the IRS relied heavily on propaganda, half-truths, and exploitation of the average person's ignorance about Fifth Amendment rights in order to maintain its power over the American people. Further, I concluded that the IRS routinely exceeded its constitutional and statutory authority and violated people's rights in administering the federal income tax.

I confronted the IRS with the results of my investigation into Bill Conklin's research and the research performed by many others. I in-

## Foreword

formed the agency of my findings that people's rights were being at best, ignored, and, at worst, violated. The agency refused to discuss the results of my investigation and encouraged my resignation.

Realizing that the IRS had absolutely no intention of "applying the tax law with integrity and fairness to all," as its mission statement so clearly states, I resigned on February 25, 1999. I have returned to the accounting profession and I now have the honor of joining a growing number of retired judges, attorneys, CPAs, former IRS employees, concerned citizens, and knowledgeable experts like Bill Conklin in teaching Americans the truth about the deceitful way the federal income tax is administered.

I tip my hat to Bill Conklin, who has taken the time and effort to inform his fellow Americans about the way the IRS administers the federal income tax and about precious rights many Americans did not even know existed. I am one of those Americans he has so informed. As I described above, learning this information has forever changed my life and the way I view the federal income tax. I have no doubt it will have a similar effect on you.

Joseph Banister, CPA  
Former Special Agent,  
IRS Criminal Investigation Division  
San Jose, California

## Introduction

*by William Conklin*

All individuals who file tax returns waive their Fifth Amendment protected rights. The government cannot require individuals to waive their Fifth Amendment protected rights. We have a conflict here.

The income tax system of the United States has become absurd. It has become absurd because it has become complicated beyond belief. The system is so complicated that the average person must spend hundreds of dollars each year for professional help or on computer software in order to attempt to comply with the system. Individuals feel compelled to sign documents, under the penalty of perjury, that they do not understand. The IRS misleadingly refers to the tax system as “voluntary.” The IRS does so because it knows that requiring individuals to provide information on 1040 returns—information which may be used to criminally prosecute the provider—would create a severe constitutional problem.

The IRS routinely prosecutes individuals who choose not to voluntarily file 1040 returns, in order to keep the pressure on the rest of the public to continue to volunteer. Criminal prosecutions, unsubstantiated and arbitrary Notices of Deficiency, garnishments, outrageous penalties and illegal searches and seizures, are all tools the IRS employs to force “voluntary” compliance with the present tax laws. The IRS is an agency out of control. It has little respect for the right to due process, or the many other rights of the citizens of this country which are protected by the Constitution. It is time for a change and this book will tell you, in plain and simple language, how you personally can become a catalyst for making change.

So, sit down in your favorite chair and give me about two hours of your time. I’ll expose for you the most incredible scam ever perpetrated on the American public: the federal income tax system.

You will learn in this book that:



## Introduction

- There is no statute that makes a person liable or responsible to pay the federal income tax. Individuals only become liable to pay the income tax when they voluntarily file a tax return, or when the IRS follows its assessment procedures as outlined in the Internal Revenue Code.
- If there were a statute which clearly and unequivocally required the filing of tax returns, such a statute would be unconstitutional under the present income tax system to the extent that it would require individuals to give the government information which could be used against them criminally.
- The IRS, under our U.S. Constitution, cannot legally require information on 1040 returns from individuals. That is why the IRS continually refers to the income tax as “voluntary.”



# Why No One is Required to File Tax Returns

**REFORMING TAX LAWS USING  
OUR FIFTH AMENDMENT RIGHTS**

**2<sup>ND</sup> EDITION**

***BY WILLIAM CONKLIN***



# Chapter 1: My Story

The year 1976 was the two hundredth anniversary of the signing of the Declaration of Independence. During that year, there was a lot of interest in the Constitution and its influence on modern society. One day in early June of 1976, I was walking to get a bit of exercise after a hard day spent as an elementary school teacher, when I noticed a sign on the front of an old building which read: “National Tax Strike.” My generally strong curiosity led me to enter, and the subsequent meetings and conversations I had with the folks I met inside that building started me on the twenty year voyage that eventually led to the writing of this book.

Inside the building, I met several gentlemen whose ideas at first seemed completely loony to me. However, they did get my attention with their views on the tax laws, and gave me enough incentive to begin my own research. After several months in a law library, I realized they had some valid concerns, and I, too, “went public” with my new-found knowledge. A local newspaper in the Denver area published an article quoting my comments about the tax system.

The IRS immediately sent me an audit notice and proceeded to do everything it could to shut me up and destroy me emotionally and financially. During the extensive litigation that followed over the years, however, I defeated the IRS six times! My wins in the federal Tenth Circuit Court of Appeals are published in the Federal Reporters found in the law libraries.

If you visit a law library, you may obtain photocopies of the published court decisions in the cases that I have won. There is no doubt that in over twenty years of litigation involving these cases, the IRS has spent hundreds of thousands, if not millions of dollars fighting me, a little guy! It is a shame that the IRS wasted so much money with its frivolous litigation—not just once, but six times!

If you were to raise similar challenges against the IRS, you could have published wins in the law books, too. The challenges I have made are not difficult to make, nor do you have to have formal legal training to understand the principles. However, *the implications of repeated losses*

*for the IRS are significant.* If more of us forced such losses, the laws would have to be changed by Congress. *The only reason the present tax system continues to exist is because not enough people take time to challenge it.* In fact, we Americans continue to voluntarily waive our rights (rights which the Fifth Amendment was designed to protect) every time we file 1040 returns. Worse, we do everything we can to avoid litigation with the IRS when the agency challenges us. My fellow Americans, this has to change.

Here are just a few of the details of some of the challenges I have made to the IRS.

### **The Church of World Peace**

In 1977, I set up a church to promote my religious beliefs, and take advantage of the tax laws relative to churches. I also started exercising my First Amendment protected rights by telling others about my beliefs, and sharing with them the concepts for setting up their own church.

The IRS became extremely upset with me because in establishing these churches I made sure that all of the rules set out in the law were strictly followed and thereby forced the IRS to let the small churches take advantage of the tax breaks which the law allows all churches. When followed to the letter, the laws passed by Congress pertaining to all churches, large and small, allow literally billions of dollars of church assets and income to escape taxation—church organizations are exempted from the tax laws by the IRS. Of course, if there were true separation of church and state, churches would actually be immune from government regulation and taxation and thus would not even have to ask the IRS for a recognition of exemption, but I will not sidetrack on that issue here.

In an effort to discourage my activities, the IRS attacked my church and told me it would, in effect, pull the exempt status of the Church if I did not answer some additional questions to its satisfaction. We went to court over the efforts of the IRS to force my answers. In my first case, the Tenth Circuit ruled that the IRS could not revoke the tax exempt status it had previously recognized without following all the procedures to the letter, including first issuing me a summons. See *Church of World Peace, Inc. v. IRS* (715 F.2d 492).

Seeing that I was going to dig in my heels and not be quickly in-

## Chapter 1: My Story

timidated, the IRS backtracked a bit and issued a summons, as instructed by the Court. I filed a court action challenging the summons, but the district court ordered it enforced. In order not to be held in contempt of court, I had to appear and answer some of the questions of the IRS. I was not finished, though. I appealed.

In my appeal, the Tenth Circuit Court of Appeals essentially ruled in favor of my argument, and quashed the lower court's enforcement order! See *United States v. Church of World Peace* (775 F.2d 265).

Even though I won this round, I was not refunded any court filing fees or granted any monetary relief for the costs I had incurred. However, in reading over the rules and the law, I noticed that since this was a summons issue, I could at least apply for a small witness fee. I did so. The IRS Code says witness fees must be paid since I appeared in answer to the summons.

The IRS refused to pay me, however, probably because it did not get all the answers it had wanted. So I sued the IRS again, this time in order to collect the meager witness fee. Again, the lower court seemed only too anxious to help the government—it sanctioned me \$1,000 for filing what it called a “frivolous” lawsuit. But again I stuck to my guns, and again I prevailed. As a result of my case, Tenth Circuit reversed the lower court. Additionally, the Court chastised the Department of Justice for misrepresenting the facts in its response to my lawsuit! See *Conklin v. United States* (812 F.2d 1318).

Because the summons enforcement order had ultimately been quashed, I filed a motion to suppress the information that the IRS had obtained from my forced response. Since the information had already been obtained by the IRS, the Court held that my motion issue was “moot.” See *U.S. vs. Church of World Peace* (878 F.2d 1281).

However, some years later, the Church of Scientology took the exact same concern up to the U.S. Supreme Court. See *Church of Scientology of California v. United States of America* (113 S.Ct, 447; 121 L.Ed.2d 313). In the Scientology case, the Supreme Court reversed the earlier ruling that the Tenth Circuit had made in my case, and even pointed to my case as an example of “bad” law. The court ruled that my issue had not been moot and that relief should have been granted. With this encouragement, I subsequently re-litigated my case and I won that case, too!

My battle was not over though. After defeating the IRS on this initial church issue, the IRS decided to lay on me a statutory Notice of Deficiency for tens of thousands of dollars that I did not owe. In this personal attack on me, the true colors of the IRS and its incipient tyrannical tendencies showed up. Without going into the details of this case, suffice it to say that the Tenth Circuit ultimately reversed everything the IRS argued. See *Conklin v. C.I.R.* (897 F.2d 1032) and *Tavery v. United States* (897 F.2d 1027).

For those readers who may wish to check all this out in the law library, you will note that the IRS finally settled the financial part of this battle in a case titled *Tavery v. United States* (Civ. No. 87-Z-180, USDC Colorado). I think the IRS did so because the IRS knew it would otherwise have to defend its outrageous actions to a jury if the case were to have gone to trial.

Eventually, in 1995, the IRS got its way. The Tenth Circuit Court of Appeals upheld a Tax Court judge's opinion revoking the tax exempt status of the Church of World Peace—for doing the same things that other churches do. The Tenth Circuit ignored its previous rulings (where it had decided in my favor), and it ignored the decision by the Supreme Court in the Scientology case. Interestingly, the Court chose to mark the last Church of World Peace case, “not for publication.”

Although I finally lost the battle, I feel that I won the war because I learned so much about the IRS and the courts in the process. I have learned that *knowledge of the law is only one small part of the issue*. The “big picture” issue is realizing and understanding how the courts and the government bend the law if it is in its best interest; that is, if it feels it necessary in order to defeat a perceived threat to the sacrosanct tax system. I am not saying such things because I am a poor loser, but because that is just the reality of it. I certainly have no regrets about the final outcome, because I have gained invaluable insights into the methods and madness of the courts and the government in general. I have learned how to litigate and obtain justice in spite of this terrible reality.

### **Tavery v. United States**

My next-to-last case to date argued before the Tenth Circuit was *Tavery v. United States* (32 F.3d 1423, 10th Cir., 1994). Although the IRS



thinks it won this case, the IRS does not really understand the implications of the Tenth Circuit decision. The Tenth Circuit ruled that information may be entered from tax returns into criminal cases involving third parties if the individual who filed the return is either a friend, spouse or relative of the defendant. That means that if the IRS is prosecuting a friend of yours, it can (according to the Tenth Circuit) use information in that friend's case which came from your personal finances, if the IRS believes that you might have been able to provide financial help for the friend.

If the courts take the position that information from your return may be inserted into third party cases, it becomes clear that every time you file a return, you are waiving not only your rights to privacy (protected by the Fourth Amendment) but also your Fifth Amendment rights to not be a witness against yourself. If this idea does not bother you, you may as well put this book down now. You are wasting your time reading it.

### **When You File a Return, You Waive Your Rights**

The IRS insists that you waive many of your rights when you file a tax return. The IRS deceitfully tells you that you are “voluntarily” filing because the IRS and the courts both know that *the government simply cannot require you to waive any rights protected by the Constitution*. The IRS is worse than sneaky—the IRS *knows* that as long as you voluntarily provide information, you have no legal standing to object if the IRS later decides to use the information you volunteered against you.

### **The Achilles Heel of the Federal Income Tax Code**

As I learned more and more about my rights, the constitutional protections of my rights, and the intricacies of IRS procedures and the federal court system, I eventually realized that I was on to something big. I saw that the use by the IRS of return information in criminal cases directly collides with the Fifth Amendment. I realized that the Achilles heel of the federal income tax code was in the Bill of Rights to the United States Constitution, specifically the Fifth Amendment.

## **A \$50,000 Reward**

Much additional case studying and research in the law library convinced me that the Fifth Amendment was the reason I had never been able to find a specific statute requiring me to file an income tax return! I began publishing an offer for a reward of \$50,000.00 to anyone who could satisfactorily answer the following questions:

1. How may I file a tax return without waiving my Fifth Amendment protected rights?

2. What statute in the Internal Revenue Code makes me liable to pay the income tax?

I have published my reward offer for several years now, and although several famous attorneys have applied for it, none of their answers have really qualified them for it.

## **A New Strategy – An Unsigned Tax Return**

In 1986 I decided to file an unsigned tax return. *I must emphasize that as I look back over more than 20 years of paralegal experience, this strategy turned out to be a mistake and I do not recommend that anyone file an unsigned tax return. I include the story here merely for the sake of being historically complete with my narrative.*

I submitted the unsigned return with a cover letter pointing out that I had discussed with several attorneys my perceptions of the Fifth Amendment conflict with the requirement of filing returns, and none of them had been able to show me how I could file a return without waiving my rights. I enclosed photocopies of their written opinions to that effect. I gave the IRS a Power of Attorney to sign the return for me if the IRS could do so without waiving the Fifth Amendment protections of my rights.

The IRS fined me \$500 for my concern! (The fine is now \$5,000.) I was told that without a signature I was filing a frivolous tax return and was thus subject to a \$500 penalty for filing a frivolous return. Far from giving up my habits of challenging the IRS rulings, I filed a suit to argue the issue. During five years of wrestling with the issue, Judge Nottingham, a federal judge in Denver, Colorado, told me that if he were to rule

in my favor, he was afraid that he would overturn the federal tax system. Finally, he ruled against me but he took the position that the Fifth Amendment does not apply to the federal tax system because the Fifth Amendment only applies to “compelled testimony.”

### **A Bad Ruling**

I appealed the case and the Court of Appeals (the Tenth Circuit again, in Denver) upheld Judge Nottingham’s contention that tax returns are not the compelled testimony spoken of in the Fifth Amendment and that therefore the Fifth Amendment does not apply to the income tax system. (See more on this case in “Chapter 6: My Tenth Circuit Case, beginning on page 22.”)

This was an incredible ruling. In other words, the court ruled that filing tax returns is not required, or compelled. Said yet another way, the courts had just ruled that filing returns was truly voluntary! Perhaps the government realized that significance of the ruling, too, because the IRS lost no time in trying to put a damper on my celebration of what the ruling truly signified.

The IRS immediately asked the court to order me to pay \$6,000 for the valuable time it had taken the IRS attorneys to prepare arguments and motions to defend against my “frivolous” contention. Permit me to also state this another way: the government wanted the court to fine me for taking the position that the filing of income tax returns was compelled or required!

### **Heads, I Win—Tails, I Win**

Are you confused yet? I hope not. In fact, I hope you feel the same elation I felt about the outcome. I thought it was great! As the judge had mused out loud earlier during one of our hearings, either way he ruled, I win! For example, if he were to have ruled that the \$500 fine should be abated, he would have had to decide that the unsigned return and my concerns were not frivolous. But he could not do that, because then other folks might start submitting unsigned returns. That would pull the teeth of the IRS—it could no longer fine people for submitting a “frivolous” return. But more importantly, how then could the IRS use anyone’s return information against them criminally if the filer had not signed it “under

the pains and penalties of perjury?”

On the other hand, by upholding the \$500 fine, it would mean that the judge was ruling against the written, professional opinions of six attorneys whom I was relying on. Further, upholding the fine would underscore the uncomfortable fact what my attorney’s opinions brought into sharp focus—that the IRS could use the club of a fine to force me to sign and submit a return, thereby forcing me to waive my rights not to be a witness against myself.

### **Either Filing Is Voluntary, or It Is Compulsory**

Either the Fifth Amendment applies because filing a return is compelled, or the Fifth Amendment does not apply because filing a return is voluntary. Of course, if the Fifth Amendment applies, then my argument is far from frivolous, and if the Fifth Amendment does not apply, I have proven my point that filing is not required.

In any event, the only way that justice can prevail in the face of a judicial system that will declare words to mean their opposites in true Orwellian fashion (or *Alice in Wonderland*, whichever prose you prefer) is this: *the American public as a whole must become aware of the terrible deceit that has been perpetrated on them regarding the federal income tax.* The American people must begin to make their own challenges.

### **The IRS Says Filing Is Voluntary**

The IRS, in an obvious attempt to deal with the problem, continually refers to the income tax system as voluntary. *Why No One Is Required to File Tax Returns* will tell you that in this regard the IRS is right—as long as we have the Fifth Amendment to protect our rights, filing returns must indeed be voluntary. And I believe we can shove such words right back down the throat of the IRS until it, too, goes with us to the Congress so that we, together, demand that the law be changed!

## Chapter 2: The Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

— Article V: United States Constitution

**A**s our proposed Constitution was being discussed prior to adoption, many people expressed concern that it gave too much power to a central government. To calm such concerns, eventually a Bill of Rights was proposed and adopted which listed several prohibitions to the new government—certain individual rights which the government was to understand from the beginning that could not be infringed upon.

The Fifth Amendment is part of the Bill of Rights and it holds that individuals cannot be required to give the government information which may be used against them in criminal cases. Subsequent case law has applied the Fifth Amendment in civil cases, too, when there is the possibility that the information in question may be used criminally. (Of course, there is always the possibility that information may be used for criminal prosecution in a system like our present tax system, where civil enforcement is used by an agency to gather information that the very same agency may utilize for criminal prosecution.)

### **The Miranda Warning**

When a police officer questions an individual for information that may be used against that individual in a criminal case, the police officer is supposed to first read him a “Miranda” warning to advise him of

many of his rights (See *Miranda vs. Arizona*, 384 U.S. 436, 1966). After such warning, every time the individual answers a question, he is voluntarily waiving the Fifth Amendment protection of his rights. He cannot later object when the answers he volunteered are used in his criminal prosecution.

If an individual is indicted and taken to trial by the government, he cannot be required to testify against himself. The government must have enough information before the indictment to convict the individual without his own testimony. The Fifth Amendment protections we all enjoy are thus extremely important to protect us against government prosecution and persecution, but as you will see from the rest of the information in this publication, the government ignores the Fifth Amendment in the collection of income taxes. Since the population is generally ignorant as to the nature of its rights and constitutional protections, the federal government continues to get away with the biggest scam in United States history. The government has done so for over eighty years.

### **Coercion to Waive Fifth Amendment Rights**

The government of the United States of America, through its agency the Internal Revenue Service, and supported by a court system that deliberately ignores the law in tax cases, is requiring individuals to waive their Fifth Amendment protected rights to provide information on April 15. That information may be used against the individual criminally. Such a situation makes a complete mockery of the Fifth Amendment.

Through the IRS and the Department of Justice, the government by carefully orchestrated trials and outrageous fines and criminal penalties instills fear in the American public and thus perpetuates a tax system which is not only un-American (in that it taxes an individual's industriousness and productivity), but also unconstitutional in that Americans must waive their constitutionally protected rights in order to comply with it. In this manner, the IRS essentially beats confessions out of 100 million Americans each year, and make a mockery of our Bill of Rights. It is time for us to wake up, assert our rights again, and reveal the truth to others.

## Chapter 3: The Tax Return and the Privacy Act Notice

All government agencies are required to tell the public the law and the penalties for not obeying the law under the Privacy Act. The following statement is the Privacy Act Notice as it appears in the 1040 Instruction Booklet.

The law says that when we ask you for information we must tell you our legal right to ask for the information, why we are asking for it, and how it will be used. We must also tell you what could happen if we do not receive the information and whether your response is voluntary, needed for a benefit, or mandatory under the law.

This notice applies to all papers you file with us, including this tax return. It also applies to any questions we need to ask you so we can complete, correct, or process your return; figure your tax; and collect the tax, interest, or penalties. Internal Revenue Code Sections 6001, 6011, and 6012(a) say that you must file a return for any tax for which you are liable. Your response is mandatory under these sections. Code section 6109 says that you must show your social security number on what you file, so we know who you are and can process your return and other papers. You must fill in all parts of the tax form that apply to you. However, you do not have to check the boxes for the Presidential Election Campaign.

We may give the information to the Department of Justice and to other Federal agencies, as provided by law. We may also give it to cities, states, the District of Columbia, U. S. Commonwealths or possessions, and certain foreign governments to carry out their tax laws.

If you do not file a return, do not give the information asked for, or give false information, you may be charged penalties and you may be subject to criminal prosecution. We may

also have to disallow the exemptions, exclusions, credits, deductions, or adjustments shown on your tax return. This could make the tax higher or delay any refund. Interest may also be charged.

Please keep this notice with your records. It may help you if we ask you for other information. If you have questions about the rules for filing and giving information, please call or visit any Internal Revenue Service office.

Most Americans have heard of the 1040 Income Tax Form and the rest of the forms in the 1040 family. Each year, approximately 100 million people rush to the post office (many at the last minute) to give the government complete information on their financial lives. Amazingly, thousands, perhaps even millions, of these individuals file their returns without any real understanding of the form or the information placed on it. Their lack of understanding is why they use CPAs and computer programs to prepare the documents for them. But think on this: *Americans sign the forms they do not understand, oftentimes prepared entirely by others, and swear to their accuracy "under the pains and penalties of perjury!"*

### **The Conditioning of Americans**

I have to hand it to the IRS for its fantastic conditioning of millions of Americans. Millions of individuals blindly and unthinkingly commit the federal crime of perjury each year because they file income tax returns that they do not understand and that they thus could not explain or defend. Perjury is a serious felony punishable by a fine of up to \$2,000 and a jail term of up to five years, or both. See Title 18, United States Code, Section 1621.

### **The Privacy Act**

The IRS is very aware of the fact that it has a legal right to use any information provided on a 1040 Form. The IRS is also aware that the Privacy Act requires all government agencies to inform the public about the law and to tell the public what the agency might do with the information requested, as well as to advise the public of the consequences for disobeying the law. That is why the IRS warns us that information on tax re-



turns may be given to the Department of Justice.

The IRS goes to great lengths in its Privacy Act Notice to create a confusing situation. After all, the IRS wants you to think that you are *required* to file a return. At the same time, the IRS warns you that you are giving it information that it can use in a criminal case—yours! The Privacy Act Notice also states that individuals are required to file a return “for any tax for which you are liable.” You are referred to IRS Code Sections 6001, 6002 and 6012.

Get a copy of the IRS Code in the law library and read those sections. Do you see a section anywhere in the Code that makes you liable to file a return? Only a few sections actually come close, but they do not actually require you to file the return; the sections simply state that *if you are liable, then you must file*.

Discuss these sections with your attorney. Your attorney will have to conclude that in and of itself, the language of these sections does not make you liable to pay an income tax. (The lawmakers did not simply misspeak here. Contrast these sections with Section 5005, for example, which very clearly specifies that if you distill or import distilled spirits, such action makes you liable for the tax.) Your attorney will likely further conclude that you are not liable for the tax *unless and until you voluntarily* file a return. Such action is what assesses or bills you—by signing the bill, you are making a promise to pay. Again, there is no section in the Internal Revenue Code that generally makes individuals liable to pay an income tax.

### **Filing a Return Is Voluntary**

Read the lips (and the written words) of the IRS: the IRS insists that filing a return is *voluntary*! If you will look through the IRS literature, you will see that the IRS continually refers to the income tax as a “voluntary tax.” The IRS also says that millions of individuals voluntarily file returns. Several years ago, I searched through the entire Internal Revenue Manual and I found numerous instances of the use by the IRS of the word “voluntary” in relation to the filing of income tax returns.

Here are some examples:

- Chapter 6200 at 6210 states that “It is the goal of the Internal Revenue Service to encourage and achieve the highest possible degree of voluntary compliance with the tax laws....”
- Chapter 100 at 110 states that “The primary mission of the Taxpayer Service is to promote voluntary compliance through education and assistance to taxpayers.”
- In Part VI, under Section 6810 (Taxpayer Service), it is stated at (13) 31(1)(f) that “returns are voluntarily submitted by taxpayers.”
- In Section 6810 (Operating Techniques and Reporting) at (13) 91(1)(a), the Manual states: “securing a valid voluntary income tax return from the taxpayer....”
- In the Section on IRS Policy Statements at P-4-84, the Manual states: “The purpose of criminal tax investigations is to enforce the tax laws and to encourage voluntary compliance.”
- In the General Section, at 4022.65(3) we read: “When a person indicates he/she will voluntarily comply but requests that he/she be served....”
- In the Automated Collection Function Procedures at 5535.4, the Manual states that the IRS may file returns under 6020(b) if the returns are “not filed voluntarily.”

Furthermore, Webster’s Dictionary defines the word “voluntary” to mean the following:

Voluntary: brought about by one’s own free choice; given or done of one’s own free will; freely chosen or undertaken; arising in the mind without external constraint; spontaneous; in law, (a) action done without compulsion or persuasion.

### **Filing a Return Provides Information to Be Used Against You**

The Privacy Act Notice by the IRS does not mention that the only purpose of the Department of Justice is to investigate and prosecute crimes. If it did so, more folks might pause and ask why the IRS would

be alerting them to the possible sharing of their individual return information with that prosecutorial agency. I think this is deceitful. *The IRS does not really want you to know that you are providing information that it can and will use against you.* However, the IRS knows that it must have something in print to point to in the event you later try to claim you were never told that you were waiving the Fifth Amendment protections of your rights by “volunteering” the information. Note that the Fifth Amendment states that you cannot be compelled to witness against yourself; and note further that the *Fifth Amendment protections do not apply if you can be tricked into voluntarily witnessing against yourself.* Doesn't this make you just a teensy bit mad?

At the risk of belaboring this point, the IRS would not be required to give the warning that information may be given to the Department of Justice *unless* it were allowed to use information on tax returns in criminal cases. So when we read the Privacy Act Notice, we should know beyond a doubt that filing returns is indeed “voluntary” because the IRS is warning us that it can give the information to the Department of Justice.

*Let me say it one more time: when you send in a tax return, you have been forewarned how the information may be used.* Since, in spite of that warning, you have voluntarily given the information on the return to the government, you cannot later object if the IRS or the Department of Justice later decide to use the information against you in a criminal prosecution.

### **Keeping Fear Alive**

Each year the IRS indicts several hundred individuals who have not filed tax returns in order to keep a degree of fear alive in the general public and keep them volunteering. Although the IRS refers to the filing of returns as voluntary, it has both criminal and civil penalties for those individuals who do not “volunteer.” That is why any challenge or stand you make for the truth and the Bill of Rights is serious business, and why you must know what you are doing. You are dealing with a corrupt government agency and a major judicial conspiracy to protect the income tax. The actions of both the IRS and the courts have the blessing of our elected representatives. That is why this situation can only be changed by the people themselves.

## Chapter 4: What Do the Attorneys Say?

**G**uy Curtis, an attorney who practices law in Imperial, Nebraska and who has extensively studied the issues discussed in this book, has the following to say about the federal tax system and its filing "requirements." Mr. Curtis put his legal opinion in writing in 1985.

### **The Curtis Letter**

Dear \_\_\_\_\_:

In response to your letter requesting my legal opinion as an attorney regarding the voluntary nature of filing an income tax return, I am generally in agreement with Mr. Rendelman's excellent analysis of the income tax laws. Regarding my own qualifications and experience, I have served as an elected prosecuting attorney for over twenty years. In addition, I have handled a number of criminal tax trials in federal courts as defense attorney.

The average individual is utterly intimidated by the voluminous 6000 plus pages of the Internal Revenue Code. It is so vague, confusing and impossible to understand that even Commissioner Roscoe Egger, Jr., IRS, told an audience on November 30, 1984, in Baltimore that: Any tax practitioner, any tax administrator, any taxpayer who has worked with the Internal Revenue Code knows that it is probably the biggest "mishmash" of statutes imaginable. Congress, various Administrations and all the special interest groups have tinkered with it over the years, and now a huge assortment of special interest and pet economic theories have been woven into the great hodgepodge that is today's Internal Revenue Code. IR-84-123, 11-30-84.

Even President Reagan has attested to the fact that the Code is impossible for the average citizen to understand. He said in a 1984 Associated Press story: "The government has the nerve to tell the people of the country, 'you figure out how much you

owe us—and we cannot help you because our people do not understand it either—and if you make a mistake, we will make you pay a penalty for making the mistake.”

The Supreme Court, in *Garner vs. U.S.*, 424 U.S. 648 (1975), held that the information in a return is, for Fifth Amendment analysis, the testimony of a witness. Therefore, since no citizen can be compelled to be a “witness” against himself, any statute that attempted to require a citizen to file a return which could be so used would be unconstitutional.

I must tell you that the Internal Revenue Service and the Federal Courts have taken positions that are in conflict with the opinion in this letter. However, in IRS Publication #17, the IRS says that where there is a conflict in the Court decisions, the IRS will favor the position of the government, not the taxpayer, even though this policy is a blatant violation of the well established legal principle that in case of any ambiguity of statutory construction, the doubt should be resolved in favor of the taxpayer, not the government. See *Greyhound Corp. vs. U.S.*, 495 F.2d 863 (1974).

I cannot tell you not to file an income tax return. As the IRS itself stated in their Publication 21, you must make this decision.

However, the critical point as to whether your decision not to file would be “criminal,” that is, in violation of section 7203 depends on your “intent.” Merely proving that you failed to file a return is not enough. The government must also prove beyond a reasonable doubt that your failure to file was “willful.” Failing to file a tax return is not a crime. As stated by Mr. Rendelman, if you reasonably believe in good faith that you are not required under the law to file a return, then your action cannot be considered to be “willful” or in “bad faith,” even if you are wrong. By virtue of the fact that you have sought, accepted and relied upon a professional opinion, your actions ought to be construed as “reasonable” and “in good faith,” not “willful” or in “bad faith.”

In the Bishop case referred to in Mr. Rendelman’s letter, the United States Supreme Court said that any person who relies upon a prior decision of that Court cannot be “willful”. Conse-

quently, any person relying upon the decision of *Flora vs. U.S.* which stated that our tax system is voluntary, cannot be considered to be acting with “willful” or “evil” intent as formulated in the Bishop case. The Supreme Court in the Bishop case said, “it is not the purpose of the law to penalize frank differences of opinion.” If the government were to prosecute you without evidence of willfulness, it would be the same thing as prosecuting you for murder without having a witness, or even a body.

A citizen is entitled to rely on an official interpretation of the law, even if mistaken. See *U.S. vs. Barker*, 546 F.2d 940 (1976), District of Columbia. In this case, the Federal Court of Appeals cites the Model Penal Code which states the defense as follows:

“A belief that conduct does not legally constitute an offense is a defense to a prosecution...when (b) he acts in reasonable reliance upon...a judicial decision,... or... an official interpretation of the public officer charged by law for the administration or enforcement of the law.”  
Sec. 204 (3)(b).

Again, the individual has no patriotic duty to volunteer any more than what the law requires. The Supreme Court in *Gregory vs. Helvering*, 293 U.S. 465 said it in plain words:

“The legal right of the taxpayer to decrease the amount of what otherwise would be his taxes or altogether avoid them by means which the law permits, cannot be doubted.”

I applaud your research and study of the law, and urge you to continue. If you have any questions, please do not hesitate to call me.

Yours very truly,

Guy Curtis, Attorney at Law  
Imperial, Nebraska

## Chapter 5: My Challenge Offer

I studied the Fifth Amendment issue for years before I felt positive that the government has a severe conflict with the Fifth Amendment and its “voluntary” filing requirement. I am completely convinced that the government is abusing the Fifth Amendment severely every time it indicts an individual or civilly penalizes an individual for not filing a return. It saddens me to think that our government resorts to skullduggery to get away with such abuse, but unfortunately it is true.

### **My \$50,000 Challenge**

Once I understood the problem, I tried to think up a way that I could call attention to the situation and at the same time, convince people that I am right. I decided at that point to offer a \$50,000 reward to anyone who could answer these questions:

1. How could I file a tax return without waiving my rights protected by the Fifth Amendment?
2. What statute in the current Internal Revenue Code makes me liable to pay an income tax?

### **Melvin Belli Tries to Collect**

Soon after I started advertising my reward, the famous “palimony” attorney Melvin Belli applied for the reward. He even threatened to sue me if I did not send him the \$50,000 immediately. Mr. Belli said that the way I could file a tax return without waiving my rights would be to do it through an attorney (such as himself, of course). He suggested that I give to the attorney my Power of Attorney to file returns for me, and also that I give him the money for my taxes, which would be placed in the attorney’s trust account. The attorney would then file the return and pay the IRS out of his trust fund. The attorney would, however, file the return with a code number on it known only to me and to him. He would not put my name and address on the tax return, but simply sign the return as the preparer, using my Power of Attorney.

Obviously, the IRS would then have to come to the attorney to ask

for the name of the individual who was represented by the return. The attorney would stand on attorney-client privilege and refuse to identify me, thereby preserving my Fifth Amendment protected rights!

Well, even though it seemed like quite a bit of trouble if I were to file in this manner in order to still preserve my rights, I was pleased with Mr. Belli's answer to my question because he was so creative. I informed him that he had basically proven my point: there is definitely a Fifth Amendment problem if filing tax returns is required and not voluntary.

I informed Mr. Belli that he did not win the reward, however, because if the IRS tried to prosecute me criminally for "willful failure to file returns" (Section 7203 of the IRS Code) or if the IRS proceeded civilly against me, in my defense I would ultimately have to put the attorney on the courtroom stand as my witness and have him testify that he had filed a return for me.

Of course, if I had to have him so testify in order to defend myself, the IRS would be forcing me to waive my rights supposedly protected by the Fifth Amendment in order for the IRS to consider my return as filed. I encouraged Mr. Belli to sue me for the money in order to publicize my point, but he chose not to do so.

### **William Cohen Tries to Collect**

Another excellent criminal trial attorney from California, Mr. William Cohen, next applied for the reward. He explained that he felt one could file a return without waiving his Fifth Amendment protected rights by filing two returns. The first return would contain financial information only—no identifying information. The second return would contain the name and other identifying information, but indicate Fifth Amendment objections on each and every specific question concerning income and deductions.

I agreed with Mr. Cohen that this approach would not require me to waive my Fifth Amendment protected rights when I mailed the returns, but if the IRS proceeded against me, I would have to testify in my defense that I had mailed returns containing, in toto, all the information required, and I would have to identify them and at that point I would be waiving my rights.



### **Others Are Still Trying to Collect**

After six years, I am still offering the reward. One individual, a Mr. Charles Ostman, sued me in Federal Court in Seattle, Washington with an absurd theory of law, but the judge decided the case in my favor and even granted me my costs. See *Ostman vs. Conklin*, Civ. #C92-1371C; USDC Seattle, 1992.

The judge also referenced contract law in order to set aside Mr. Ostman's objection to me being the proper arbiter of the reward that I had offered.

The point is that no one can answer my two questions: it is simply impossible for me or anyone else to file a tax return without waiving Fifth Amendment protected rights; and there simply is no statute or provision in the Internal Revenue Code that makes an individual liable to pay the income tax.

### **What Statute Makes a Taxpayer Liable to Pay?**

The second part of my reward involves showing me which statute makes me liable to pay an income tax. There are only two ways that an individual may be made liable and therefore legally owe an income tax: first, an individual may become liable by voluntarily filing a tax return; or second, an individual may become liable if the IRS files a return for him.

However, law requires the IRS to follow definite and involved procedures if the IRS decides to file a return for an individual who has not filed. If a knowledgeable person decides he wants to fight such action by the IRS, he can force the agency to expend a lot of time and energy following through with its assessment.

### **My New \$200,000 Challenge**

After all this time, no one has even come close to collecting my original \$50,000 challenge or its successor, my \$100,000 challenge. I doubled my \$50,000 offer to \$100,000 upon the publication of the first edition of this book. With the publication of my second edition, I doubled it to \$200,000. Visit my web site (<http://www.anti-irs.com>) and find the number of my current edition. Multiply it times \$100,000 for the new offer!

## **Chapter 6: My Tenth Circuit Case**

**B**eginning in 1985, it took me over seven years of thinking about the Fifth Amendment as it relates to the income tax to become absolutely convinced that the government has no legal way around the Fifth Amendment conflict with its alleged requirement to file 1040 tax returns.

If Americans were more concerned about waiving their Fifth Amendment protected rights, the IRS would no longer be able to routinely use information on tax returns in criminal tax cases; nor would it be able to proceed civilly against individuals and later turn the civil case into a criminal prosecution once it obtained enough information through the civil process to determine that the case might have criminal potential.

As we have seen, law requires the IRS to warn the public that the agency may use the information criminally whenever it wishes to, but most of us overlook this warning. Strangely, the compliant individual is at much more risk in our convoluted system than the individual who stands on the constitutional protections of his rights. The only reason that the present hated tax system continues to work is because individuals continue to voluntarily waive their rights and file tax returns.

### **Forcing the First Amendment Issue in Court**

During my research, I discovered that the court system and the IRS are schizophrenic in their interpretation of this Fifth Amendment problem. I became bound and determined to figure out a way to raise the Fifth Amendment issue and to put the court in a position where it would have to come up with a decision that would make my point.

Years ago, when I started to criticize the IRS publicly, the IRS classified me as an illegal tax protester. I sued the IRS under the Privacy Act to get the classification removed. I lost in the Tenth Circuit Court of Appeals, but one judge did rule in my favor with an eloquent opinion that really put the IRS in its place. Nonetheless I was, by a vote of 2 to 1 of the Appeals Court panel, branded an illegal tax protester for the rest of my life. This was primarily because I had dared to criticize an agency that deserves criticizing.

Judge McKay dissented in my case, *Conklin vs. IRS* (an unpublished case, circa 1982), with his opinion from *U.S. vs. Amon*, 669 F.2d 1351 (1981) which follows:

McKay, Circuit Judge, (dissenting):

It makes clear that IRS activities with regard to tax protesters extend well beyond the manifestly permissible policy of using admissions of a crime against the criminal, to the suspect policy of punishing political protesters—or in other words, of punishing citizens for exercising a right which is front and center to the First Amendment. Indeed, if the objective of the IRS were only to prosecute the more serious or frequent violators of the tax laws, the word ‘protester’ would be irrelevant. As the trial court found, the object of the selectivity is to shut up the ‘outspoken.’

The test for determining whether a prosecution is unconstitutionally selective is two-pronged. To support a selective prosecution claim a defendant bears a heavy burden of establishing, at least prima facie (1) that he has been singled out for prosecution, and (2) that the selectivity for prosecution was invidious or in bad faith, and that it was based on such impermissible considerations as race, religion, or the desire to prevent or inhibit the exercise of such constitutional rights as free speech....

...Here, the IRS declared (and the court believed) that it intended to select and silence outspoken ‘tax protesters.’ Thus, both the fact of selectivity and its motivation to silence the outspoken are proved by direct evidence. I find it impossible to believe that the majority really means what it is saying. Surely it does not mean that even though the government declares its intent to select persons for prosecution in order to silence them, the ensuing prosecution does not violate constitutionally protected interests.

It is beyond cavil that this conviction would fall if the trial court had found this defendant to have been selected for prosecution because he is black. Nor would there be any doubt if the trial court had found this defendant had been selected for prose-

cution by the IRS because he is on the President's political enemies list. Similarly, there can be no doubt that this conviction would fall if the trial court had found this defendant had been selected for prosecution because he protested in writing that:

There is nothing sinister in so arranging ones affairs to keep taxes as low as possible. Everybody does so, rich or poor, and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant. *Commissioner vs. Newman*, 159 F.2d 848 (1947), Judge Learned Hand, dissenting.

Whatever else the trial court may have found, its express language compels the conclusion that it found that this defendant had been selected for prosecution because he was an 'outspoken protester.' To hold that such selectivity is permissible would make the examples of selectivity I have just set out equally permissible. For First Amendment purpose, nothing distinguishes an 'outspoken protester' against existing tax laws from one who protests as Judge Hand and Justice Frankfurter have protested.

By definition, each and every instance of selective prosecution which reaches us on appeal involves a person who has allegedly violated some law. Nevertheless, the usual carte blanche of the prosecutor in seeking the convictions of these persons is subject to the requirement that the decision to prosecute not be motivated by factors by which the government cannot constitutionally distinguish one violator from all others. If administratively, the government has not the resources to prosecute every violator, if the government therefore must pick and choose from among all violators, it may not do so based on its desire to shut the taxpayer up. However reprehensible may be citizens who object to paying the taxes which make possible an acceptable degree of civilization, the First Amendment protects the right to make those objections. If not, then the constitutional guarantee for Free Speech is illusory. The right to protest against government policies lies at the core of First Amendment values....

Where, as here, the government seeks to silence a citizen pre-

cisely because it detests or fears the citizen's spreading of ideas relating to effective self-government, the Constitution forbids the government action unless the annunciation of those ideas amounts to such clear and present danger to the security of the Republic that it falls outside the ambit of otherwise protected political speech.

While one could argue that the history of the American Revolution supports a finding that tax protests present a clear and present danger to the Republic, there is no argument before us that they do; no court has so held; and it is doubtful that any court is prepared so to hold. Of course there is a danger that illegal tax practices will become more widespread if the government fails to strike swiftly and decisively in gagging or at least intimidating the most outspoken tax protesters. However, in a day in which even a computerized search is incapable of tabulating the fractions of a citizen's conduct which the government agents now have discretion to charge serially or cumulatively as alleged violations of the law, the necessity of subjecting that discretion to constitutional scrutiny is manifest and certain.

It seems a puny enough effort to suggest that the limit on the dangers of unconstitutional discrimination be drawn at least where the hapless citizen can carry his heavy burden to show that he was singled out because (to use the trial court's express language) 'he is an active and outspoken protester.'

It is hard to imagine a kind of political protest more consistent with the most cherished traditions of this nation than protest focusing on taxation. Certainly no form of protest is more American. (Furthermore, tax protest is neither modern nor American in its origin. Many people venerate one who commented on the publicans who collected the taxes in his time.) It was, after all, protest against the Stamp Act which helped set in motion that chain of events which won for this nation its independence from a repressive King George and led to the enshrining in the First Amendment of the right to protest.

Since the trial court seemed justifiably confused as to the proper application of the first prong of the test, this case should

be remanded to give the trial court an opportunity to reconsider the matter in light of this clarification of the various means by which selectivity may be proved. The possibility that the confusion may have affected the finding that selectivity was motivated by a desire to suppress outspokenness suggests that the trial court not be bound by that finding on remand but rather be permitted to reconsider whether both selectivity and illegal purpose were proved in this case. I would therefore reverse and remand for reconsideration by the trial court.

As you can see from Judge McKay's dissenting opinion, apparently neither the IRS, nor at least the other two Tenth Circuit judges on the panel with Judge McKay for this case, have much respect for the First Amendment and its freedom of speech guarantee when the federal income tax is involved. It is a shame there are not more judges like Judge McKay.

During my research I discovered that the classification by the IRS of anyone as an illegal tax protester is a project of its Criminal Investigation Division (CID), so I came up with a new idea. I believed it was a new idea because I could not find any evidence in my research that anyone else had ever tried it.

### **A New Insight on the Problem**

In 1986, I went to several attorneys and other tax professionals and explained my concerns of wishing to comply with the filing law if I must, but not wanting to waive my rights in order to do it. All of the professionals I talked with agreed that I had a definite dilemma: since the IRS by officially classifying me as a tax protester had essentially notified me that I was under scrutiny by the CID, I obviously had reason to be concerned about witnessing against myself with anything I said or submitted, so there was no way I could file a return without waiving my Fifth Amendment protections. They put their opinions in writing, on their letterheads.

### **I Filed an Unsigned Return with a Challenge to the IRS**

In order to comply with the alleged filing requirement, and at the same time prevent the IRS from using criminally any of the information

that I might voluntarily give, I filed an unsigned return. I also enclosed photocopies of the letters from the attorneys I had contacted, and said in my cover letter that I was relying on their professional evaluations.

As I stated earlier, *I must emphasize that as I look back over more than 20 years of paralegal experience, this strategy turned out to be a mistake and I do not recommend that anyone file an unsigned tax return. I include the story here merely for the sake of being historically complete with my narrative.*

I attached an IRS Power of Attorney Form 2848 on which I gave power of attorney to the IRS District Counsel to sign the returns for me if he could figure out how to do so without waiving my Fifth Amendment protected rights. The attorneys in private practice could not figure out how I could do it; maybe the attorneys working with the agency could! The IRS accepted and processed my return and never said a word about the manner in which I had mailed it.

### **I Filed a Second Unsigned Return**

In the Spring of 1988, I filed a return for the tax year 1987 in the same manner as I had done the previous year, for 1986. However, this time the IRS fined me \$500.00 for filing a frivolous return. Apparently some sharp-eyed return processor or agent figured my action was an excuse for the agency to collect another 500 bucks from me and perhaps put me in my place for doing what I did.

I did not think the IRS had any real basis for the fine, because it had not objected the first time I did it, and in the meantime I had come across several cases where it had been held that a return was not really a return unless and until it had been signed.

So I had concluded that I was on relatively solid ground. If my unsigned return was not even to be officially considered as a return, how could the IRS assess a frivolous return penalty? However, after I was hit with the frivolous return penalty, I could only conclude that once again the IRS was making up its own law. An unsigned return was not a return when the IRS did not want it to be a return, and yet the unsigned return was a return when the IRS wanted it to be a return—i.e., when the IRS wanted to assess a fine!

## **I Sued the IRS—Again**

I paid the percentage of the fine required by statute to have standing to sue the IRS (15%), and filed suit in federal court. Judge Nottingham, a federal district court judge in Denver, Colorado finally informed me (after putting off his decision while he wrestled with my issue for a couple of years) that he had a real problem ruling on my lawsuit. The problem, he said, was that if he ruled in my favor, allowing me to file without signing, he might overturn the federal tax system. He also realized that if he ruled against me, he would be ruling against all of the attorneys whose opinions stated that I would be forced to waive my Fifth Amendment protected rights. Clearly, he did not want me to go on to the Supreme Court which has ruled time and again that no one may be forced to waive constitutional protections in order to comply with a law.

Judge Nottingham stated in a hearing on August 27, 1992, in federal district court in Denver, (Case No. 89 N 1514):

“And one of the fatal things that I—or things that you are overlooking—I will not say it is fatal, although it appears to me it may be fatal—is when you do not sign a return, the reason that the tax collection system is frustrated is because you are not signing under the penalty of perjury. I mean, if everybody could do what you did, the tax collection system would collapse, which you know I am sure some people would argue is not a bad result. But it is not one that I am in a position to bring about.”

Notice that the judge basically told me that I could not possibly win because it would overturn the federal tax system. Of course, that was the point of my lawsuit to begin with!

After thinking about the case for five years(!), he decided to rule against me. He took the position that the Fifth Amendment does not apply to tax returns because the Fifth Amendment applies only to “compelled testimony.” In other words, the Fifth Amendment only applies to information that individuals are required to give to the government.

Since I had argued that the Fifth Amendment applies to tax returns because I felt that their filing was compelled by the penal provisions of



the law, it is clear that Judge Nottingham took the position that individuals are not required to give information to the government on 1040 returns (or, in other words, he was talking like the IRS talks by saying that filing is “voluntary”), and that is why the Fifth Amendment cannot be applied.

### **The Court Rules in Opposition to the U.S. Supreme Court**

Judge Nottingham had to rule directly against the position of the Supreme Court in *Garner vs. U.S.*, *supra*. Remember, the Garner Court took the position that information on tax returns is “compelled testimony” for purposes of the Fifth Amendment.

Furthermore, Judge Nottingham also accused me of taking a blanket Fifth Amendment position, even though I certainly had not done that. In fact, I had completely filled out the return and provided the supporting documentation and paid the tax that I voluntarily self-assessed. The Supreme Court took the position that if an individual so much as even admits to having books and records, he waives the Fifth Amendment protections of his rights because the Fifth Amendment does not apply to documents, it only applies to testimony. See *U.S. vs. Doe*, 104 S.Ct. 1237 (1984).

Judge Nottingham also ruled that “Plaintiff has wholly failed to persuade me that truthful completion of the IRS Form 1040 or any related forms would tend to incriminate him.”

### **The Judge Answers a Question I Did Not Ask**

The judge answered a question that I did not ask. How could the judge know if a piece of information would incriminate me? There is no way either of us could know that! But I was not arguing that I might incriminate myself. I was arguing that I could not be required to waive the Fifth Amendment protections of my rights. As a layman, there is no way I could be presumed to know if a piece of information would be incriminating or not. His opinion duly impressed me again as to how tricky the courts can be in their “*Alice in Wonderland*” language.

I appealed the case to the Tenth Circuit Court of Appeals. The Tenth Circuit upheld the lower Court and thus also took a position exactly opposite to the position taken by the Supreme Court in the Garner case.

The circuit court judges held that information on a tax return is not compelled, and the judges also accused me of taking a blanket Fifth Amendment position even though I had answered all the questions.

I could not believe it! It was as if the court had not even looked at my return! Then the Tenth Circuit Court sent the case back to the lower court for any further recommendations by Judge Nottingham. The government seized the opportunity and asked Judge Nottingham to order me to pay the amount it estimated it had cost the IRS in attorney time to respond to my complaint. I was amazed when the attorneys for the IRS submitted a \$6,000 bill for their time! I was really flabbergasted when Judge Nottingham assessed me the entire amount—this for raising the “frivolous” argument of law that individuals are required to waive their Fifth Amendment rights when they file tax returns!

For me, the judge’s action underscored the unfair bias of the courts against someone who is challenging the incongruities of our income tax laws. Think about the contradictions in this scenario: The judge was saying that this was an obviously frivolous issue—an issue that even I, a layman, should immediately realize could be quickly defeated. Yet when the government submitted a \$6,000 bill for the time that it required for two professional attorneys to defeat my position, the judge accepted their bill and the many hours it represented without question, and considered it appropriate to pass it along to me in its entirety!

## **I Appeal to the Supreme Court**

I guess I should have been grateful that the judge did not add his time to my bill, too. It took him five years to evaluate my “easily understood as frivolous even by a layman” argument! Of course, I appealed once again, this time on the issue of the newly-imposed \$6,000 worth of sanctions. Unfortunately, the Supreme Court was too busy with other far more important issues. It decided to not even consider my objection to the \$6,000 sanction.

Putting aside my outrageous \$6,000 fine, do you now understand why the IRS continually refers to the filing of tax returns as voluntary? The IRS knows that if it stated that an individual is required to file tax returns, a Fifth Amendment confrontation would be created, so the IRS enforces the idea that tax returns are indirectly required. The IRS requires

you to volunteer, and then punishes you if you chose not to volunteer. (Did I just hear you say that you feel like *Alice in Wonderland*, trying to tie the Queen down to fixed definitions for words?)

Like the attorneys I consulted for their learned opinion on the law, I have a formal education which I have used professionally. Therefore, after all this, I decided to put my own understanding of the language of the Tenth Circuit opinion into a written opinion. If you write me for a copy of it, here is what it will say:

Thank you for your recent request. I appreciate your interest in my litigation efforts in the 10th circuit of the federal courts.

I am a Communication Expert and have made an extensive study of the morphosyntax of English. I have a Masters Degree from the University of Colorado in Communications and I have over fourteen years of experience teaching English and Communications at the elementary, junior high, high school, and college levels.

In my recent case that I filed in federal court, both the lower (district) court and the appeals (circuit) court ruled against my argument that individuals waive their Fifth Amendment protected rights when they file tax returns. The courts took the position that my argument was frivolous because the Fifth Amendment only applies to “compelled testimonial communication.”

The circuit court took the position that the income tax Form 1040 is not “compelled testimonial communication.” The court stated:

“In granting the IRS’ motion for summary judgment, the court found Conklin’s argument that his refusal to sign his 1987 Form 1040 on the grounds that his signature would violate his Fifth Amendment rights was rejected in *Betz vs. United States*, 753 F.2d 834, 835 (10th Cir. 1985). (‘It is well settled that the Fifth Amendment general objection to filing a proper tax return is not a valid claim of the constitutional privilege.’) Conklin’s contention that his classification by the IRS as an illegal tax protester justifies invocation of the Fifth Amendment

privilege misunderstands the nature of the... privilege... which protects against compelled testimonial communications... (emphasis mine) and Plaintiff has wholly failed to persuade me that truthful completion of the IRS Form 1040 or any related forms would tend to incriminate him. (R. Vol. II at p. 6).

“On appeal, Conklin posits the following issues: Whether an individual who has been classified as an illegal tax protester has a valid concern about waiving his Fifth Amendment protected rights when he signs a federal income tax return; and whether an individual who has been advised by several attorneys that he will waive his Fifth Amendment protected rights on a federal tax return should be penalized when he relied in good faith on the advice of counsel. The government responds that the District Court correctly held that Conklin was liable for the \$500.00 frivolous return penalty imposed under Section 6702. Further, the government urges that we should impose sanctions against Conklin for bringing this frivolous appeal. We agree.”

As you can see, the Court has taken the position that the Fifth Amendment does not apply to the income tax because the income tax is not a “compelled testimonial communication.”

Black’s Law Dictionary defines “compel” as follows:

Compel: To urge forcefully, under extreme pressure. The word “compel” as used in constitutional right to be free from being compelled in a criminal case to be a witness against one’s self means to be subjected to some coercion, fear, terror, inducement, trickery or threat—either physically or psychologically, blatantly or subtly; the hallmark of compulsion is the presence of some operative force producing an involuntary response. *U.S. v. Escandar*, C.A. Fla., 465 F.2d 438, 442.

Furthermore, the Random House Dictionary of the English

Language defines “compel” as follows:

1. To force, drive, esp. to a course or action. 2. To secure or bring about by force. 3. To force to submit; subdue. 4. To overpower.

As an expert on the English language, it is my opinion that “compel” means to force or to require someone to do something. A compelled action would be an involuntary action. A compelled action is the opposite of a voluntary action.

The circuit court has obviously sanctioned me because I have taken the position that individuals are required to give the government information on 1040 Forms. The court has taken the position that providing information to the government on 1040 forms is not “compelled.” Thus, from an English language standpoint, I can only conclude that if an income tax form is not “compelled” or required, it must be voluntary. This is also why the court ruled that the Fifth Amendment does not apply.

For a more in-depth analysis of the word “voluntary” and other words related to the income tax, I suggest that you review my comments on the “Words and Phrases of the Internal Revenue Code” in the Appendix to this volume.

I further suggest that you obtain a copy of the opinion from the Tenth Circuit Court of Appeals (in Denver) so that you will have your own official version of a case in which a circuit court rules that the income tax form is not compelled (required). You may order the case from the United States Court of Appeals, Tenth Circuit, 1823 Stout Street, Denver, Colorado 80257. Ask for a copy of the Order and Judgment in *Conklin vs. United States of America*, No. 94-1213.

Curiously enough, although the Tenth Circuit Court has taken the position in this particular case that providing information on income tax forms is voluntary, since this case is not published, the holding by the judges cannot be used as law. Nonetheless, if you are one of the many individuals in the country who believe that the income tax is not compelled, I think you should order and have on hand a copy of the appellate decision so you can see for yourself that the Tenth Circuit judges agree with you, even though they are not willing to let the world know

their thoughts on the issue.

My attorney, Guy Curtis, also wrote an analysis of the Tenth Circuit Opinion. His analysis follows:

In response to your request for my legal opinion regarding the recent decisions in *William T. Conklin vs. IRS*, Civil action No. 89 N 1514 filed May 2, 1994, in the U.S. District Court for the District of Colorado, and the appellate decision in this same case by the Tenth Circuit Court of Appeals, No. 94-1213 filed September 10, 1994, affirming the District Court's opinion, these decisions can be interpreted in two ways:

First, that the information given on an income tax return is not "compelled testimonial communication". This implies that an individual is not required to give return information to the IRS.

If we follow this reasoning to its logical conclusion then it would be absurd to penalize a person for not signing a return that is not required. And it is doubly absurd to sanction him for appealing the issue to the appellate court.

My second interpretation would be that information given on a tax return is compelled, i.e., that the individual is required to give it, but because it is not viewed as "testimonial communication" the Fifth Amendment protections do not apply.

The second interpretation directly contradicts the U.S. Supreme Court in *Garner v. United States*, 424 U.S. 648 (1975) ruling that the information on a tax return is compelled testimonial communication.

The Garner Court specifically stated:

"The information revealed in the preparation and filing of an income tax return is, for purposes of Fifth Amendment analysis, the testimony of a witness."

Furthermore, in the case of *U.S. v. Doe*, 465 U.S. 605, 79 L.Ed. 2d 552, (1985), the Supreme Court held that the act of producing subpoenaed documents would involve testimonial self-incrimination. Therefore 'testimonial' does not exclude every-

thing except oral testimony. The holding in the *Doe* case supports the statement in *Garner* that the privilege applies to written as well as oral compelled testimony that may have testimonial aspects and an incriminating effect.

It seems clear that the District Court erred in stating that Mr. Conklin took a general Fifth Amendment objection since he did provide specific personal information for assessing the tax with supporting documentation.

Furthermore, it was clearly Mr. Conklin's intent to raise and resolve this issue at an administrative level with the IRS. Mr. Conklin's good faith attempt to properly resolve the 5th Amendment issue is evidenced by the Power of Attorney he gave to the IRS, and the copies of legal opinions he received from attorneys and tax consultants outlining the Fifth Amendment dilemma.

By volunteering such information there is also no question but that Mr. Conklin waived his Fifth Amendment protected rights as to the information given. However, there was no waiver of those rights as to signing the return.

Since Mr. Conklin did not make a general Fifth Amendment objection, the ruling in *Betz v. United States*, 753 F.2d 834 10th Cir. 1985) cited by the District Court and the Tenth Circuit Court does not apply.

As Mr. Conklin would have waived his Fifth Amendment protections by signing the tax return, and would have authenticated information that could be used in a criminal case (such as *Doe* and *Garner, supra*), his concerns were not frivolous, particularly in view of Mr. Conklin's classification by the IRS as an "illegal tax protester."

Regarding my own qualifications and experience, I have been a licensed attorney for over thirty years and admitted and currently in good standing to practice law in the State of Nebraska as well as in the 7th, 8th, 9th, and 10th U.S. Courts of Appeals, the U.S. District Courts for Nebraska and Hawaii, and the U.S. Tax Court, and I have served as an elected prosecuting attorney

for over twenty years. In addition, I have handled a number of criminal tax trials in federal courts as a defense attorney.

Sincerely,

Guy Curtis, Attorney at Law  
Imperial, Nebraska

My Petition for Certiorari challenged the constitutionality of the statute that allows the Court of Appeals to sanction without any due process. The essence of my Supreme Court argument is as follows:

William T. Conklin, the appellant in this action, hereinafter referred to as "Conklin," was classified as an illegal tax protester by the IRS for his involvement in the Church of World Peace. His case was set aside for special scrutiny by the Internal Revenue Service Criminal Investigation Division. There can be no question that he was confronted with substantial and real hazards of incrimination by virtue of the Criminal Investigation's interest in his case. He became concerned about waiving his Fifth Amendment protected rights on a 1040 return after speaking with several attorneys who advised him that he does waive his rights when he signs a return.

So Conklin, in an attempt to comply with the law and not voluntarily waive his rights, filed a return with payment and the necessary assessment information. He did not sign the return, but instead he provided a power of attorney form giving the IRS power of attorney to sign the return if they could do so without waiving his rights.

The IRS assessed Conklin a \$500 penalty for filing a frivolous return. Conklin paid the fine and filed a claim for a refund. The IRS denied the claim and Conklin filed suit in 1989.

The lower Court ruled May 2, 1994 that the IRS imposition of the penalty was justified, and the Tenth Circuit affirmed the opinion on September 10, 1994 and sanctioned Conklin with attorney's fees and double costs. The Tenth Circuit sent the case back to the District Court for its recommendations and the District Court ruled on January 13, 1995 that Conklin should be



## Chapter 6: My Tenth Circuit Case

sanctioned approximately \$6,000 plus double costs. The District Court told Conklin that due process does not apply. Conklin appealed and on June 6, 1995, the Tenth Circuit Court of Appeals ruled that Conklin could not contest the fairness of the sanction at the remand to District Court.

### REASONS FOR GRANTING THE WRIT

The court ruled that: "Plaintiff misunderstands the nature of the fifth Amendment Privilege. It protects against compelled testimonial communications." Conklin is a pro se and he naturally has assumed in the past that the testimony on a tax return is a "compelled testimonial communication" in view of the fact that the IRS continually indicts individuals for willful failure to file tax returns under 26 USC 7203. Since the general public believes that information on a tax return is "compelled" and since the Supreme Court has ruled in *Garner v. United States*, 424 U.S. 648 (1975) that information on a tax return is compelled testimony for the purposes of the Fifth Amendment, it is not unreasonable for a layman to conclude that giving information to the government on a tax return is compelled and that it is testimonial.

The Garner Court stated:

Government compels the filing of a return much as it compels, for example, the appearance of a "witness" before a grand jury (p. 652).

The Garner Court went on to say:

The information revealed in the preparation and filing of an income tax return is, for purposes of Fifth Amendment analysis, the testimony of a "witness" (p. 656).

The court has taken the position that Conklin's position is frivolous because testimony on a tax return is *not* compelled. The Supreme Court in *Garner* ruled that testimony on a tax return IS compelled and that it is Fifth Amendment testimony.

The court sanctioned Conklin with attorney's fees and double costs even though he relied on counsel. In sanctioning Conklin, the Court held Conklin to the standards of an attorney in direct violation of the law in *Haines v. Kerner*, 404 U.S 519 (30 L.Ed 2d, 1972).

Furthermore, the lower courts ruled that Conklin had taken a blanket Fifth Amendment even though he completed a tax return and provided copies of his tax records to the IRS. In the case of *United States v. Doe*, 104 S. Ct., 1237 (1984), the Supreme Court ruled that an individual waives his Fifth Amendment protected rights if he admits to having records. Since by his filing Conklin admitted to having records, and since he completed his tax return and sent it to the IRS lacking only a signature, he could not have taken a blanket Fifth Amendment position.

In view of the facts that the Supreme Court has ruled in *Garner, supra*, that information on a tax return is "compelled testimony;" the District Court for the District of Colorado and the Tenth Circuit have ruled that information on a tax return is not "compelled testimony;" the lower courts have held Conklin to the standards of an attorney in sanctioning him; and the Court has taken the position that an individual takes a blanket Fifth Amendment simply by withholding a signature in contradiction of *Doe, supra*, this Court should correct the refusal of the Court of Appeals to consider Supreme Court cases.

The District Court and the Court of Appeals denied any sort of due process to Conklin and sanctioned him on an issue of first impression in spite of the fact that the lower court ruled directly opposite the Supreme Court. Such a position violates the Supreme Court law in *Chambers v. NASCO, Inc.* 1991, 111 S. Ct. 2123, and *McKnight v. General Motors Corp.*, 114 S. Ct. 1826 (1994). It also takes a position opposite that taken by the Seventh Circuit Court of Appeals in *Brooks v. Allison Div. of Gen. Motors Corp.*, 874 F.2d 489 (7th Cir. 1989) since the government did nothing to mitigate the expenses. The Court of Appeals ruled that the petitioner could not raise the issue of due process in the District Court on remand. It is the petitioner's position that the

issue of due process could not be raised until a final determination of the amount of sanctions had been made by the court. Since the Court of Appeals remanded the case to the District Court for its recommendations, the issue of sanctions was not arguable until the final determination as to the amount of the sanction was made. Therefore, the instant appeal is the proper time to raise due process and fairness issues.

Rule 38, the Appellate Rule that allows the Circuit Courts to sanction litigants, is unconstitutional because it allows the Circuit Court to sanction a litigant and does not allow any meaningful opportunity for the litigant to contest the sanctions. Due process requires that before sanctions are imposed, the offender be afforded fair notice and an opportunity to be heard. Conklin had no reasonable notice that he would be fined \$6,000 and he had no reasonable opportunity to respond. Since Rule 38 does not mandate due process for the offending litigant, it is unconstitutional.

### CONCLUSIONS

The issues raised here involve a substantial question of law about the imposition of sanctions by the Circuit Court of Appeals when there has been no determination that the petitioner acted in bad faith and when the Circuit Court of appeals for the Tenth Circuit has failed to consider the law in *McKnight* and *Chambers, supra*. There is also a substantial question of law about whether Rule 38 is constitutional when it allows the Court of Appeals to sanction an offending litigant without an opportunity to be heard. Furthermore, since the government did nothing to mitigate the damages, the decision of the Tenth Circuit is in direct conflict with the ruling in *Brooks v. Allison Div. of Gen Motors Corp., supra*.

Wherefore, it is prayed that this honorable Court will grant the Petition for a Writ of Certiorari.

And so the battle for truth continues.

## Chapter 7: More Cases

The first case is that of *Mary Ann Tavery vs. United States*, 32 F.3d 1423, 1428-30 (10th Cir. 1994). The IRS was happy because it won this battle, but actually in the Tavery case the IRS lost the war again since *the Tavery case proves one more way that individuals who file 1040 returns waive the Fifth Amendment protections of their rights*. Since the government cannot require individuals to waive their constitutional protection or their rights in order to comply with any law, then the Tavery case stands for the proposition that the filing of 1040 returns must be voluntary.

### Tavery vs. United States

In *Tavery vs. United States*, the Court ruled that information on a tax return may be put into any criminal case that involves a family member or friend. That means if you file a tax return, information may be disclosed in virtually any criminal case involving some person that you might happen to know.

The Court in *Tavery, supra*, stated as follows:

The scope of the relevant inquiry on the financial inability issue is broad. See *United States vs. Barcelon*, 833 F.2d 894, 897 and n.5 (10th Cir. 1987) detailing numerous factors to be considered, including “the availability of income to the defendant from other sources such as a spouse....” The factors to consider include money sent to the applicant by his mother, *Souder vs. McGuire*, 516 F.2d 820, 821 (3rd Cir. 1975), and transfers in trust. *United States vs. Schmitz*, 525 F.2d 793, 794 (9th Cir. 1975) Opinion of Chambers, Chief Judge: “Financial inability includes an inquiry into whether there is available to the defendant funds for his defense from other sources such as family, friends, trusts, estates, or defense funds.” *United States vs. Martinez-Torres*, 556 F. Supp. 1275, 1279 (S.D.N.Y. 1982). Under this broad test, we hold that the district court correctly decided that Ms. Tavery’s income and tax refunds were relevant

to the issue of Rev. Conklin's eligibility for appointment of counsel, and that the government's disclosure of this information was therefore permissible under Section 6103(h) (4)(B).

Tavery had argued in her case that since the Department of Justice obtained her income information from her tax return, the information disclosure was an unlawful disclosure as she was not a party to the proceeding. It is clear in this particular situation that Ms. Tavery waived her Fifth Amendment protected rights when she filed the tax return and disclosed the information that the government allowed into evidence. Could the government have used Ms. Tavery's tax return information against her if she had been compelled to submit it?

Of course not, if the Fifth Amendment means anything. So the court must have decided that she had volunteered the information on the return. And of course the opinion in *Conklin vs. United States*, *supra*, is consistent with this theory since the Tenth Circuit took the position that information on tax returns is not compelled by the government. Ms. Tavery voluntarily waived the Fifth Amendment protections of her rights by filing her return and disclosing information.

### **Conklin vs. United States**

I then filed a suit arguing that unrelated information on tax returns cannot be disclosed in third party litigation. The Tenth Circuit ruled against me on July 31, 1995 in an unpublished decision: *William T. Conklin vs. United States*, No. 95-1013 (Tenth Cir., July 31, 1995). Since the Tenth Circuit declined to publish this decision, I will quote it here in its entirety:

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

In 1990 the Internal Revenue Service (IRS) revoked the tax-exempt status of the Church of World Peace (CWP). The CWP then asked for a declaratory judgment regarding the revocation

of its tax exempt status. In the course of that case, the IRS introduced the tax returns of the plaintiff, who was a central figure in the CWP organization.

Plaintiff subsequently filed this federal action pursuant to 26 U.S.C. Section 7431. He claims that the introduction of his tax returns violated 26 U.S.C. Section 6103. Section 7431 allows civil suits against any employee of the United States who knowingly or negligently discloses a return or return information in violation of Section 6103. *Id.* Section 7431(a)(1). The district court granted the government summary judgment and denied plaintiff's summary judgment motion. Plaintiff now appeals. We have jurisdiction pursuant to 28 U.S.C. Section 1291 and affirm.

The government contends that the IRS could properly disclose this evidence under 26 U.S.C. Section 6103(h)(4)(B). That section states:

A return or return information may be disclosed in a Federal or State judicial proceeding pertaining to tax administration but only... (B) if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding.

Plaintiff does not claim that the information in his return was not an "issue in the proceeding" or that the information was not "directly related" to the resolution of an issue, *cf. Tavery vs. United States*, 32 F.3d 1423, 1428-30 (10th Cir. 1994). Instead, he claims that only one item on the return was relevant to the proceedings and, consequently, it was error to introduce the entire return.

"A statute's plain meaning must be enforced." *United States Nat'l Bank vs. Independent Ins. Agents*, 113 S. Ct. 2173, 2182 (1993). "If the language is clear and unambiguous, then the plain meaning of the words must be given effect." *Resolution Trust Corp. vs. Love*, 36 F.3d 972, 976 (10th Cir. 1994).

The statute clearly authorizes the IRS to disclose the entire re-

turn even if only one part of the return is relevant. The statute gives the government an option. Once the predicate condition is met (i.e., an item on a “return is directly related to the resolution of an issue in the proceedings,” 26 U.S.C. 6103(h)(4)(B)), then the “return or return information may be disclosed,” *id.* 6103(h)(4) (emphasis added.) Because the statute is phrased in the disjunctive, the government may disclose either the return or return information once it satisfies that one of Section 6103 (h)(4)’s predicate requirements is met.

The government therefore did not violate section 6103 when it introduced plaintiff’s entire tax return, and the district court properly entered summary judgment for the government. Accordingly, the judgment of the district court is AFFIRMED.

Well now, isn’t that interesting? The IRS may disclose your tax return information in any criminal case involving a friend or family member and the IRS may disclose your entire tax return in any litigation if only one small part of the return is relevant. Doesn’t this make it even more clear that you waive your Fifth Amendment protected rights when you file a tax return? Of course, that does not matter anyway since the Tenth Circuit has also ruled that the Fifth Amendment only applies to compelled or required testimony or information.

So, once again, *either filing tax returns is required* and the government is requiring individuals to waive their protections and their rights (in which case any statute that requires the filing of tax returns would be unconstitutional) or *filing tax returns is voluntary* so that the Fifth Amendment does not apply. Either way, it is obvious that the IRS has a severe problem. Once this cat fully gets out of the bag (i.e., once everyone understands these concepts), I think the income tax is dead. What do you think?

### **United States v. Paul Robbins**

In this remarkable decision, the U.S. District Court in San Jose, California, upheld Paul Robbins’ Motion to Dismiss a Summons issued by the IRS. Robbins asserted that compliance with the summons would violate his Fifth Amendment privilege against self-incrimination.

## *Why No One Is Required to File Tax Returns*

The case number, should you wish to look it up, is C-04-4097-JF and the actual Order Granting Respondent's Motion to Dismiss is included in the Appendix. Note that the case was listed as unpublished, "Not for Citation." We're publishing it here. Apparently Judge Jeremy Fogel is reluctant to let anyone else apply the findings of the case to his or her own case. But we're not!



# Chapter 8: The Internal Revenue Code

The Internal Revenue Code is a thick and very boring book. It is composed of hundreds of complex statutes and it is written in very complex and difficult to understand language. It is the law book that our government uses as the basis of the income tax. I have looked through the entire Internal Revenue Code over a period of almost twenty years now, and I have not found any statute in the Code that makes an individual liable to pay the income tax. There is a statute, Section 6020(b), that says the government may file a return for an individual if the individual does not file a return. However, the individual does not become liable to pay the tax through any statute in the Code, he only becomes liable if the government files a return for him, or if he personally voluntarily files a return. We will now examine some of these code sections.

## Section 6012

Sec. 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...

“Returns with respect to income taxes under Subtitle A shall be made by the following...”

IRS Privacy Act Notice 609 (Rev. Oct. 1986).

## Section 6020(B)

Sec. 6020. Returns prepared for or executed by Secretary.

(b) Execution of return by Secretary.

(1) Authority of secretary to execute return. If any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the

Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.

(2) Status of returns. Any return so made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes.

### **The Meaning of “Shall”**

According to Webster’s Dictionary, “shall” means:

(a) to express futurity in the first person, and determination, compulsion, obligation, or necessity in the second and third persons

According to Black’s Law Dictionary, “shall” means:

As used in statutes, contracts or the like, this word is generally imperative or mandatory... In common ordinary parlance, and in its ordinary signification, the term “shall” is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears. ...But it may be construed as merely permissive or directory (as equivalent to “may,”) to carry out the legislative intention and in cases where no right or benefit to anyone depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense... Also, as against the government, it is to be construed as “may,“ unless a contrary intent is manifest. (*Black’s Law Dictionary*, Revised 4th ed., pp 1541-1542.)

The IRS relies on Section 6012 of the Internal Revenue Code as the statute that allegedly requires the filing of tax returns. However, the IRS Privacy Act Notice states it a little differently—the law requires you to file a return for any tax you are liable for.

Since there is no statute that makes you liable, and since the IRS Privacy Act Notice is supposed to tell you the requirements of the law, then Section 6012 cannot apply until you are made liable.

### **Section 6012 and the Meaning of “Shall”**

Let us assume, however, that Section 6012 of the Internal Revenue Code does require individuals to file, even though they are not first made liable. The problem with Section 6012 is that the word “shall” is used in the statute. According to Black’s Law Dictionary (above), we have seen that the word “shall” is mandatory except when a mandatory interpretation would create a rights or constitutional violation. Since an interpretation of “mandatory” in this case would require individuals to waive the Fifth Amendment protection of their rights, Section 6012 would be unconstitutional if it really required individuals to waive such protections. Therefore, the word “shall” in Section 6012 must be interpreted to be *permissive*.

As you can see, Section 6012 has been deliberately left murky by Congress so that Congress cannot be accused of requiring individuals to waive the constitutional protections of their rights. Exacerbating the problem is the courts’ consistent interpretation of Section 6012 as *requiring* the filing of returns. I know of several cases in which individuals have raised issues related to this contradiction in 6012 but the courts deliberately ignore the arguments and dismiss the cases without comment.

One criminal case went all the way to the Supreme Court and was dismissed all the way up without comment. That case involved attorney Richard Viti. The judges know they have to stay away from this issue because if they meet it head on, they will definitely overturn the federal income tax. **We cannot legally have a law that requires individuals to give the government information that can be analyzed and used in criminal cases for violation of the very law that requires the returns to be filed.**

Yes, something is rotten here, and I maintain that it is up to us—the

American people—to take out such garbage and be sure that it is properly buried. The IRS is requiring individuals to waive their rights at the same time that it emphatically states in all of its publications that we have a “voluntary” tax system.

### **Section 6020(b) and the Meaning of “Shall”**

Another interesting point is that Section 6020(b) also contains the word “shall.” When the IRS files returns for individuals under 6020(b), it never signs the return. However, if an individual submits an unsigned return, the IRS will not code the computer to show that a return has been filed.

In my Tenth Circuit case, the IRS had not posted my return as having been filed because I did not sign it. (Remember, I was fined \$500 for *not* signing it.) Since then, I have also been fined \$6,000 for arguing that since the IRS had not filed my return in its computer system, I should be penalized for filing an unsigned return. The IRS consistently, however, records the returns that it files in its computer system when it does so under 6020(b), even though the IRS never signs the returns. I actually did the same thing that the IRS consistently does when it files returns for individuals under Section 6020(b) of the Internal Revenue Code, but I was fined a total of \$6,500.00!

# Chapter 9: The IRS and Criminal Prosecutions

The IRS has the power to proceed criminally whenever it wishes to, against anyone. In its criminal cases, the IRS may use any information that has been given to it because individuals “voluntarily” file tax returns. Section 7203 of the Internal Revenue Code is one of the favorite sections of the IRS for proceeding criminally.

## Section 7203 and Willful Failure to File

Section 7203 states that the IRS may prosecute people who “willfully” do not file tax returns. Congress was very careful to make the aspect of “willfulness” important for the crime because the tax system is so complicated. Every year, the IRS indicts a few hundred individuals for “willful” failure to file tax returns and some of these people end up in federal penitentiaries. The IRS indicts individuals in order to keep the rest of the population “voluntarily” filing their tax returns.

## Filing “Exempt” on a W-4 Form

About 20 years ago, when many people started to become aware of the Internal Revenue scam, individuals began to file “exempt” on the W-4 form they gave their employer, and then did not file returns. Over the last 20 years, the IRS has prosecuted hundreds of such individuals. In these proceedings, the IRS has used tax returns that were previously filed by the defendant to “prove” to the juries that the defendant knew all along that he was required to file returns. Juries have bought that routine and convicted many for not filing returns. The argument used by the defendants—that they only filed returns previously because they were unaware that they had been waiving their rights but now they wanted to stop waiving them—was ridiculed by the prosecuting attorney.

## The Problem of Filing a W-4

I believe that the principal flaw in the legal position of such defendants is their use of the W-4. The moment an individual files an exempt

W-4 with his employer, he waives his Fifth Amendment protections. In my view, it is inconsistent to file an Exempt W-4 and then not file a tax return.

### **Using Jealousy to Convict**

During the last ten years, I have traveled the country to observe and even participate in many criminal tax trials. I am convinced that the juries have convicted many people for not filing tax returns because they have been led to completely ignore the “willfulness” requirement of the statute. Juries convict individuals because the jurors are made to feel jealousy about a defendant who did not “pay his fair share,” while they (the members of the jury) did. Prosecutors appeal to this emotion by pointing out such “fair share” baloney with these very same words.

### **Selective Juries**

An individual who is knowledgeable about the tax system and the issues discussed in this book will not be taken in by such rhetoric. But then, he will not be allowed to be on a jury if the prosecutor or the judge become aware of his knowledge during jury selection. The IRS and the Court make sure that the individuals on juries are uneducated as to tax and legal issues.

The IRS and the Department of Justice also appear to prefer that jurors work as employees for someone else. Self-employed people tend to be a little more original and independent in their thoughts and actions. I have often seen them eliminated when juries are selected. *The government does not wish to take a chance with knowledgeable jurors who identify with the defendant because the government might lose the case.*

### **The John Cheek Case**

In 1991, a fellow named John Cheek took the issue of proper and adequate jury instructions relative to “willfulness” up to the Supreme Court. The Supreme Court made it clear that the trial judge in Cheek’s case had not done a proper job of instructing the members of the jury relative to their consideration of the reasonableness of his defense. See *U.S. vs. Cheek*, 489 U.S. 658 (1991).

The Cheek case is very important because, among other things, it

stands for the proposition that *individuals who rely on attorneys and other professionals in making their decisions about this complex tax system are entitled to inform the jury as to the extent of their reliance*. It also stands for the proposition that the jury must be instructed to view the defendant's actions subjectively, not objectively. In other words, the juror has to put his own pre-conceived notions aside of whether or not the juror believes everyone must file, and instead get inside the defendant's head and try to determine if he really believed, based on the defendant's own research and the advice of the attorneys he consulted, that he acted in good faith, and truly believed that his research in toto indicated that he was not required to file. *When it can be shown that one's actions were based on a good faith reliance on professional advice, the element of "a willful violation of the law," essential for a conviction, is conclusively eliminated.*

It is apparent to me that the Cheek case destroyed the ability of the IRS to prosecute individuals for "willful" failure to file who have followed the procedures outlined in this book.

### **Conclusion**

In sum, if you stop waiving your rights on April 15 on reliance of counsel, and if you are an employee and allow wage withholding (or you are self-employed and you submit quarterly payments against any tax that the IRS might assess you under Section 6020(b) of the IRS Code), you will virtually eliminate the ability of the IRS to victimize you for relying on, and refusing to waive, your constitutional protections.

In "Chapter 12: What Can You Do About the Problem?" (beginning on page 59), I will show you how easy it is to consult with attorneys and get them to provide you their legal opinions that will support your decision to stop filing.

## **Chapter 10: The IRS — A Modern American Gestapo**

**M**ost Americans do not have any idea of the incredible power that Congress has given to the IRS. When we are students in school, we are taught the fundamental (and somewhat unique) American legal maxim that even though the government may accuse someone of wrongdoing, that person must be considered innocent unless and until the government can prove them guilty. However, when it comes to civil tax cases and the IRS, the burden of proof is placed on the accused. That means that the IRS can say anything it wants to say about how much money we owe and we have to prove that the IRS is wrong.

I know this first-hand, because years ago after I criticized the IRS publicly, the IRS assessed me a bogus deficiency of upwards of \$100,000. After years of litigation, when I finally signed a stipulation, the IRS owed me \$4,000.

As this book is written, there is a bill before Congress to shift the burden of proof back to the IRS. If this bill passes, it will be a very important milestone in curtailing the power of the IRS Gestapo. It may not pass, though. Ohio congressman Traficant has introduced it repeatedly for the last ten years and it has gone nowhere. However, it presently has the support of a majority of congressmen, so it appears close to being passed.

### **Pre-pay Your Liability**

Since the IRS has been given incredible power to seize assets, it is very important if you decide to take on the IRS that you have pre-paid any liability that it might reasonably allege. If you do that, you will be in the driver's seat.

(I will be repeating my main points including this point more than once in this book. Although I may seem redundant at times, I think redundancy is necessary to be sure that everyone pays attention. If you already think I am redundant, then you must be understanding what I have been saying.) Sparring with the IRS when you are in a defensive



position is exhausting; but sparring with the IRS when you are in the driver's seat can be enjoyable indeed.

### **Do Not Ignore Correspondence from the IRS**

An important fact to remember if you get into an IRS confrontation is that you should not ignore any correspondence from the IRS. Challenge the IRS with every procedure available to you. In the interest of your rights to due process, the IRS is *required* to follow specific procedures when it deals with you. If you force the IRS to “toe the line” and go through each procedure, it will expend a lot of time and energy, but you will have lots of fun, and you will be the one to come out on top.

### **Search Warrants Are Still Required**

Many people heard recently about the new policy for “life-style audits” by the IRS, which were reported to allow the IRS to come into your home in an effort to verify your declared income against your lifestyle. Before the idea of such invasive audits was scrapped, I talked with people who were outright angry that a government agency would be allowed to do that. Actually, there is nothing to worry about. Although many Americans do not know it, the IRS must and always has had to have a search warrant if it wants to enter your house, just like any other law enforcement agency. Just say “No!” If Americans just say “No” to the IRS, the IRS Gestapo will be forced to go back to its offices, prepare affidavits to support a request for a warrant, and then go to a judge and submit its request for consideration by the judge. If the IRS is forced to go to court to get search warrants each time it wants to do a full-blown “life-style audit,” there will be very few entries indeed.

### **Attendance at Audits Are Not Required**

Also, there is no law that requires you to attend any audit. If you do not attend an audit, the IRS has two choices: it may send you a summons, which you have every right to contest in federal court, or it may invent a bogus assessment which you may choose to contest in either the tax court or in federal court. You are only at the mercy of the IRS if you do not know anything about your rights and the IRS procedures. *With knowledge you have power.*

## Chapter 11: The Summons Power of the IRS

**T**he IRS has the power to issue an administrative summons. That means that the IRS may send you a summons if it wishes to talk with you (for an audit, for example), and the IRS can require you to show up. If you do not show up and comply with the summons by either answering the questions or by properly asserting the Fifth Amendment in answer to the questions, the IRS can go to Federal Court and get a judge to order you to comply.

Only if you do not comply at that point can you be charged with a crime, and that would probably be contempt of court. Up to this point, you have not violated any law. However, if you are ultimately held in contempt of court, such a charge is based on a violation of law and the judge could put you in jail or fine you, or both.

The fact that the IRS has to issue a summons and get enforcement of the summons in District Court just to require an individual to show up clearly shows that *the IRS cannot require you to give the same information on a tax return without a summons enforcement hearing.*

### Do Not Admit to Having Books and Records

Actually, if you do show up and you choose to take the Fifth Amendment in response to specific questions of the IRS, you will prevail *provided that you do not admit that you even have books and records.* Contrary to popular belief, the IRS cannot *make* you answer its questions! See *U.S. vs. Sharp*, 920 F.2d 1167 (4th Cir. 1990), and *U.S. vs. Argomaniz*, 925 F.2d 1349 (11th Cir. 1991). These are two federal appeals court rulings that deal with the issue of using the Fifth Amendment in IRS summons cases.

If you handle your summons correctly, the IRS will not be able to enforce it and get information from you. However, if you handle the summons incorrectly, you could end up in jail for either civil or criminal contempt or both. Obviously, *it is extremely important that you know exactly what you are doing when you respond to a summons.*

## Never Ignore a Summons

*Do not ever ignore a summons.* If you do, the IRS will immediately move for enforcement because it thinks that you are afraid to respond, probably because you do not understand your position and probably do not know your rights. Ninety-nine times out of a hundred, the IRS is probably correct. It has certainly been my experience that people who ignore a first party summons from the IRS do not know what they are doing.

On the other hand, I remember individuals who are those one in one hundred. I remember one man recently who, like a few people before him, made the IRS agent wish he had not initiated efforts to make an assessment of liability in the first place. When the IRS discovered that this individual had failed to file a return, the IRS issued a summons requiring him to appear for questioning. The individual appeared but stood on the Fifth.

The IRS went to court and obtained a court order, ordering the individual to respond to its questions. Again, he took the Fifth. The IRS tried to have him cited for contempt, but the judge held that the individual had responded satisfactorily and completely by invoking the Fifth in response to each individual question. The individual and the judge were both aware that any information the individual provided could become a link in the chain of evidence that could be used for prosecution of a criminal violation of the tax law. (See *Sharp, supra.*) The individual stuck to his position, and the court ruled that he had fully complied with the summons and the court order enforcing it, and did not hold him in contempt even though the IRS agent obtained no information!

Now, think about this: if the courts will not require individuals to answer questions by the IRS in response to a summons (and, in fact, rule that the individual may properly take the Fifth to each question asked), how can the government require individuals to answer the same questions on 1040 returns? It really cannot.

Some might argue that answering questions on a 1040 return form may not qualify as warranting the protections of the Fifth Amendment, especially if no criminal accusation or proceeding has been initiated. However, in *Argomaniz, supra*, the 11th Circuit Appeals Court judges

ruled that a taxpayer *could* take the Fifth Amendment in a *civil* matter as well as a *criminal* matter. The court stated: “There can exist a legitimate fear of criminal prosecution while an IRS investigation remains in the civil stage, before formal transfer to the criminal division.” Of course, this is true any time because the IRS can gather all the information it wishes to gather civilly and then switch the audit to criminal at any point in time.

The IRS is sneakily requiring individuals to “volunteer” information that can be used in any criminal case at any time. Do I say “sneakily” because the IRS does not inform us of such intentions? No, I say “sneakily” because the IRS only makes a quick statement to that effect in the Privacy Act Notice section of the 1040 Instruction Manual—and nobody takes the time to read that anyway.

I would not accuse the IRS of sneakiness if it put a big, bold WARNING! above that statement. If the IRS did so, I would blame individuals for being stupid to ignore it! But the IRS does not emphasize that it may use the information to criminally prosecute at a later date. The IRS just benignly states that it “may give the information to other agencies (including) the Department of Justice.” How many of you have ever read that sentence and if you have, have you pondered its significance? Do you know that *the Department of Justice only has one mission, and that is to investigate and prosecute crime*? The only thing that the Department of Justice will do with your information will be to use it against you, to convict you of a crime so you may be fined and/or sent to jail. The IRS does not point this out anywhere in its Notice, does it? Is the IRS “sneaky,” or what?

The IRS may also issue a summons to third party record keepers, such as banks. That means that any information you give to a bank you are making available to the IRS. The IRS may obtain anyone’s bank records (there is nothing private or secret about your checking or savings accounts—the government has complete access to all the details anytime it wants it, thanks to a law passed by Congress in 1970 and sneakily mislabeled, “The Bank Secrecy Act”). Although the law permits you to file a motion to quash such a third party summons in a federal district court, it is virtually impossible to beat the IRS on this issue. When you entrust banks and other third parties with your records, once again you are vol-

untarily giving up a constitutionally protected right—your right to privacy.

If you receive a summons for your own personal records, you have a right to assert the Fifth Amendment as long as you do not admit the existence of books or records. *If you admit the existence of books and records, you automatically waive the Fifth Amendment protections of your rights because the Supreme Court has said that the Fifth Amendment applies to testimony and not to books and records.* See *United States vs. Doe*, 465 U.S. 605 (1985).

Of course, if you see things like Judge Nottingham did in my case, you could say that even if someone answered all of the questions asked, they have still taken a blanket Fifth Amendment position(!); but of course you and I both know that any other judge would rule that you had waived all Fifth Amendment protections by providing all the answers.

If you use banks and other similar third-party entities for holding your money, the laws allow the IRS to get all the information that you have entrusted to those entities. Remember that the Fifth Amendment is still incredibly powerful in an IRS summons enforcement. When it is used properly, the IRS is helpless before the law. This is very important to keep in mind.

Several years ago a friend of mine was jailed for contempt by a federal district court judge because he had been summonsed by the IRS and had refused to show up. He again refused even after the IRS went to the judge and obtained a summons enforcement order. On the order of the judge, a United States Marshal then arrested him and brought him to court. He told the federal judge that he did not believe that the court had any jurisdiction over him. As if to show him otherwise, the judge promptly found him in contempt of his lawful order and jailed him.

Later on, after a little jail time, he wised up. After talking with a counselor, he went in and apologized to the judge and took the stand as the court had originally ordered. *He then answered every one of the government's questions by asserting the Fifth Amendment.* The judge allowed him to stand on the Fifth Amendment on all but a couple of very non-threatening questions (i.e., “What is your name?”; “Where do you live?”, etc.). The IRS agents and the Department of Justice attorneys were

completely beside themselves because they still could not get the answers they were seeking!

The power of the Fifth Amendment when used properly is astounding, and when enough Americans wake up and quit waiving their Fifth Amendment protections on April 15, the power of the Fifth Amendment will force Congress to change our un-American federal tax system.

## Chapter 12: What Can You Do About the Problem?

If you have studiously read through the previous chapters in this book (and they certainly require only a modicum of concentration), you have come to the following conclusions:

1. Individuals who file tax returns voluntarily waive the Fifth Amendment protections of their inherent rights.
2. The government cannot require individuals to waive any constitutional protections of their rights.
3. Therefore, the government cannot lawfully (i.e., constitutionally) require individuals to file tax returns.

However, you might also have come to the conclusion that the government and the courts are not ready to admit this problem to the general public because *if the general public knew that filing tax returns was truly voluntary, the tax system would fall apart*. The present federal income tax system depends completely on voluntary self-assessment.

### Becoming Judgment Proof

From a practical standpoint, if you wish to get involved in standing up for your rights, and if you wish to quit voluntarily waiving your Fifth Amendment protections each April 15, you have certain actions that you can take which will not subject you to a defensive posture. For example, if you are not judgment proof, you must either allow wage withholding or, if you are self-employed, you must submit quarterly payments toward any tax that you figure you might owe if you were to choose to file a tax return at year end and voluntarily waive your rights.

You are not judgment proof if you own a car or a house or other “attractive nuisances” that tend to entice IRS collection agents, or if you depend on wages, or if you represent yourself as an independent contractor but you are paid by only one or a few clients. Nor are you judgment proof if you have any monetary assets such as a checking or savings ac-

count in a bank, or an investment account with a stock broker.

If the IRS insists that you owe something, it may proceed civilly against you in these areas, and take such assets. Therefore, if you are not judgment proof, but you choose to cease waiving your rights and cease filing returns, you must be sure that the IRS has been paid any money that it thinks you owe up front. Then, when the end of the year rolls around and you decide to file a Claim for Refund instead of a 1040 return, you can go on the offensive to effect your Claim, rather than be forced to go on the defensive like you surely would have to if the IRS were to decide to take your assets, or to charge you criminally.

Also, if you wish to quit waiving your rights voluntarily, *you must consult with a few tax professionals and get opinion letters from them.* You must be careful to have professional support in advance, advice that you can rely on for deciding to stop voluntarily waiving your rights. To work for reform in the laws, and force change from a powerful position, make sure that you can show that your actions are based on legal advice, otherwise you wind up becoming more grist for the IRS enforcement mill.

### **Consulting with Tax Attorneys**

Assuming you are like most Americans (that is, assuming you are not judgment-proof because you have assets and work for a regular paycheck), you can still assert your rights once you have consulted with and obtained advice from tax professionals. *Meet with a few attorneys who bill themselves as tax experts and ask them to explain to you how you may file a return without waiving the constitutional protections of your rights.* Show them the Fifth Amendment and the IRS' Privacy Act Notice. Also, do not forget to take along copies of the *Sharp* and *Argomaniz* cases in the event a sharper-than-average attorney insists that the language of the Fifth Amendment means that it does not apply unless you are already under criminal investigation or prosecution. Copies of these cases are on the CD-ROM included with this book.

At the conclusion of your individual meetings with each tax attorney, after they have admitted to you that they cannot advise you of any way you can file a return without waiving the Fifth Amendment protections of your rights, ask them to put their opinion in writing, on their let-



terhead. (This opinion letter will undoubtedly cost you some money.) Now, you are ready for the next step, and you have several strong options.

### **If You Are An Employee**

If you are an employee, the best action to take in order to stand up for your rights is to instruct your employer to continue to withhold so that at the end of the year, were you to calculate a tax owed on a 1040 as you used to do, it would come out that you would not owe any more than what was withheld throughout the year. An even more solid position is to submit a W-4 early in the year that results in your employer withholding a little more by year end than would be required, so that the IRS owes you at year end.

### **The “No Waiver of Rights” Letter**

Then, at year end, instead of filing a return, send a letter in to the IRS explaining that you have become aware that filing a return requires you to waive your rights, which you no longer wish to do. Explain further that you have consulted with several professionals and none have been able to tell you how you can file a 1040 return without waiving your rights. Be sure to enclose photocopies of their written opinions.

Ask the IRS for an extension of time to file, until it can come up with a way for you to file without waiving your rights. (Incidentally, at this time, if you feel that your withholding has not quite been enough to cover what you have calculated would be owed if you were to file a return, include a payment for the difference. You want to eliminate any excuse that the IRS might use to seize any of your assets.)

Point out also that you have become aware that unless and until a return is filed making you liable for a tax, you understand that the money that has been withheld and sent in on your behalf just sits in a “pending” file somewhere and cannot be used by anyone. (Your return is your self-assessed tax bill. If you do not prepare it and bill yourself, you cannot owe any tax.)

State that you wish your letter to also serve as an informal Claim for Refund. Now, pursuant to IRS Code Section 6532(a)(1), unless the agency can inform you of a way you may file a return within the next six months

(without waiving your rights, of course), you are entitled to sue the IRS to enforce your Claim:

§6532. Periods of limitation on suits. (a) Suits by taxpayers for refund. (1) General rule. No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

When you sue, you are in the driver's seat and the IRS will be on the defensive. To a jury, the IRS will have to try to explain why it has not been able to respond to your concerns for your rights, and the Achilles heel of the hated income tax system will become apparent to twelve more over-taxed Americans. Are we having fun yet?

This should be a thoroughly enlightening experience for both you and the jurors, and an embarrassing experience for the IRS. Perhaps the IRS will scurry around prior to trial and file a return for you under its Section 6020(b) procedure, and then argue that your withheld moneys have been applied to that return. *The IRS could file a return for you because the procedures allow for it, but the IRS does not have the manpower to do it for thousands of folks who will read this publication and then take the IRS to court.* Probably the worst thing that could happen to you would be that you would become totally tongue-tied and completely fumble your argument and the jury simply would not understand the issues and would not award you your claimed refund. But how many cases like this filed in the courts do you think it will take to thoroughly consume the agency and force the agency itself to go to Congress and ask them to either correct the tax laws or amend the constitution? Which do you think they will do?

### **If You Are Self-Employed**

An individual who is not an employee but is self-employed could

follow essentially the procedure outlined above, except that the “withholding” would be his responsibility. He should be sure that he posts a bond against any assessment the IRS might make (in other words, he should send in his estimated tax amounts quarterly as he has in the past). Then he can follow the same procedure as the employee:

- File a combined extension of time and informal Claim for Refund letter.
- Follow up with a lawsuit to enforce his Claim.

Remember, *anyone who decides to quit filing tax returns must only do so on the advice of attorneys and other professionals*. Especially if he is not completely judgment proof, he must be sure that any tax the IRS might assess under Section 6020(b) is *pre-paid*. By pre-paying the tax, you will be filing a Claim for Refund letter and you will put the IRS on the defensive. If you have *not* pre-paid your taxes, *you* will be on the defensive.

Each year, an individual could send photocopies of his opinion letters along with his own letter to the IRS requesting an extension of time and also making an informal Claim for Refund, instead of waiving his rights and submitting a tax return. After going through the first lawsuit or two to pursue his Claims, I would wager that he would even find that it was an easier thing to do than what he had done in the past—that is, try to get all of his receipts sorted out, understand the latest changes in the tax laws, figure out what amount goes on what line and where he fits in the tax tables, ad nauseam. I am certain that he will find it to be a lot more satisfying and a lot more fun!

Our governmental system was for years the envy of the rest of the world, but it currently suffers from many severe problems and it is now so huge and sluggish that making changes is quite difficult. *However, if just a few thousand responsible Americans became aware of and challenged the severe constitutional problem with the income tax, I believe that the system could be changed in just a couple of years.*

Remember that *when you file a tax return, you vote in favor of the income tax*, and you also vote in favor of the abuse by the IRS of your rights and your Fifth Amendment protections. If the government can re-

quire you to give information that it can decide at any time to use against you in a criminal tax case (or in any kind of criminal case), then the Fifth Amendment has become worse than void, it has been made into a joke.

As long as the American public remains unaware of the situation, this horrible abuse will continue. If you are reading this book, however, you have become aware. I hope that you feel confident enough with what you have learned to seriously consider joining those who have decided to quit voting (i.e., filing a return) every year in favor of a system that continues to ignore, and even trample on, our rights.

### **The “Substitute Jurat” Approach**

You say you do not quite feel that confident yet? Well, that is either my fault or perhaps I have not given enough credit to the IRS’ propaganda and fear-instilling program. Or perhaps you have been filing 1040 forms so long that you just cannot quite yet bring yourself to quit cold turkey this year.

As a suggestion for you to ease into the ranks of us erstwhile reformers, let me suggest a slightly different twist that may feel more comfortable. I call it the “substitute jurat” approach. Next year, go to your CPA and have your return prepared, as usual. In preparation, take the time this year to adjust your W-4 so that a little more than normal is withheld. In short, make sure the IRS will owe you a little money. When your CPA presents your return to you for filing, go ahead and file it, but file it without signing it. Instead, attach a statement that states something like this:

“I cannot sign this return under the penalty of perjury as the attestation requires because I do not understand the document or its contents. Obviously, if I did understand the return and the tax laws governing its preparation, I would have prepared it myself. I am, however, certifying under the penalty of perjury that I told the truth about my income to the CPA who has prepared the return, and who has signed as its preparer.”

Now the IRS will react by either issuing a \$500 fine or declining to send you your refund; in either case, you have still set up your own op-

portunity to challenge the Federal Income Tax in court at its very roots. Here again, you are postured to file and follow through on a Claim for Refund.

### **The “Claim for Refund” Letter**

Let us return to the idea of not filing, but instead sending the IRS a “Claim for Refund” letter. Since the IRS knows it cannot require individuals to waive their rights, it is not going to accept or decline your request for an extension of time. It will most likely ignore the request and will proceed under Section 6020(b).

In order to proceed, the IRS will have to follow very expensive and time-consuming procedures. There is no possible way that the IRS could deal in this way with even half a million people a year out of the 100 million who file. I am confident that less than half a million people a year using this approach could completely reform the existing tax system within two years. The existing system will not work unless people voluntarily waive their rights on April 15. Similarly, if the IRS does not send the refund to the individual who has filed but who has signed his own *jurat* instead of the IRS's *jurat*, the IRS will still have to defend itself against a Claim for Refund lawsuit in federal court.

### **Additional Problems for the Judge**

The *jurat*-related lawsuit could pose an additional problem for the judge. He may decide that it is an issue of law that he should rule on, rather than a jury. Then he will have to rule that either the individual must commit perjury and sign a document that he has already sworn under the penalty of perjury he does not understand, or he will have to rule that the customized *jurat* is acceptable for purposes of a refund suit. Either way the judge rules, he creates a problem for the IRS. If and when just one judge rules that the customized *jurat* is acceptable, his ruling will be published far and wide so that it will become common knowledge that individuals are not required to file signed returns. The IRS' prosecutorial teeth will be pulled. Millions will then quit voluntarily waiving their Fifth Amendment protected rights.

## **The Wrong Way to Challenge the IRS**

In the past, many individuals have chosen to challenge the invalid assumptions of our tax system by not giving the government money and not filing. Most of these individuals were not judgment proof. Years later, when the IRS finally made an assessment, the individuals were assessed thousands in late charges and interest in addition to the taxes for those years, and the IRS seized their assets. In addition, many of these individuals went to jail for their efforts.

### **Wrong Motives**

Unfortunately, other than make some of the rest of us wake up and start thinking about the issues ourselves, their great sacrifices accomplished little. It was apparent, too, that some were doing what they were doing for the wrong purpose, that is, saving money on taxes. They were not doing it to protect their rights. In fact, many were not even very well educated about their rights.

### **Wrong Tactics**

They certainly did not prepare for their situation in advance. They did not establish a strong and defensible good faith foundation for their actions. It is my opinion that if the techniques outlined in this book would have been used by these early activists, the system would have been changed by now. Rather than successfully prosecuting for non-filing and non-paying, the IRS would have found it impossible to enforce a tax system against millions of people who were simply insisting on the constitutional protections of their rights and choosing not to voluntarily waive such protections.

## Chapter 13: What Will Uncle Sam Do?

Each year, as individuals quit voting (filing) in favor of the income tax on April 15, the IRS will have to begin assessing each individual separately. Even if individuals did not file Claims for Refund that the IRS would eventually have to defend in court, the agency would still face the burden of having to issue a Statutory Notice of Deficiency to each individual who has not voluntarily self-assessed. Going through this process for a few hundred thousand individuals would require more of the IRS than it could handle.

Each person who receives a Statutory Notice has 90 days from its date of issuance to file a Tax Court petition. If it availed itself of this opportunity, the IRS would have to schedule Tax Court for these hundreds of thousands of challengers. Even if those individuals who have allowed withholding or posted bond against the government's 6020(b) assessment simply elect to agree to the assessed amount and not pursue a Claim for Refund action, the IRS will have to do an incredible amount of work on each individual case.

There is no doubt that the IRS would become overburdened immediately with the amount of administrative paperwork, and Congress would be forced to give us a more fair and equitable tax system that does not blatantly ignore our constitutional protections. People can force the IRS to tell the truth and to quit requiring all of us to voluntarily waive the Fifth Amendment protections of our rights. Handled properly, the IRS is a paper tiger, but it could quickly become a paper victim. So you feel like slaying a tiger today?

And be sure to read *U.S. v. Argomaniz* on page 127, *U.S. v. Sharp* on page 141, and *U.S. v. Robbins*, on page 149. You might find some ammunition for your tiger hunt.

## Chapter 14: Empowerment

**M**any individuals who have read this far in this book will be completely amazed at my position. They had no idea that there is no statute that requires the payment of income tax on an individual basis (in other words, that there is no statute that makes one liable for the income tax). Furthermore, the idea that the IRS can require individuals to give information that the government may immediately use in any criminal or tax case it wishes, will probably amaze and anger many people that were not upset with the tax system before.

### **You Are Not Too Small**

I imagine that although many will become aware from reading this book, a large number will probably feel that they are too small to take on city hall. I run into that reaction often on the lecture circuit. Actually, the truth is quite different. I too felt overwhelmed by “city hall” back in 1978, but I started reading and studying and finally taking action. My experiences taught me that I could take the government on, all by myself, and win.

I am proud of my six published wins on my case related to the audit of my 1979 tax return. Of course, I am proudest of the ruling I received from the Tenth Circuit Court of Appeals—that tax returns are not compelled or required. I have never had any formal legal training. If I can do it, everyone can do it. It is not necessary for you to reinvent any wheels.

You can benefit from my experiences and those of others who have gone before both of us. I will be pleased to hold your hand and walk you through the process. Since I am not an attorney, nothing in this book can or should be construed as legal advice, but I can certainly share my experiences.

### **Give This Book to Your Attorney**

Speaking of attorneys, I would like to suggest that you give this book to your attorney to read. Let me know of his or her opinion by sending an email to me. My email address for correspondence about the subject matter of this book is **info@billconklin.com**. Ask your attorney



## Chapter 14: Empowerment

to put *in writing* the conclusion he or she is bound to come to: that is to say, your attorney will not be able to figure out a way for you to file without waiving your rights and the constitutional protection of those rights.

Ask your tax attorney to apply for my \$100,000 reward. If you decide to quit voting in favor of the Federal Income Tax on April 15, there is a lot you can do, but you must do it. I have walked this road many times with others, but I will be only too happy to walk it again with you and keep you from taking any wrong turns. I know you will feel great taking the journey, and feeling that you have personally been a major catalyst for positive change in America.

## Conclusions

If you have read this book carefully, you know the following concepts:

1. The Fifth Amendment to the Bill of Rights says individuals are not required or compelled to give the government information that may be used against them in criminal cases. Note that the Fifth Amendment does not apply to corporations.

2. The IRS continually uses the word “voluntary” in relation to the filing of income tax returns. The IRS knows that the Fifth Amendment prohibits the government from requiring individuals to waive their rights.

3. Individuals who voluntarily file tax returns freely give the IRS information that may be used in a criminal case if the IRS decides at any point in time to turn a civil investigation into a criminal case.

4. The IRS has a “Miranda” type of warning in its Privacy Act Notice. The purpose of the warning is to warn individuals who file returns that the information may be used against them in a criminal case.

5. Individuals who become aware that they are voluntarily waiving their Fifth Amendment protected rights when they file tax returns and who wish to quit waiving those rights, should seek professional counsel, and then ask the IRS for an extension of time to file their return until the IRS can inform them how to file the return without waiving their rights. Opinion letters from professionals should be sent in to the IRS with the request for an extension of time to file.

6. The IRS cannot require any individuals to come to an audit without issuing a summons. However, once a summons is issued, a knowledgeable individual can appear and assert the Fifth Amendment to specific questions. The IRS cannot enforce a summons in the face of specific Fifth Amendment responses.

7. There is no statute that makes anyone liable to pay the federal in-

## Conclusions

come tax. Individuals become liable to pay the tax by filing tax returns and self-assessing themselves voluntarily. Alternatively, the IRS may make an assessment under 26 USC 6020(b). However, in order to assess, the IRS must follow certain procedures.

8. Knowledge is power. On the other hand, ignorance breeds fear. The IRS is able to get away with its terrible abuse because lack of knowledge about their own rights leaves individuals afraid.

9. If you think that you can prove that I am incorrect, you may wish to apply for my reward. In order to win the \$100,000 reward you must show me: (1) What statute in the Internal Revenue Code makes me liable to pay an income tax, and you must also show me (2) How I can file a tax return without waiving my Fifth Amendment protected rights. I welcome your challenges.

## Frequently Asked Questions

**I have read your book and you have convinced me that you are right, but I am still a little afraid to take what seems like a major step. Do you have any further suggestions that I might consider in order to help?**

Yes, there is a lot that you can do to help! Here are some suggestions:

- First of all, you can pass out copies of this book to your friends.
- You can schedule a speaking engagement for me with a local group in your town.
- You can put copies of my \$100,000 Challenge advertisement in your local newspaper.
- You can advertise in your local newspaper that the Tenth Circuit Court of Appeals has taken the position in *Conklin vs. U.S.* that tax returns are not compelled or required.

State in your ad how a reader may contact the court for a copy of its unpublished decision—think of the effect on the judges here in the Tenth Circuit as they receive such requests and realize that thousands are aware of their decisions.

**If enough people become convinced that you are right and take actions, what will our government do for money?**

I am not advocating that people should not pay their taxes. I am taking the position that people should know that filing returns for individuals is voluntary and that people waive a very important constitutionally-protected right when they file a return voluntarily. If the IRS wishes to count the money in its accounts as a collected tax, then it must assess each individual under Section 6020(b) who does not voluntarily file a return.

When a few hundred thousand of us take such positions each year, the load of the IRS will become so severe that Congress will either have

## Frequently Asked Questions

to give us a new tax system or correct the constitutional conflicts in this system. Right now, our income tax system only functions because each year a hundred million individuals voluntarily waive their rights and give an abusive agency unnecessary and unprecedented power over them.

Even if I were advocating that we not send the IRS any money (and I am *not* advocating that), the government would get along without it because it already prints what it needs anyway. It is because the Treasury Department just print what it needs that we have such huge deficits each year—how do you think the many government programs are paid for, if there is a deficit between the program cost and the taxes collected? The deficit is filled by printing presses that churn out the difference in billions of dollars of paper currency.

**If the IRS cannot require individuals to answer specific personal financial questions when the Fifth Amendment is specifically asserted in response to a summons, then how can the IRS require individuals to answer the same questions on a 1040 Form each April 15th?**

I think you understand the thesis of this book quite well. The answer of course, is that the IRS cannot require that any individual give information on a 1040 return.

**What will happen if I file a 1040 return and I take the 5th Amendment on the return on specific questions?**

You have asked a very good question because it would seem that filing a return with specific Fifth Amendment objections would be a good way to deal with the problem. However, if you object on the tax return, the IRS will issue a \$500.00 penalty for filing a frivolous return, and as you can see from my case, the courts will come up with some sort of ridiculous argument to protect the income tax system. There is a judicial conspiracy to protect the income tax and keep the truth from the American public. The Alice in Wonderland logic and Orwellian doublespeak is rampant and knows no bounds. That is why I suggest instead that you mail an informal request for an extension of time to file the return once the IRS can show you how to file it without waiving the Fifth Amendment protections of your rights. Since you have not proffered a return

with your mailing, the IRS cannot fine you for filing a frivolous return.

**How does the IRS get so many people to file returns voluntarily each year?**

Congress and the IRS have conspired together to keep the people in fear. They have done so with criminal sanctions and prosecutions, inexcusable in my opinion in a country like America that so strongly touts freedom. Unbelievably, America is one of the very few countries in the world which has criminal tax implications in its laws! The IRS throws a few people in jail each year for “willfully” not filing returns to intimidate the rest of us and keep us volunteering. Also, have you ever wondered why it is that when you adjust your W-4 to the correct number of allowances, you always get a refund? The withholding tables are specifically designed so that the IRS owes you money at the end of the year. The IRS is playing with our minds again; it is another psychological ploy to encourage people to file returns—the benevolent IRS will send them a refund! I will bet that if the tables were designed so that everyone owed the IRS a few dollars each year, the IRS would lose control immediately. But as it is, many, many people voluntarily file returns to get a refund at the end of the year. They count on it and regard it as akin to a windfall—some have apparently lost track of the fact that it is their earned money in the first place! However, if your rights are important to you, then you need to consider doing something to change this absurd situation.

**I understand your criticism of the current system and I am astounded. What would you envision as a decent system in a perfect world?**

I do not have a perfect answer to that question. If I did, I would know more than any of our politicians or economists. I do know however, that we must have a government and a court system that is honest with the people. We cannot have a Fifth Amendment that gives the people a right not to give the government information that can be used in criminal tax cases and then turn around and prosecute individuals criminally for not volunteering the information. We cannot have an agency that collects information in civil proceedings and then turns the case to one of criminal prosecution once the information has been col-

## Frequently Asked Questions

lected. We cannot have a system that survives only because it is feared; and we cannot have a system in which the IRS can take any property it wants without a court order.

For a start, if we are to have a fair system, we must do the following:

1. Shift the burden of proof to the IRS.
2. Allow jury trials on all tax cases without prepayment.
3. Repeal all criminal tax laws.
4. Prevent the use of any information on tax returns in any criminal case.
5. Require the IRS to obtain a court order before it can seize any property.
6. Make it illegal for the IRS to audit or harass individuals who exercise their First Amendment protected rights and criticize the system.

**How can a person who owns a car, has a job and uses banks, etc. quit waiving his Fifth Amendment protections on April 15th, and still hold on to his assets?**

Good, you are now thinking on the right track. If you are sure that the IRS has the money up front for any tax it might eventually assess under Section 6020(b) of the Internal Revenue Code, and if you assert all your rights as the IRS attempts to assess, you will not lose any assets. As a matter of fact, you should have a lot of fun. The IRS will probably spend more money following the assessment procedures under 6020(b) than you will pay in taxes. As you can see, we only have the tax system that we have now because the American people continue to tolerate the abuse of their rights.

**I am completely judgment proof. I do not own a house and I work for cash jobs. I do not even have a bank account. I have not filed returns or paid any income taxes for over ten years. What can the IRS do to me?**

Actually, the IRS might have a lot of trouble with you. The IRS may

proceed criminally, but that is unlikely unless you make quite a bit of money or you are very vocal. If the IRS ever discovers you, the IRS is likely to issue a Statutory Notice of Deficiency and proceed with an assessment. However, if you do not have any visible assets the IRS can seize, it will be forced to issue a First Party Summons to you.

If you know how to respond to the summons properly, the chances are the IRS will just leave you alone and go after easier fish. I think that right now there are literally tens of thousands of people in the country who are following your approach. The IRS Commissioner has admitted in public that over ten million returns are not filed each year! From this point forward, I would be sure to rely on the advice of professionals for any decisions you make regarding the federal income tax.

While I admire your temerity, I am not advocating that people take a position as hard-core as yours. However, I know that there are all types of people in this country and I know that many people hate the income tax system so much that they simply neither file nor pay income taxes. Obviously, if enough people were to start doing what you are doing, Congress would definitely have to come up with a better system.

**Do I have to be a knowledgeable legal expert or have a lot of money to hire lawyers if I decide to quit voluntarily waiving my Fifth Amendment protections on April 15th. Is that really necessary?**

Actually, if you prepare yourself in advance by making sure there is withholding or a bond posted against a 6020(b) assessment, and if you have opinion letters from various professionals, you will be in a great position to have fun and learn a lot.

**I would like to write my congressman about this problem. What should I say?**

Write your congressperson and ask the following three questions:

1. Do I waive my Fifth Amendment protected rights when I file a 1040 tax return?
2. If I do waive my Fifth Amendment protected rights when I file a 1040 tax return, what statute requires me to so waive them?
3. If I do not waive my Fifth Amendment protected rights when I



## Frequently Asked Questions

file a 1040 Return, then why does the IRS have a Miranda-type of warning in the Privacy Act Notice of the 1040 Instruction Book, stating that the IRS may give any information on my return to the Department of Justice, obviously for use in criminal cases?

Let me know what your congressman has to say about this issue. In the past, congressmen have either neglected to answer the letters or they have ignored the questions and sent back generic answers that are not responsive to the question. They must be aware there is a problem.

**Several congressmen and several presidential candidates are talking strongly about replacing the income tax with a flat tax. Won't that get rid of the Fifth Amendment conflict that the present tax system has with the Constitution?**

Not at all. The flat tax would still require filing a return. It is said that it will be a shorter return, with no deductions allowed, but it still requires a return. Not only that, but Congressman Armev, who has proposed the flat tax, is proposing that his flat tax require the short return to be filed every month, with a 13th return, a summary return, due at the end of the year also! The IRS would not go away; it would still be needed to audit the returns. In fact, since there will be 13 times as many returns, the IRS will probably have to hire more IRS employees to "help" (i.e., harass) us. Now, the present system gives the IRS one return to find errors on and to take us to task for, civilly and criminally; can you see that our exposure to such prosecutions and persecutions will increase with 12 more returns, even though it has been promised that the returns will be simpler?!

On the other hand, a national sales tax, as proposed by Congressman Archer, would get the IRS out of our lives altogether. With a national sales tax, there would be no returns filed by individuals. The tax to support the federal government would simply be collected at the point of sale by the retailer in the same manner that state and local sales taxes are collected in most states today. In turn, the retailer would turn what he collects over to the state and the state would submit the state's pro rata share of the federal budget needs to Washington, DC. Even though our federal government should not be involved in so many expensive

(and unconstitutional) programs that require the collection of a sales or income tax at all, a tax handled in this way would be far more in line with the concept of taxation held by our founding fathers. The federal government would not directly interact with the citizens at all, only with the states, as envisioned by the founders. For almost all of us, there would be no more record keeping, audits, late fees and other penalties, interest, or fear of criminal prosecution and incarceration. Wow! What a burden to lift off of our own shoulders!

**If your thesis in this book is correct, hundreds of thousands of people have been punished with both civil and criminal fines illegally since the beginning of the income tax. In other words, if filing returns is voluntary, many people have been convicted and have spent jail time for not volunteering.**

Your point is well taken. It is my position that the issues in this book are quite clear to anyone with a modicum of sense. The IRS is completely honest when it states that we have a voluntary tax system. However, Department of Justice attorneys who argue to the Court that individuals are required to file and therefore required to waive their Fifth Amendment protected rights are either ignorant of the law or they are bald-faced liars. The same goes for district court and appellate judges.

I personally believe that the situation has gone on so long that the establishment has an investment in continuing the lies, the doublespeak and the Alice in Wonderland logic. Incidentally, the longer we allow this un-American system to continue, the more entrenched it becomes. That is another reason why the system cannot be changed only by challenges in the courts, or only by writing to your congresspersons. It is going to take both, but if we are willing to put our traditional American determination to the task, we will get it done. A few hundred thousand of us simply have to get off our collective duffs, make the safe Claim for Refund challenges I have outlined, and work to gather support for congresspersons who are pushing for true reform with a national sales tax, for example, and it will happen.

# On Compulsory Production of Documents

*by Lowell Becraft, Esq.*

The provisions of the United States Code regarding summons enforcement proceedings, 26 U.S.C., §7601 through §7610, have over the last three decades been the subject of much litigation and consequently have been construed by the federal courts of appeals as well as the United States Supreme Court.

- In *Reisman v. Caplin*, 375 U.S. 440, 84 S.Ct. 508 (1964), the Supreme Court held that a witness or taxpayer could challenge an IRS summons on any appropriate grounds and may assert as a defense to the proceedings the fact that the materials sought by the IRS relate solely for use as evidence in a criminal prosecution.
- In *United States v. Powell*, 379 U.S. 48, 85 S.Ct. 248 (1964), the Court outlined four requirements which must be shown before any summons can be enforced.
- In *Donaldson v. United States*, 400 U.S. 517, 91 S.Ct. 534 (1971), the Court held that an IRS summons could lawfully be used for a criminal investigation provided the summons also had a civil purpose.
- In *Couch v. United States*, 409 U.S. 322, 93 S.Ct. 611 (1973), the Court held that the Fifth Amendment to the U.S. Constitution did not protect tax records in the possession of a taxpayer's accountant.
- In *United States v. Bisceglia*, 420 U.S. 141, 95 S.Ct. 915 (1975), the Court allowed the issuance of a John Doe summons for the purpose of investigating a \$40,000 deposit of \$100 bills.

- In *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569 (1976), the Court held that the Fifth Amendment did not protect tax records in the possession of the taxpayer's attorney. See also *United States v. Rylander*, 460 U.S. 752, 103 S.Ct. 1548 (1983).

This line of cases clearly shows that the Internal Revenue Service has very broad summons authority and may secure virtually any record or document in the possession of a third party.

### **The Nature of IRS Summons**

IRS summonses are issued to two separate and distinct classes of persons, with one class representing third parties who have possession and custody of books and records of the taxpayers under investigation, and the other class comprising taxpayers under investigation. A summons enforcement action is utilized when compliance with the summons has not been obtained due to the taxpayer notifying the third party not to comply, by the institution of a suit to enjoin enforcement, or by the refusal on the part of the taxpayer to comply when summons is directed to him. When the Service proceeds to enforce a summons issued to either a third party record holder or the taxpayer himself, its burden of proof is very minimal and amounts to nothing more than proof of compliance with the requirements of *Powell*, supra. See *United States v. Will*, 671 F.2d 963 (6th Cir. 1982).

Whereas the burden of proof upon the Service is relatively light in summons enforcement actions, a taxpayer opposing enforcement of the summons has a far heavier burden to carry. Basically, a taxpayer seeking denial of enforcement of the summons has available three defenses: (a) bad faith; (b) institutional posture, and (c) the Fifth Amendment. The "bad faith" defense is based upon *Reisman v. Caplin*, supra, and *Donaldson v. United States*, supra, and involves those situations wherein the summons has been issued for the improper purpose of gathering evidence needed for a criminal prosecution after referral to the Department of Justice. The "institutional posture" defense is based upon *United States v. LaSalle National Bank*, 437 U.S. 298, 98 S.Ct. 2357 (1978), and relates to those situations when the Service has made an institutional commitment to criminally prosecute the taxpayer under investigation

but desires to withhold referral to the Justice Department to allow for the gathering of additional evidence needed for a successful criminal prosecution. (Pursuant to the 1982 TEFRA, summonses may now be issued solely for a criminal investigation, thus these decisions no longer have any effect.)

These two defenses are most often utilized by a taxpayer when intervening in a third party summons enforcement action or commencing an action to enjoin enforcement of the summons. Although a taxpayer opposing enforcement of a summons issued to him may assert the defenses of "bad faith" and "institutional posture," he will most likely rely upon the third defense available to him, that of the Fifth Amendment.

### **The History and Development of the Fifth Amendment Right Against Self-Incrimination**

The history and development of the Fifth Amendment right against self-incrimination has been one of slow but sure expansion of the benefits of its protection. James Madison, the prime author of this provision in the Bill of Rights to the U.S. Constitution, sought this provision to prevent the development in our country of proceedings similar to or identical with Spanish Inquisitions or Star Chamber proceedings. A cursory examination of the *William Penn Case*, 6 How. St. Tr. 951 (1670), reveals that resort to "Spanish Inquisitions" has on many occasions been desired in order to bring about the efficient operation of governmental machinery; this is what Madison desired to avoid by inserting the Fifth Amendment into our Constitution.

The original intent or purpose for the Fifth Amendment was to compel the government to procure independent evidence of the facts and proof of a crime other than through the mouth of the accused. Without such a requirement and with the availability of procedures such as the Inquisition or Star Chamber, the government could constantly harass law abiding citizens and might on some occasion procure a confession through duress and coercion. But as is well known, such confessions are highly suspect; hence we have the protection of the Fifth Amendment.

One of the most appropriate statements concerning the Fifth Amendment and its operation was made by U.S. Supreme Court Justice John Marshall in the case of *United States v. Aaron Burr*. Chief Justice

Marshall, quoted in *Counselman v. Hitchcock*, 142 U.S. 547, 565, 12 S.Ct. 195 (1892), maintained that a witness could plead the Fifth Amendment not only in situations where his answer to a question would directly implicate him in a crime, but also in response to questions the answer to which would provide a link in the chain of evidence needed to convict the witness of a crime. Protection from compulsory testimony designed to implicate a witness in a crime has been secured through the Fifth Amendment and has been one of the most sacred principles known to American jurisprudence. This principle of the Fifth Amendment protection from compulsory testimony, absent a grant of immunity, has seen no erosion in its application since first expounded and requires but few citations to support it. The statutory provisions regarding immunity grants are found in 18 U.S.C., §§ 6001, et seq. See *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370 (1906), *Blau v. United States*, 340 U.S. 159, 71 S.Ct. 223 (1950), and *Hoffman v. United States*, 341 U.S. 479, 71 S.Ct. 814 (1951).

### **The Fifth Amendment and Books and Records**

The question of Fifth Amendment protection for the books, records and personal documents of a witness who may be implicated in a crime was first really considered in *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524 (1886), where the Supreme Court expanded Fifth Amendment protection against compulsory testimony to books and records of the witness. In granting such protection, the Court held:

And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom. —116 U.S., at 631-32.

And we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a

witness against himself, within the meaning of the fifth amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the fourth amendment. 116 U.S., at 634-35.

### The Fifth Amendment and Corporations and Partnerships

Since the decision in *Boyd*, the Supreme Court has on some occasions limited the full import of that historic ruling. In *Wilson v. United States*, 221 U.S. 361, 31 S.Ct. 538 (1911), the Court held that the *Boyd* principle did not apply to corporations. See also *United States v. Peter*, 479 F.2d 147 (6th Cir. 1973); and *In Re Grand Jury Empanelled March 8, 1983*, 722 F.2d 294 (6th Cir. 1983).

Still later, application of *Boyd* to partnership records was prohibited in *Bellis v. United States*, 417 U.S. 85, 94 S.Ct. 2179 (1974). However until 1984, it still appeared that personal, non-corporate tax records of a person with potential criminal liability were still protected by *Boyd* principles. When the Supreme Court held that *Boyd* protection did not apply to partnership records in *Bellis*, supra, it expressly affirmed this proposition by stating:

The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life. (417 U.S., at 87-88.)

Likewise, *Fisher*, supra, did not emasculate *Boyd* in any respect as the issue in that case was completely different; in fact, the Court in *Fisher* definitely appeared to have sided with *Boyd* in the last paragraph of its opinion:

Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his 'private papers,' see *Boyd v. United States*. (425 U.S., at 414.)

Shortly after its decision in *Fisher*, the Court was confronted with a

similar issue in *Andresen v. Maryland*, 427 U.S. 463, 473-74, 96 S.Ct. 2737 (1976). Here, a search warrant had been issued for the seizure of certain private books and records, and the criminal defendant was not required to produce those records or authenticate them because authentication was achieved by the use of third parties. The Supreme Court in *Andresen* did not emasculate *Boyd* in any way and in fact expressly affirmed *Boyd*:

Thus, although the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information..., a seizure of the same materials by law enforcement officers differs in a crucial respect--the individual against whom the search is directed is not required to aid in the discovery, production or authentication of incriminating evidence.

### **The Fifth Amendment and Evidence**

The Fifth Amendment to the U.S. Constitution states that no person shall be compelled to be a "witness" against himself in a criminal prosecution. Similar provisions exist in the constitutions of the various states of our nation, with some such constitutional provisions following the Fifth Amendment via use of the word "witness" while other provisions offer more expansive protection by stating that no person shall be compelled to give "evidence" against himself in a criminal prosecution. There exist distinct and crucial differences in the type of protection offered under these two different types of constitutional provisions. The protection against being compelled to give "evidence" against the accused is far broader than protection only afforded to "witnessing" and giving "evidence" arguably would include providing to the prosecution documents incriminating to the accused. The protection afforded by the Fifth Amendment is only that of proscribing testimonial compulsion and is not as all encompassing as the provisions prohibiting compulsory production of "evidence."

Neither *Fisher* nor *Andresen* disturbed the holding in *Boyd* or *Bellis* and both are wholly consistent with these two other cases. What the Su-



preme Court did in these two cases was note the crucial difference between protecting “evidence” and being a compelled “witness.” Private papers may no longer be specially protected and in a distinct and different class from other evidence, property or contraband. What the Supreme Court has directed is that an accused cannot be compelled to produce his own incriminating books and records because such would involve to a degree an amount of authentication of such books and records on the part of the accused. Such a production of documents is tantamount to compelled testimony specifically proscribed by the Fifth Amendment. What the Supreme Court has commanded is that if the government desires to obtain personal books and records and use the same against the accused, it must be done through witnesses other than the accused himself.

A survey of pre-1984 decisions reveals the continued vitality of the principles of *Boyd* and the crucial government-citizen relationship which it protects.

- In the First Circuit case of *In Re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051, 1056 (1st Cir. 1980), the court found that “personal, self-created business records in the possession of a sole proprietor or practitioner would enjoy a privilege against subpoena.”
- In the Second Circuit, the case of *United States v. O’Henry’s Film Works, Inc.*, 598 F.2d 313 (2nd Cir. 1979), held that a corporate official’s Fifth Amendment plea to questions concerning the location of corporate records was valid. (See also *United States v. Beattie*, 522 F.2d 267 (2nd Cir. 1975), *United States v. Patterson*, 219 F.2d 659 (2nd Cir. 1955), *In Re Grand Jury Subpoena Duces Tecum*, 657 F.2d 5 (2nd Cir. 1981), *In Re Grand Jury Witness (Gilboe)*, 699 F.2d 71 (2nd Cir. 1983), and *United States v. Bobart Travel Agency, Inc.*, 699 F.2d 618 (2nd Cir. 1983).)
- The three cases of *In Re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327 (3rd Cir. 1982), *In Re Grand Jury Proceedings (Johanson)*, 632 F.2d 1033 (3rd Cir. 1980), and *In Re Grand Jury (Colucci)*, 597 F.2d 851 (3rd Cir. 1979), demonstrate that the

Third Circuit has protected private books and records from compulsory production.

- In *United States v. Henry*, 491 F.2d 702 (6th Cir. 1974), the Sixth Circuit quashed an IRS summons to a taxpayer already indicted on a narcotics offense.
- The Seventh Circuit, faced with a *pro se* litigant in *United States v. Averkamp*, 497 F.2d 832 (7th Cir. 1974), who was prematurely raising Fifth Amendment objections to the enforcement of an IRS summons, held that the taxpayer could make specific Fifth Amendment pleas to questions directed at him when he complied with the order of enforcement.
- In two other Seventh Circuit cases, *Hill v. Philpott*, 445 F.2d 144 (7th Cir. 1971), and *United States v. Dickerson*, 413 F.2d 1111 (7th Cir. 1969), that court held that the records of an individual taxpayer were immune from a summons.
- The Eighth Circuit, in *Isaacs v. United States*, 256 F.2d 654 (8th Cir. 1958), held a Fifth Amendment plea of a corporate official to be valid when he responded to questions relating to \$99,000 in checks written by the corporation.
- Another Eighth Circuit opinion in *United States v. Plesons*, 560 F.2d 890 (8th Cir. 1977), would have granted protection to the records of a doctor if he had raised his Fifth Amendment plea to a grand jury subpoena before testifying about those records.
- In the Ninth Circuit cases of *United States v. Cohen*, 388 F.2d 464 (9th Cir. 1967), and *United States v. Helina*, 549 F.2d 713 (9th Cir. 1977), protection of a taxpayer's records from production was upheld.

The above cases demonstrate that the great weight of authority in the various circuits has been that an individual taxpayer's records are protected from compulsory production because of the Fifth Amendment.

The Fifth and Eleventh Circuits have apparently treated this precise issue more often than the others and have conclusively held that tax records of an individual are immune from production on the basis of *Boyd*.

## On Compulsory Production of Documents

In *Stuart v. United States*, 416 F.2d 459 (5th Cir. 1969), *In Re Grand Jury Proceedings (McCoy)*, 601 F.2d 162 (5th Cir. 1979), *In Re Oswald*, 607 F.2d 645 (5th Cir. 1979), *In Re Grand Jury Subpoena (Kent)*, 646 F.2d 963 (5th Cir. 1981), and *United States v. Meeks*, 642 F.2d 733 (5th Cir. 1981), this principle was upheld. More specifically in *United States v. Davis*, 636 F.2d 1028, 1043 (5th Cir. 1981), that court held:

Their cumulative teaching is that any incriminating papers in the actual or constructive possession of an individual, which he holds in his individual capacity, ... and which he himself wrote or which were written under his immediate supervision, are absolutely protected by the *Boyd* principle from production by subpoena or equivalent process, regardless of whether they are business-related or more inherently personal in content.

The Sixth Circuit does not deviate in any respect from comparable decisions made in other circuits. In *Patty v. Bordenkircher*, 603 F.2d 587 (6th Cir. 1979), the court held that the government couldn't compel a criminal defendant to testify concerning his previous criminal convictions where they were relevant to a habitual offender statute. In *United States v. Hill*, 601 F.2d 253 (6th Cir. 1979), that court acknowledged that a taxpayer could raise Fifth Amendment objections by refusing to answer specific questions. In *United States v. Doss*, 563 F.2d 265, 275 (6th Cir. 1977), a case involving an indicted defendant called before a grand jury, that court concluded:

However, upon the trial of the defendant in a criminal case, it would be a clear violation of a defendant's right against self-incrimination under the Fifth Amendment of the Constitution to compel him to take the stand, testify and produce his records, relating to the matter with which he is charged.

The erosion of *Boyd* principles started in the early eighties. In *United States v. Schlansky*, 709 F.2d 1079, 1084 (6th Cir. 1983), a case where the taxpayer under investigation was compelled to surrender certain of his records which had previously been in his accountant's possession, the Sixth Circuit held that the three elements of compulsion, testimonial communication and incrimination by such communication were

requisites to a valid assertion of the Fifth Amendment:

Under this focus the key question is whether the compelled production involves compelled testimonial communication. The answer to this question in turn depends on whether the very act of production supplies a necessary link in the evidentiary chain. Does it confirm that which was previously unknown to the government; e.g., the existence or location of the materials? Does it supply assurance of authenticity not available to the government from sources other than the person summonsed? Though the party seeking to avoid compliance does not have to show more than is required to demonstrate that the privilege is properly claimed, he must make some showing that the act of production alone would involve an incriminating testimonial communication.

The Third Circuit case of *In Re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327 (3rd Cir. 1982), involved the issue of compulsory production of books and records and that court continued to uphold the principles of *Boyd*. Because of a desire to have the Supreme Court adopt the *Schlansky* rationale, the government sought and obtained a writ of certiorari with the United States Supreme Court to review the decision in this case.

On February 28, 1984, the U.S. Supreme Court reversed the above decision in *United States v. Doe*, 465 U.S. 605, 104 S.Ct. 1237, 1242 (1984). In this pronouncement, the Court reversed its former holding in *Boyd* and held that books and records were no longer protected by the Fifth Amendment. It reasoned that the Fifth Amendment protected only compelled testimony and not books and records, and it relied heavily upon its rationale in *Fisher*, supra. But while the Court decided to withdraw Fifth Amendment protection to books and records, it held that production of such books and records was entitled to such protection. The Court reasoned that compulsory production of books and records via subpoena or summons is communicative in nature and similar to giving testimony, therefore such production is entitled to Fifth Amendment protection:

Compliance with the subpoena tacitly concedes the exis-

## On Compulsory Production of Documents

tence of the papers by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena.

The U.S. Supreme Court in *Boyd v. United States*, supra, clearly held that compulsory production via subpoena or summons of books, records and other documents in the possession of a witness was not permitted by the Fifth Amendment. This decision prevailed for some 98 years and effectively prevented the government from obtaining such written documentation from one having potential criminal liability. In *United States v. Doe*, supra, the Court changed its construction of the Fifth Amendment and held that the Amendment did not protect such records; and by making this change, a problem not addressed by *Boyd* arose. If the records are not protected from compulsory production by the amendment, what protection by the Fifth Amendment is left to a witness under process to produce documents? In *Doe*, the Court analyzed this situation and found that the mere act of producing such documents via compulsion non-verbally provides the following:

- (a) Such production concedes that the requested documentation exists;
- (b) Such production proves that the same are in the witness' possession;
- (c) Such production proves that the witness believes that the documents so produced are those which are sought;
- (d) The act of production authenticates the documents.

Because of these non-verbal but communicative aspects present within any act of production, the Court held that the Fifth Amendment applied to the act of production. Thus, even though there is no longer any protection afforded by the Fifth Amendment for books and records, the Fifth Amendment's protection for the act of production accomplishes virtually the same result as under the *Boyd* doctrine.

This has proven to be the case as shown by various cases decided subsequent to *Doe*. In *In re Kave*, 760 F.2d 343, 355-56 (1st Cir. 1985), an attorney was permitted to plead the protection of the Fifth Amendment

because the request to produce certain documentary evidence would have in effect, under the “act of production” rule, forced her to testify against herself, the court explaining:

The compelled production of such documents is prohibited only if there are testimonial aspects to the act of production itself. ... This rule extends to the business records of a sole proprietor ... In this context, the rule has three elements: The Fifth Amendment protects against compulsory surrender of (1) personal business records, (2) in the possession of a sole proprietor or practitioner, (3) only with respect to the testimonial act implicit in the surrender itself.

For a few years after *Doe*, its rule was applied to corporate records. The *Doe* “act of production” rule was followed in *In Re Grand Jury Proceedings*, 747 F.2d 1098 (6th Cir. 1984), and *In Re Grand Jury Matter*, 768 F.2d 525 (3rd Cir. 1985), to prevent the compulsory production of corporate and partnership records. However, in *Braswell v. United States*, 487 U.S. 99, 108 S.Ct. 2284 (1988), the Court held that *Doe* did not apply to corporate records; see also *Doe v. United States*, 487 U.S. 201, 108 S.Ct. 2341 (1988).

### **The Fifth Amendment and Personal Records**

But the application of *Doe* has continued as to personal and private records. In *United States v. (Under Seal)*, 745 F.2d 834 (4th Cir. 1984), a case decided some seven (7) months after *Doe*, the Fourth Circuit specifically held that personal and individual records can’t be forcibly produced by any process, over a Fifth Amendment objection. See also *United States v. Cates*, 686 F.Supp. 1185 (D.Md. 1988); *United States v. Argomaniz*, 925 F.2d 1349 (11th Cir. 1991); and *United States v. Sharp*, 920 F.2d 1167 (4th Cir. 1990).

In *In Re Grand Jury Proceedings on Feb. 4, 1982*, 759 F.2d 1418 (9th Cir. 1985), it was determined that records of a party under investigation in the hand’s of his attorney were entitled to protection under the *Doe* “act of production” rule. Further, there is no “tax exception” to this rule. See *United States v. Troescher*, 99 F.3d 933 (9th Cir. 1996). Thus, according to the rationale of these cases, the compulsory production of private

personal records cannot be obtained in view of a valid Fifth Amendment objection. Therefore, it is clear that the decision in *Boyd* still produces a legal result, even if from its “grave.”

A summons or subpoena for individual books and records, either personal or business, cannot be enforced over a Fifth Amendment objection because of the *Doe* “act of production” rule.

### The Fifth Amendment and Civil Proceedings

The rule that a party or a witness can plead the right against self-incrimination in civil proceedings has been well established by an abundance of authority. In *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316 (1973), the U.S. Supreme Court stated this rule as follows:

The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future proceedings.

The subsequent decisions of *Maness v. Meyers*, 419 U.S. 449, 95 S.Ct. 584 (1975), and *Pillsbury Company v. Conboy*, 459 U.S. 248, 103 S.Ct. 608 (1983), serve only to buttress this basic principle and apply it to specific situations. This rule is followed by the federal appellate courts. See *In re Kave*, 760 F.2d 343 (1st Cir. 1985); *National Life Ins. Co. v. Hartford Accident & Indemnity Co.*, 615 F.2d 595 (3rd Cir. 1980); *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979); *In Re Corrugated Container Anti-Trust Litigation*, 620 F.2d 1086 (5th Cir. 1980); *In re Morganroth*, 718 F.2d 161 (6th Cir. 1983); and *United States v. Jones*, 703 F.2d 473 (10th Cir. 1983).

Decisions on this point by various state courts reveal that this rule is not a modern one. In *Morris v. McClellan*, 154 Ala. 639, 45 So. 641, 645 (1908), that Alabama court acknowledged that a party in a civil case could claim the right against self-incrimination. In *International Brotherhood of Teamsters v. Hatas*, 287 Ala. 344, 252 So.2d 7, 21 (1971), the court held:

The privilege against self-incrimination afforded by section

6 of the 1901 Constitution of Alabama has been held available to a party in a civil action.

Similar decisions have been made by courts in other States in the Union. In *State ex rel. Hudson v. Webber*, 600 S.W.2d 691, 692 (Mo. App. 1980), a judgment debtor pleaded his right against self-incrimination in answer to questions posed to him regarding his financial affairs, his fear of incrimination being related to federal taxes. The court sanctioned the answers of this party:

This privilege is available to a judgment debtor in proceedings pursuant to sections 513.380-513.390, RSMO 1978.

The great weight of other State authorities holds that the right clearly applies in civil cases. See *Carson v. Jackson*, 466 So.2d 1188 (Fla.App. 1985); *Lewis v. First American Bank of Palm Beach*, 405 So.2d 300 (Fla.App. 1981); *Travis Meat & Seafood Co. v. Ashworth*, 127 Ga. App. 284, 193 S.E.2d 166 (1972); *In re Zisook*, 88 Ill.2d 321, 430 N.E.2d 1037 (1982); *Martincich v. City of Hammond*, 419 N.E.2d 240 (Ind. App. 1981); *Whippany Paper Board Co. v. Alfano*, 176 N.J.S. 363, 423 A.2d 648 (1980); *Banca v. Town of Phillipsburg*, 181 N.J.S. 109, 436 A.2d 944 (1981); *People ex rel. Anonymous v. Saribeyoglu*, 131 Misc. 2d 647, 501 N.Y.S.2d 286 (1986); *Byrd v. Hodges*, 44 N.C.App. 509, 261 S.E.2d 269 (1980); *Ohio Civil Rights Commission v. Parklawn Manor, Inc.*, 41 Ohio St.2d 47, 322 N.E.2d 642 (1975); *Rey v. Means*, 575 P.2d 116 (Okl. 1978); *Caloric Corp. v. Unemployment Compensation Board of Review*, 452 A.2d 907 (Pa. Comwlth. 1982); *Ex Parte Stringer*, 546 S.W.2d 837 (Tex.App. 1985); *Smith v. White*, 695 S.W.2d 295 (Tex.App. 1985); *Affleck v. Third Judicial District Court of Salt Lake County*, 655 P.2d 665 (Utah 1982); *Eastham v. Arndt*, 28 Wash. App. 524, 624 P.2d 1159 (1981); and *In re Grant*, 83 Wis.2d 77, 264 N.W.2d 587 (1978).

## **The Fifth Amendment and Tax Returns**

There are basically two important Supreme Court decisions regarding the circumstances under which one may assert the Fifth Amendment regarding income tax returns. The first and most important case was *United States v. Sullivan*, 274 U.S. 259, 47 S.Ct. 607 (1927), where the Court concluded that to assert the Fifth, one must do it on the return. See



also *Garner v. United States*, 424 U.S. 648, 662-63, 96 S.Ct. 1178 (1976).

An example of how today's federal appellate courts address this issue is shown via *United States v. Neff*, 615 F.2d 1235, 1238 (9th Cir. 1980), where that court held:

The Supreme Court has stated that the privilege against self-incrimination, if validly exercised, is an absolute defense to a section 7203 prosecution for failure to file an income tax return. *Garner v. United States*, supra, 424 U.S. at 662-63, 96 S.Ct. at 1186-1187. The Court has also held, however, that the privilege does not justify an outright refusal to file any income tax return at all. *United States v. Sullivan*, 274 U.S. 259, 263, 47 S.Ct. 607, 71 L.Ed. 1037 (1927). Furthermore, an objection may properly be raised only in response to specific questions asked in the return. *Id.* See *Garner v. United States*, 501 F.2d 228, 239 n.18 (9th Cir. 1974) (en banc), aff'd *Garner v. United States*, supra, 424 U.S. 648, 96 S.Ct. 1178, 47 L.Ed.2d 370.

We are here faced with a case in which the taxpayer did assert his privilege in response to specific questions in the tax return form, but did so on such a wholesale basis as to deny the IRS any useful financial or tax information. Other circuits, faced with similar wholesale assertions of the privilege against self-incrimination, have concluded that a tax return form which contains no information from which tax liability can be calculated does not constitute a tax return within the meaning of the IRS laws. Once these courts determine that the taxpayer has filed no return, simple application of the *Sullivan* precedent, which states that the Fifth Amendment will never justify a complete failure to file a return, invalidates the Fifth Amendment defense. E. g., *United States v. Irwin*, 561 F.2d 198, 201 (10th Cir. 1977), cert. denied, 434 U.S. 1012, 98 S.Ct. 725, 54 L.Ed.2d 755 (1978); *United States v. Silkman*, 543 F.2d 1218, 1219-20 (8th Cir. 1976) (per curiam), cert. denied, 431 U.S. 919, 97 S.Ct. 2185, 53 L.Ed.2d 230 (1977); *United States v. Daly*, 481 F.2d 28, 30 (8th Cir.) (per curiam), cert. denied, 414 U.S. 1064, 94 S.Ct. 571, 38 L.Ed.2d 469 (1973).

## On the Meaning of Certain Words and Phrases from the IRS Code

**A**s a communication expert, I have a Masters Degree from the University of Colorado in Communications and I have over fourteen years of experience teaching English and communications at the elementary, junior-high, high school, and college levels. I have made an extensive study of the morpho-syntax of English and have applied my skills to the determination of the various meanings of words used in the IRS Code and in its various publications.

What follows is an analysis of selected words and phrases used in the IRS Code and in some of the IRS publications. My comments in the last row of each table may or may not conform to what the courts have held as definitions of the defined words or phrases.

Element	Definition or Comment
<b>Word:</b>	voluntary
<b>Context:</b>	"Our system of taxation is based upon voluntary assessment and payment, not distraint." — <i>Flora v. U.S.</i> , 362 US 145
<b>Webster:</b>	1) brought about by one's own free choice; given or done of one's own free will; freely chosen or undertaken. ... 7) arising in the mind without external constraint; spontaneous. 8) in law, (a) acting or done without compulsion or persuasion;
<b>Black's Law:</b>	Unconstrained by interference; unimpelled by another's influence; spontaneous; Acting of oneself. <i>Coker v. State</i> , 199 Ga. 20, 33; S.E. 2nd 171, 174.
<b>IR Code:</b>	[undefined]
<b>Comment:</b>	In my opinion, the word "voluntary" means "done by an act of free choice."
<b>Word:</b>	compliance
<b>Context:</b>	"Our tax system is based on individual self assess-

On the Meaning of Certain Words and Phrases from the IRS Code

Element	Definition or Comment
	ment and voluntary compliance.” Mortimer Caplin, former IRS Commissioner
<b>Webster:</b>	1) the act of complying; a yielding, as to a request, wish, desire, demand or proposal; concession; submission. 2) the act of complying; a yielding, as to a request, wish, desire, demand or proposal; concession; submission.
<b>Black’s Law:</b>	Submission, obedience, conformance.
<b>IR Code:</b>	[undefined]
<b>Comment:</b>	In my opinion, the word “compliance” means “obedience to” or “yielding to.”
<b>Word:</b>	voluntary compliance
<b>Context:</b>	“Our tax system is based on individual self assessment and voluntary compliance.” –Mortimer Caplin, former IRS Commissioner
<b>Webster:</b>	[definition of separate words, above, combined]
<b>Black’s Law:</b>	[definition of separate words, above, combined]
<b>IR Code:</b>	[undefined]
<b>Comment:</b>	In my opinion, the phrase “voluntary compliance” means freedom to choose whether or not to assess oneself or to yield to a self-assessment system. Before the term “compliance” can come into play, practically, a person must have first “volunteered” to assess himself a tax, otherwise, “compliance” remains a moot issue. In other words, compliance, presumably with tax laws, is irrelevant unless one volunteers to assess oneself and submit said self assessment to the Internal Revenue Service, as the terms operate sequentially.
<b>Word:</b>	required
<b>Context:</b>	“Also, answer the questions on the back if you are not required to file a return for the tax period shown.” –IRS form letter request for information about Form 1040)

Element	Definition or Comment
<b>Webster:</b>	1) to demand; to ask or claim as by right or authority; ... 3) to order; to command; to call upon to do something;
<b>Black's Law:</b>	Submission, obedience, conformance.
<b>IR Code:</b>	[Undefined]
<b>Comment:</b>	In my opinion, "required" means when one is compelled to do something by written authority; in this case, file a tax return. Further, when something is "required" by law, there is usually a corresponding penalty attached for not doing the "required" act. As a check, you may want to see whether there is a penalty for not filing an income tax return.
<b>Word:</b>	must
<b>Context:</b>	"You must fill in all parts of the tax form that apply to you." —IRS Notice 609, Rev. Oct. 1986
<b>Webster:</b>	An auxiliary used with the infinitive of various verbs to express: (a) compulsion, obligation, requirement, or necessity; as, I must pay her; (b) probability; as, then you must be my cousin; (c) certainty or inevitability; as, it must have rained while we were in.
<b>Black's Law:</b>	This word, like the word "shall" is primarily of mandatory effect (cite omitted)... and in that sense is used in antithesis to "may." But this meaning of the word is not the only one, and it is often used in a merely directory sense, and consequently is a synonym for the word "may" not only in the permissive sense of that word, but also in the mandatory sense which it sometimes has.
<b>IR Code:</b>	[undefined]
<b>Comment:</b>	In my opinion, the word "must," in this context, imparts a mandatory effect. However, in legal usage the word "must" is often synonymously used for the word "may," according to <i>Black's Law</i> above. Appar-

On the Meaning of Certain Words and Phrases from the IRS Code

Element	Definition or Comment
	<p>ently the word “must” is a key word and I believe it would be prudent for you to consult with legal counsel for its legal meaning whenever it appears, especially in statutes.</p>
<b>Word:</b>	may
<b>Context:</b>	<p>“However, we may give you other notices if we have to examine your return or collect any tax, interest, or penalties.” —IRS Privacy Act Notice 609, Rev. Oct. 1986</p>
<b>Webster:</b>	<p>(b) possibility or likelihood; as, it may rain; (c) permission or chance; as, you may go; (e) wish, hope or prayer.</p>
<b>Black’s Law:</b>	<p>An auxiliary verb qualifying the meaning of another verb by expressing ability, competency, liberty, permission, possibility, probability or contingency, (cite omitted). Regardless of the instrument, however, whether constitution, statute, deed, contract or whatever, courts not infrequently construe ‘may’ as “shall” or “must” to the end that justice may not be a slave to grammar. However, as a general rule, the word “may” will not be treated as a word of command unless there is something in context or subject matter of act to indicate that it was used in such sense. (cite omitted) In construction of statutes and presumably in construction of federal rules, the word “may” as opposed to “shall” is indicative of discretion or choice between two or more alternatives, but context in which word appears must be the controlling factor. (cite omitted)</p>
<b>IR Code:</b>	[undefined]
<b>Comment:</b>	<p>In my opinion, the word “may” means having a free choice between two or more alternatives.</p>
<b>Word:</b>	shall
<b>Context:</b>	<p>“Returns with respect to income taxes under Subtitle A shall be made by the following:...” —Sec. 6012, I.R. Code as referred to by IRS Privacy Act Notice</p>

Element	Definition or Comment
	609, Rev. Oct. 1986
<b>Webster:</b>	(a) to express futurity in the first person, and determination, compulsion, obligation, or necessity in the second and third persons;
<b>Black's Law:</b>	As used in statutes, contracts or the like, this word is generally imperative or mandatory in common ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or person have rights which ought to be exercised or enforced, unless a contrary intent appears. <i>People v. O'Rourke</i> , 124 Cal. App 752, 13P.2d 989, 992. But it may be construed as merely permissive or directory (as equivalent to "may,") to carry out the legislative intention and in cases where no right or benefit to anyone depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense. <i>Wisdom v. Board of Sup'rs of Polk County</i> , 236 Iowa 669, 19 N.W.2d 602, 607, 608.
<b>IR Code:</b>	[undefined]
<b>Comment:</b>	In my opinion, the word "shall" is generally used in the permissive sense (first person) and is mandatory when used in the second or third person. However, in legal usage, as it is used in the above statutory context, the word "shall" could mean "may" if a

On the Meaning of Certain Words and Phrases from the IRS Code

Element	Definition or Comment
	right is impaired or violated (See Black’s Law above). For a complete understanding of what “shall” means in this legal context, I suggest you consult further with an attorney.
<b>Word:</b>	assessment
<b>Context:</b>	“Our system of taxation is based upon voluntary assessment and payment, not distraint.” — <i>Flora v. U.S.</i> , 362 US 145
<b>Webster:</b>	2) a method or schedule of assessing; 3) an amount assessed. Assess: to set or fix a certain sum against, as a tax, fine or special payment; as to assess each citizen in due proportion.
<b>Black’s Law:</b>	It is often used in connection with assessing property taxes or levying of property taxes. Also, the amount assessed. Taxation: The process whereby the Internal Revenue Service imposes an additional tax liability. If, for example, the IRS audits a taxpayer’s income tax return and finds gross income understated or deductions overstated, it will assess a deficiency in the amount of the tax that should have been paid in light of the adjustments made. (assess) To ascertain; fix the value of. To impose a pecuniary (monetary) payment upon persons or property. To tax.
<b>IR Code:</b>	[undefined]
<b>Comment:</b>	<p>In my opinion, the word “assessment,” as used in the above legal citation, means the process or method by which a tax due is ascertained, i.e., by the individual “self assessment” method. In another context, the word “assessment” could mean “IRS assessment.”</p> <p>ADDITIONAL COMMENTARY: In this context, it is my opinion that the assessment spoken of is the “self” assessment method as the assessment is de-</p>

Element	Definition or Comment
	<p>scribed as “voluntary,” which means the <b>free choice</b> of an individual to decide whether or not to assess a tax on his income), as opposed to a tax assessment on income made by the IRS and billed to the taxpayer (as described in Black’s Law above).</p> <p>Note, however, that the definition of “assessment” in Black’s Law is defined only as “imposing) an additional tax liability” against the taxpayer based on a determined “deficiency” (the amount of income tax still due and owing). In other words, there is no description in this definition of an “initial” or “original” income tax assessment that was imposed by the IRS or by the individual (i.e., self assessment).</p> <p>In any event, I feel it important to inform you of the two methods of assessment: 1) a voluntary, self assessment, and 2) an IRS assessment made after a voluntary, self assessment is made by the individual and the IRS determines that the self assessment (resulting amount) was deficient.</p>
<b>Word:</b>	self assessment
<b>Context:</b>	“Our tax system is based on individual self assessment and voluntary compliance.” –Mortimer Caplin, former IRS Commissioner
<b>Webster:</b>	[undefined]
<b>Black’s Law:</b>	[undefined]
<b>IR Code:</b>	[undefined]
<b>Comment:</b>	<p>In my opinion, the term “self assessment” means a method of ascertaining an amount of tax where the amount is determined solely by the individual through his own efforts to assess this tax upon his property or income AFTER he has voluntarily decided to do so. “Self assessment,” in my opinion, is synonymous with “voluntary assessment” (as found in the <i>Flora v. U.S.</i> definition for “assessment” above)</p>



On the Meaning of Certain Words and Phrases from the IRS Code

Element	Definition or Comment
<b>Word:</b>	person
<b>Context:</b>	<p>“Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements...,” —Portion of Sec. 6001, Chap. 61, IR Code</p> <p>“Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements...,” —Portion of Sec. 6001, Chap. 61, IR Code</p>
<b>Webster:</b>	<p>1) an individual human being, especially as distinguished from a thing or lower animal; an individual man, woman or child. ... 6) in law, any individual or incorporated group having certain legal rights and responsibilities.</p>
<b>Black’s Law:</b>	<p>In general usage, a human being (i.e., natural person), though by statute term may include a firm, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.</p>
<b>IR Code:</b>	<p>(1): Definition found in Chapter 79.— Definitions*            Sec. 7701(a)(1) Person. The term “person” shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation. [NOTE: Chapter 61 of the IR Code contains sections 6001 and 6011, in which context the word “person” is found. Definitions for certain words in each chapter are usually found within the chapter. The word “person” is not defined in Chapter 61; thus Chapter 79’s definition holds. ]</p> <p>(2): Definition found in Chapter 75.            Sec. 7343. Definition of term “person.” The term “person” as used in this chapter includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, em-</p>

Element	Definition or Comment
	<p>ployee, or member is under a duty to perform the act in respect of which the violation occurs.</p>
<p><b>Comment:</b></p>	<p>(1): In my opinion, the term “person” as used in Sec. 6001 means all of the entities listed in the definition of Sec. 7701(a)(1). The definition or answer you specifically seek, however, depends on your “status,” i.e., the descriptive title of who you are (nature, purpose and function being major characteristics of who you are). For the sake of rendering you an answer, albeit hypothetical, I say that you are an “individual” based solely on my brief assumption that you are a “live, breathing, human being” and because you signed your name on a letter without having “President” or “Inc.” after your name!</p> <p>(2): In my opinion, the meaning of the term “person” as used in Sec. 7203 is limited to the legal definition set forth in Sec. 7343 (see above) for two reasons. First, there is no other definition for the term in Chapter 75. and second, within Sec. 7343 itself, the term “person” is construed to be limited to mean only an officer or employee of a corporation (etc.) by the use of the word “includes” preceding “officer or employee.” In this context, the word “includes” by definition from <i>Black’s Law</i>, means to “confine within, contain,” thus restricting the meaning to only that which is stated in the definition of the term.</p>
<p><b>Word:</b></p>	<p>liable</p>
<p><b>Context:</b></p>	<p>“Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary from time to time prescribe....” —Portion of Sec. 6001, Chap. 61, IR Code</p>
<p><b>Webster:</b></p>	<p>1) legally bound; answerable; responsible.</p>

On the Meaning of Certain Words and Phrases from the IRS Code

Element	Definition or Comment
<b>Black's Law:</b>	Bound or obliged in law or equity; responsible; chargeable; answerable; compellable to make satisfaction, compensation or restitution.
<b>IR Code:</b>	[Undefined]
<b>Comment:</b>	<p>In my opinion, the word "liable" means "responsible" and "bound by law." This sentence points out that if a person is "liable," and the IR Code section designates said person as "liable" (bound by law), then he must do those things, i.e., keep such records, make such returns, etc., as set forth in Sec. 6001.</p> <p>Without careful scrutiny, an individual could believe that the word "liable" means "to owe (something)" and that he must "pay (something)"—i.e., a tax or fine. The code section does not discuss the payment of taxes; rather it serves to give the reader a clue as to what he must do if he determines he is the "person liable."</p>
<b>Word:</b>	made liable
<b>Context:</b>	“(a) General Rule. When required by regulations prescribed by the Secretary, any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary....” —Portion of Sec. 6011, Chap. 61, IR Code
<b>Webster:</b>	1) legally bound; answerable; responsible.
<b>Black's Law:</b>	Bound or obliged in law or equity; responsible; chargeable; answerable; compellable to make satisfaction, compensation or restitution.
<b>IR Code:</b>	[Undefined]
<b>Comment:</b>	In my opinion, the phrase "made liable" means, as does the above term "liable," that somewhere in the IR Code there may be a code section that binds you by law (making you "responsible") to do some or all of the acts set forth in this Sec. 6011. Like Sec. 6001,

Element	Definition or Comment
	<p>there is no discussion of payment of taxes, so we know that the phrase does not imply that one is responsible for payment of taxes.</p> <p>However, this phrase could also imply that there is more than one way that a person could be “made liable” for any tax imposed, but no explanation is presented in this section. For example, a “voluntary assessment” or “self assessment” (words previously defined) by the individual could be tantamount to him becoming liable, i.e., being “made liable” by his own action. At this point, I must defer this discussion of the ways or means by which persons are “made liable” as the legal aspects of this subject can be more fully and appropriately advised you by an attorney or tax professional.</p>
<b>Word:</b>	person liable
<b>Context:</b>	“(a) General Rule. When required by regulations prescribed by the Secretary any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary....” – Portion of Sec. 6011, Chap. 61, IR Code
<b>Webster:</b>	1) legally bound; answerable; responsible.
<b>Black’s Law:</b>	Bound or obliged in law or equity; responsible; chargeable; answerable; compellable to make satisfaction, compensation or restitution.
<b>IR Code:</b>	[Undefined]
<b>Comment:</b>	<p>In my opinion, Sec. 6001 does not state that you are a “person liable.” It is non-specific. The phrase, “Every person liable...” does not specify that you are the individual that is “liable” or that you belong to a category or group of “person(s) liable.” Rather the section implies that you have to look elsewhere in the “title” (Code) in order to find where you are</p>

Element	Definition or Comment
	<p>“bound by law”—specifically described as the “person liable” to collect taxes (if you are an employer), keep records, render statements, make returns, and comply with certain rules and regulations.</p> <p>Further, in my opinion Sec. 6011 does not state that you are the person “made liable.” It is non-specific. The section implies that you have to look elsewhere in the code to see whether or not you are “made liable” by law.</p>
<b>Word:</b>	tax liability
<b>Context:</b>	Note: There is no definition of this term from any source. Therefore, we will look to the definition of “liability.”
<b>Webster:</b>	1) the state of being liable. 2) anything for which a person is liable. 3) a debt.
<b>Black’s Law:</b>	All character of debts and obligations (cite omitted).
<b>IR Code:</b>	[Undefined]
<b>Comment:</b>	In my opinion, the term “tax liability” means a “tax debt,” for example, a specific dollar amount that is due and owing to the IRS

### “Liable for a Tax Imposed” vs. “Tax Liability”

First, let me briefly explain the term “tax imposed.” To impose something means “to place upon.” More specifically, it means “to place a burden (tax) upon something.” Thus being “liable for a tax imposed” means being “responsible for or bound by law” for a tax that has been placed upon some item. Note that the person liable is distinct from (not the same as) the item upon which the tax was placed. Also, be advised that the word “tax” as used in Sections 6001 and 6011 is used in a generic sense—that is, for whatever type of tax is being imposed (i.e., alcohol tax, income tax, etc.), and does not represent a dollar amount of tax.

“Tax liability,” as stated in my opinion immediately above, means a tax “debt”—an amount owed. There is obviously a substantial difference

between the two terms. Another way to describe the difference between the two is that it is possible to be a “person liable” for a type of tax and have no “tax liability” (debt) at all. But it is impossible to have a “tax liability” if one is not a “person liable” for that type of tax. In other words, only a person “liable” or “made liable” can possibly have a “tax liability.”

## **Conclusion**

In summary and conclusion, all of the above-listed definitions from the three authoritative sources are those that I deemed most relevant and appropriate, given the context of the subject words and phrases.

For those words and phrases contained in various Internal Revenue Code sections, heaviest reliance as to the meaning (my opinion) was given to the definition contained in the Code due to the legal nature of the subject words in their specific contexts.

You have noted in this opinion that words such as “must,” “shall” and “person” actually differ radically in meaning, depending on their context. Meanings differ between *Webster’s* and *Black’s Law Dictionary* for some, and *Black’s Law* even presented opposite meanings for some of the words, depending on context and if used in a “legal” sense.

Further, with respect to the word “person,” no definition exists in Chapter 61 (the chapter in the IR Code that contains Sections 6001 and 6011, in which “person” is found). I was obliged instead to go to a more general definition found in Chapter 79. Yet, the definition of “person” as used in section 7203 is found in Chapter 75 of the Code, upon which I based my opinion.

For accuracy in meaning relative to context and subject matter, the definitions used for the subject words found in the IR Code were taken, when existing, only from within the same Chapter in which they reside. Note, also, how the definition of “person” differs radically between Chapter 75 and Chapter 79. Again, if one is not careful in researching these legal definitions, serious mistakes can occur, resulting in serious misunderstanding.

Another interesting fact is that the Internal Revenue Code, the primary authority on tax law, does not contain the definition of many important words and phrases. For example, the terms “voluntary compli-

## On the Meaning of Certain Words and Phrases from the IRS Code

ance," "self assessment" and "tax liability" (to name a few) are not defined. Many IRS publications over the years, including the mission of the IRS, describe the tax system as one of "voluntary compliance," yet nowhere in the IR Code does any section define or explain the meaning of this very important term.

This lack of adequate definitions, coupled with inconsistencies in meanings and imparted to the public in language that is less than clear, contributes to the public's resulting confusion and misunderstanding of IRS publications, notices and Code sections. One could conclude that it is not the intention of the IRS to clarify the meanings of the Code.

In any event, as it is Congress that writes these laws, I suggest you contact your Congressmen and inform them of those IR Code sections which you feel are vague and confusing. Ask your Congressman to explain the meaning and intent of each section. Further, ask if the sections really convey such meaning and intent. You can help your Congressman by pinpointing the source of your confusion.

Indeed, confusion about tax matters continues to run rampant, even among tax professionals. This unfortunate situation actually worsens with every "tax reform." I have noticed that "uncertainty" as to how to advise clients is the "watchword" among professionals today. As laws become more complicated, people become more confused. Confusion breeds chaos, and we are rapidly approaching chaos in our society. But this trend can be corrected. Do not give up. Continue to work with the system and try to help correct and improve it.

I cannot encourage you enough to seek professional advice from knowledgeable and trustworthy attorneys and tax professionals who can fully apprise you of the legal aspects and ramifications of those relevant portions of IRS literature and tax laws. In any event, I sincerely hope your understanding of the items for which you sought my opinion has been greatly enhanced. If you need further clarification on any item, please feel free to contact me by email at [info@billconklin.com](mailto:info@billconklin.com).

## On the Definition of Income

**T**he definition of income is a significant part of understanding the basis on which we can be taxed. We will turn to an examination of part of our federal tax laws. 26 USC §61 (a) reads:

Section 61 (a) GENERAL DEFINITION.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

- (1) Compensation for service, including fees, commissions, and similar items.
- (2) Gross income derived from business;
- (3) Gains derived from dealings in property;
- (4) Interest;
- (5) Rents;
- (6) Royalties;
- (7) Dividends;
- (8) Alimony and separate maintenance payments;
- (9) Annuities;
- (10) Income from life insurance and endowment contracts;
- (11) Pensions;
- (12) Income from discharge of indebtedness;
- (13) Distributive share of partnership gross income;
- (14) Income in respect of a decedent; and
- (15) Income from an interest in an estate or trust.

### **26 USC §61 and Grammar**

By the structure of the above sentence, it is indicated that the tax is on “all income from whatever source derived.” The word “source” is the object of the preposition “from.” The correct construction of the above clearly indicates that the taxes are *not* to be levied and collected on the “source.” Source is not to be equated with income as these terms are used in the above citation.



## On the Definition of Income

The phrase “including (but not limited to) the following items” has been misinterpreted to be a phrase modifying the word “income” not the word “source” in its sentence. The rules of English composition govern the noun which is modified; these rules are discussed below.

Participles are verbal adjectives which modify nouns. The word “including” is a participle. The verb “include” was converted to a participle by adding the suffix “-ing” for the purpose of describing a noun. The use of the word “including” in Section 61 (a) creates a participle phrase.

There are two types of participle phrases: *restrictive* and *non-restrictive*. The restrictive phrase appears following the noun it modifies without commas. A *restrictive phrase* is an inextricable part of the sentence because there are no commas. The *non-restrictive phrase* can be inserted or hooked on to the sentence and is separated by commas. It is parenthetical; it contributes to but does not change the meaning of the basic sentence. The non-restrictive phrase can be eliminated without changing the basic sentence; that is the purpose of setting it apart with commas.

In examining the opening sentence of Section 61 (a), the preceding noun of the participle phrase—“including (but not limited to) the following items”—is the word “source.” Adjectives always modify the noun immediately preceding when the word or phrase is placed with intervening commas. Restating the entire sentence by the accepted rules of English composition, it says: “Gross income means all income from whatever source, including (but not limited to) the following items derived...”

By changing the modifier “including (but not limited to) the following items,” the taxing agencies have sought to increase revenues by taxing the source listed (1)-(15), *supra*. The clear language of section 61 (a) *supra*, places a tax only on the *income derived from the listed sources, not the sources themselves*. I suspect that similar violations of the rules of English composition have, in fact, created new law contrary to the express intent of Congress as written in this example of the Internal Revenue Code.

Furthermore, the Sixteenth Amendment to the Constitution of the United States of America states as follows:

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

The language of the Sixteenth Amendment is clear in the English sentence construction. English or language mechanics is something that even the IRS and the U.S. Attorneys cannot change. You will see that the source of your livelihood is not the intended object of taxation. The tax is on income only. The source of that income is not the subject of that taxation. Let us take a similarly professional look also at the Sixteenth Amendment.

### **The Sixteenth Amendment and Grammar**

By its structure, the Sixteenth Amendment indicates that the tax is on “incomes,” from whatever “source” derived. In this instance, the word “incomes” is the object of the preposition “on.” The word “source” is the object of the preposition “from.” In no way can this be construed to make the “source” the object of the preposition “on.” The introduction of the comma to separate the two prepositional phrases further widens the gap between the meanings of the objects, “incomes” and “source.” In so stating, with the use of “on” in one instance and “from” in the other instance, it negates any confusion that might lead one to believe that the tax would be levied and collected on the “source.” The “source” is not to be equated with “income” as these terms are used in the Sixteenth Amendment.

Therefore, it can only be assumed from the above discussion that IRC Section 61(a) lists sources of income; and the Sixteenth Amendment itself has authorized a tax only on income, but not on the sources of income. Because compensation for services, including fees, commissions, and similar items are defined by 26 USC 61(a)(1) as a “source” of income, the Sixteenth Amendment and the Internal Revenue Code have not authorized a tax on compensation for services or any of the other sources listed under 26 USC 61(a).

# On the Liability for Tax

I want to inform you that I am not an attorney but I am an experienced paralegal with over twelve years of experience in litigating with the IRS. I also have a Master of Arts in Communication and I have been writing letters on the syntax of the Internal Revenue Code for five years. I currently have six published wins on my own case in the Tenth Circuit Court of Appeals against the IRS. The cases are as follows:

1. *Church of World Peace, Inc. v. IRS*, 715 F.2d 492.
2. *United States v. Church of World Peace*, 775 F.2d 265.
3. *Conklin v. United States*, 812 F.2d 1318.
4. *United States v. Church of World Peace*, 878 F.2d 1281
5. *Tavery v. United States*, 897 F.2d 1032
6. *Conklin v. C.I.R.*, 897 F2d 1027.

Back in the late 1970's, I set up a home church, donated to it and took a tax deduction. The IRS attacked me and I have been winning ever since. Several years ago, I got back over \$15,000 in a refund lawsuit.

I have discovered very interesting issues about the Income Tax and, as I have stated elsewhere in this publication, for a number of years now I have offered a reward of \$50,000 to anyone who can show me the following:

1. What statute makes me liable to pay an income tax?
2. How can I file a tax return without waiving my Fifth Amendment Rights?

To date, no one has taken me up on the offer. Since I am not an attorney, I suggest that you consult with an attorney and see if I am right. If your attorney can prove me wrong, you can win the \$50,000.

My opinion is that you are not liable to pay an income tax under Title 26, the Income Tax Code. The reason is that the Internal Revenue Code (the "tax law") does not contain a code section (statute/law) that states such a requirement.

Furthermore, the filing of an income tax return is “voluntary.” However, if you do not volunteer, the IRS can file a return for you under 26 USC 6020(B) and it can collect from you using a variety of procedures which the courts will support. Therefore, it is important that individuals who choose not to voluntarily waive their Fifth Amendment Rights by filing 1040 Returns post a bond against any 6020(B) assessment if they wish to avoid assessment difficulty in the future.

I can certainly appreciate your need for information on the subject of federal income taxes, a subject that “naturally” fosters substantial confusion among the public. While your question appears simple and basic enough, it mandates a course of analysis that takes us to the very source of the tax law, an area that few professionals dare to tread as it takes careful, orderly analysis. I believe I have succeeded in cutting through the maze of confusion surrounding the tax laws to arrive at the correct conclusion: *Individuals are not required to file an income tax return form 1040. Filing these returns is completely voluntary.*

The key to “cutting through the maze” is knowing where to start cutting. If someone handed you the 2,000- page Internal Revenue Code and said, “Go find the code section that requires one to file a return,” would you, as a layperson, know where to start looking? The Code contains over 10,000 code sections! Here’s how you start: You must follow the directions in the Internal Revenue Service’s official publication to the public known as *Notice #609*. This notice directs you to specific code sections in the Internal Revenue Code on this matter.

Before we look at the Internal Revenue Code sections given us by the IRS, let me acquaint you with the background to Notice #609. It is entitled, “Privacy Act and Paperwork Reduction Act Notice.” The IRS is required to send you this Notice #609 by the Privacy Act Law of 1974 (5USC 552a, Public Law 93-574), which states in Sec. 5(e)(1):

Each agency that maintains a system of records shall...

(3) Inform each individual whom it asks to supply information...

(a) The authority which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary,

## On the Liability for Tax

(b) The principle purpose or purposes for which the information is intended to be used,

(c) The routine uses which may be made of the information,

(d) The effects on him, if any, of not providing all or any part of the requested information....

Based on the above requirements we can now look at the IRS' Notice #609 and go directly to the reference to its legal right to ask for information, which states:

Our legal right to ask for information is Internal Revenue Code sections 6001, 6011 and 6012 and their regulations. They say that you must file a return or statement with us for any tax you are *liable* for. (emphasis added)

In the second sentence, the IRS is in effect saying that *if* you are “liable” (responsible) by statute for a particular kind of tax, you must then file. Let’s take a look at the three code sections quoted above:

### SEC. 6001. NOTICE OR REGULATIONS REQUIRING RECORDS, STATEMENTS, AND SPECIAL RETURNS.

Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary may from time to time prescribe. Whenever in the judgment of the Secretary it is necessary, he may require any person, by notice served upon such person or by regulations, to make such return, render such statements, or keep such records, as the Secretary deems sufficient to show whether or not such person is liable for tax under this title. The only record which an employer shall be required to keep under this section in connection with charged tips shall be charge receipts and copies of statements furnished by employees under section 6053(a).

### SEC. 6011. GENERAL REQUIREMENT OF RETURN, STATEMENT, OR LIST.

(a) General Rule. When required by regulations prescribed by the Secretary any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary. Every person required to make a return or statement shall include therein the information required by such forms and regulations.

#### SEC. 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.

Note that Sec. 6001 refers to “Every person liable for any tax imposed by (the Code)” and Sec. 6011 refers to “any person made liable for any tax imposed by (the Code).” Also note that neither of these two code sections state who is liable (responsible) for submitting an income tax return. Again, Notice #609 says that these code sections state “that you must file a return or statement with us for any tax you are liable for.” This means that before there can be a lawful requirement for you to file a return, you must be found to be liable or responsible as the individual designated to complete the return for the particular type of tax the IRS is attempting to collect.

At this point, allow me to rephrase the question to assist you in focusing on my answer and conclusion: Am I, as an individual, liable to pay the income tax or responsible to file (by any Internal Revenue Code statute) an individual income tax return form 1040?

The answer is “No,” based on the first two code sections (6001 and 6011) the IRS referred us to in its Notice #609. And from reading section 6012, the answer is still “no” as the word “liable” is not even mentioned there. I will comment more on 6012 later.

The emphasis, for the moment, is on sections 6001 and 6011 and whether or not an individual is “liable” or “made liable.” Both sections

refer to a person being “liable for any tax imposed by this title.” Obviously, these sections are directing you to go elsewhere in the Internal Revenue Code (Title 26) to find a “tax imposed” and a code section describing who is “liable” for the tax imposed.

Thus we go to another part of the Code, “Subtitle A, Income Taxes, Chapter 1, Part I—Tax Imposed on Individuals.” In sections 1(a) through 1(d), taxes are imposed on “taxable income” of various individuals, e.g., married, single, etc., but there is no mention of the individuals being “liable” or responsible to file in these sections or any other subsequent code sections in all of Subtitle A, “Income Taxes.”

The conclusion, then, is that there is no code section that makes one liable in Subtitle A, Income Taxes, or in Subtitle F, code sections 6001, 6011 and 6012. By the way, Subtitle F is entitled, “Procedure and Administration,” which infers that “procedurally” there is a sequence of steps that the IRS must follow in its tax collection “administration”—i.e., it must first show the individual to be “liable” or “made liable” (as set forth in sections 6001 and 6011) *before* the individual can be shown to have a “tax liability” (some undetermined amount based on “gross income” as set forth in Section 6012).

In other words, Section 6012 comes into play as the second administrative step by the IRS only *after* it has satisfied the first step. Section 6012 begins a series of steps involved in the calculation of one’s “tax liability.” Said another way, you cannot have a tax liability and be required to pay a tax if you have not first been found to be “liable.” And to emphasize the obvious, *there is no way Section 6012 can make you “liable” for the tax.*

Therefore, the IRS is “stopped dead in its administrative tracks” at the first step and cannot legally enforce assessment and collection of any individual income tax at all on a Form 1040. The first sentence of section 6012 confirms this because it refers to “income taxes under Subtitle A.” And since no one is made liable under Subtitle A for the filing of income tax returns, section 6012 becomes immediately and entirely irrelevant as a “second administrative step.”

What I have just conveyed to you is not theory—it is fact. The administrative procedure set forth by the Privacy Act Notice is the same for the other types of tax found in the code because there are code sections

that determine and describe who is liable to file and pay the tax. Here are some examples:

### **Section 4401**

Sec. 4401(a) imposes a tax on wagers (gambling bets) and Sec. 4401(c) sets the requirement for who shall be liable for the tax; that is, who shall pay the tax. Sec. 4401(a) states:

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter....

Other sections of the Code specifically impose a tax, and then distinctly specify who is liable to pay the tax:

- Sec. 4261(a) imposes a tax.
- Sec. 4261(d) specifies who is liable to pay it.
  
- Sec. 4611(a) imposes a tax.
- Sec. 4611(d)(1)(2)(3) specifies three separate persons who are liable to pay it.
  
- Sec. 4971(a) imposes a tax and specifies who is liable to pay it.
  
- Sec. 4986(a) imposes a tax.
- Sec. 4986(b) specifies who is liable to pay it.
  
- Sec. 5001(a) imposes a tax.
- Sec. 5005(a) specifies who is liable to pay it.

From this foundation, we can compare the sections in Subchapter A, Income Taxes:

Sec. 1(a) There is hereby imposed on the taxable income of every married individual who makes a single return jointly with his spouse under Sec. 6013, and every surviving spouse, a tax....

Sec. 1(b) There is hereby imposed on the taxable income of every individual who is the head of a household... a tax....



## On the Liability for Tax

Sec. 1(c): There is hereby imposed on the taxable income of every married individual who does not make a single return jointly... a tax....

Again, as you can see, the tax imposed in each of the above sections is on “taxable income” a technical, legal term and not specifically on any individual. No specific section can be found that specifies who is liable for each of these income tax sections. But it is obvious that there are quite a number of individuals that are liable to file returns for various taxes in the code. These individuals are known as “taxpayers.” This term has a special and technical definition in the Code:

Sec. 1313(b) defines “taxpayer” this way: “Notwithstanding Sec. 7701(a)(14), the term ‘taxpayer’ means any person subject to a tax under the applicable revenue law.” Sec. 7701(a)(14) says “the term ‘taxpayer’ means any person subject to any internal revenue tax.”

Essentially, in order for an individual to be a “taxpayer,” he would have had to become liable (pursuant to 6001 and 6011) from some section of the Code other than Section 1. ***But there are no such sections.***

What I am saying here is that an individual becomes a “taxpayer” (subject to the tax laws) the instant he becomes “liable” to file the return. Until that point in time, the individual remains “exempt from taxation.” As the Supreme Court said, the language of the taxing statutes must be clear and cannot be enlarged by implication:

Keeping in mind the well settled rule that the citizen is exempt from taxation unless the same is imposed by clear and unequivocal language, and that where the construction of a tax law is doubtful, the doubt is to be resolved in favor of those upon whom the tax is sought to be laid.... *Spreckles Sugar Refining Co. v. McClain*, 192 U.S. 397 at 416; 24 S.Ct. at 382 (1904); 48 L. Ed. 496.

and

In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, are to enlarge their operations so as to embrace matters not specifically pointed

out. In case of doubt they are construed most strongly against the Government and in favor of the citizen. — *Gould v. Gould*, 245 U.S. 151, 153 (1917); 38 S.Ct. 53; 62 L.Ed. 211.

As you might agree, the taxing statutes given us by the IRS in its Privacy Act Notice are as “clear as mud” to the average layperson reading it for the first time, not knowing how to analyze and focus on the essential aspects. But with my step-by-step analysis thus far, we have accomplished “major surgery” in cutting through the IRS maze of confusion with respect to whether or not individuals are “liable” or “responsible” to make tax returns.

It has become obvious that for most individuals, Code Section 6012 is not relevant. It is merely a “red herring”—a distraction—that the IRS threw in to heighten the maze of confusion which it constructed. The IRS threw in section 6012 in October, 1986, and for all the years prior to 1986, its Privacy Act Notice only consisted of section 6001 and 6011 which refers, of course, to the primary issue of whether one is “liable” to make the return.

You can see the importance of understanding the meaning of the term “liable,” and how it is a critical element in the IRS’ taxing procedure. You can see how it is a false premise to believe that one automatically becomes “liable” because he made income. To prove this fallacy, let us look at the Gift Tax.

The donor or giver of the monetary gift is liable for the tax, not the recipient. Section 2502(c) verifies this. In other words, it does not matter if you made a ton of “income. *You are not liable because the code does not make you liable, therefore, you are not required to do anything.* That is, you are not required to “make returns, keep records, or make statements” to or for the IRS.

I have pointed out and explained the basic fact that you are not liable by statute. There is, however, another way that you can be “made liable” (as referred to in section 6011). *You can volunteer.* You can, by your actions, consent to be liable (responsible) for both the tax return and the tax liability. How do you volunteer to become liable? Simple: just sign your name on a government form known as a 1040 Individual In-

## On the Liability for Tax

come tax return.

In one fell swoop of your own pen, you have just been “made liable” (as it says in section 6011 of the code) and you now take on the distinguished status and title of “taxpayer.” As a “taxpayer,” guess what the IRS has in store for you, what with its myriad of statutory penalties and impositions? Remember the definition of “taxpayer?” You are “subject to”—perhaps “subjected to” would be more apropos—paying a tax.

The Appeals Court said it clearly as a principle of law:

When one files a tax return showing taxes due, he has, presumably, assessed himself and is content to become liable for the tax, and to pay it either when it is due according to statute, or when he can get the money together. *Lyddon & Company v. U.S.*, 158 F.Supp. 951, at 953

This cite also refers to the principle of “self-assessment,” which simply means that you want to make the job of the IRS in collecting taxes much easier by doing all the paperwork and calculations by yourself. Since you now know there is no absolutely no Internal Revenue Code Section that *requires* you to file a return, then filing is obviously a voluntary act. The fact that filing a return is *voluntary* is easily verified by reading the various statements of IRS Commissioners over the years and the Mission statement of the IRS itself, which was entered into law (The Federal Register) in March of 1974. Just a few of these statements follow:

Each year American taxpayers voluntarily file their tax returns and make a special effort to pay the taxes they owe. —Johnnie M. Walters, IRS Commissioner (1971 Internal Revenue 1040 Booklet)

Our tax system is based on individual self assessment and voluntary compliance. —Mortimer Caplin, IRS Commissioner (1975 Internal Revenue Audit Manual)

The mission of the Service is to encourage and achieve the highest possible degree of voluntary compliance. —Donald C. Alexander, IRS Commissioner (Federal Register, March, 1974)

The IRS’s primary task is to collect taxes under a voluntary

compliance system. —Jerome Kurtz, IRS Commissioner (1980 Internal Revenue Annual Report)

We have a voluntary compliance system. —Fred Goldberg, IRS Commissioner (Ted Koppel show, ABC news, April 13, 1990)

And, from the highest authority, the United States Supreme Court:

Our system of taxation is based upon voluntary assessment and payment, not upon distraint. —*Flora v. U.S.*, 362 U.S. 145, 176 (1959)

This principle of law, i.e., that our tax system is based upon voluntary assessment, has been emphasized and relied upon in subsequent appellate court cases also. The reason that the courts and the IRS advise that it is voluntary, is that if it were mandatory, there would be a violation of your rights under the Bill of Rights—i.e., under the First, Fourth and Fifth Amendments.

The First Amendment involves your freedom to speak to your government. It also includes your right not to speak to your government (on a Form 1040). Forcing you to speak on a 1040 would violate your First Amendment rights.

The Fourth Amendment is your right to privacy—your right to be secure in your person and papers. Compelling you to produce your personal financial information and records, etc., without a lawful court order would violate your Fourth Amendment rights.

The Fifth Amendment states that “No person... shall be compelled in any criminal case to be a witness against himself.” This simply means that you cannot be compelled to give information (on a Form 1040) because that act is equivalent to being a witness against yourself. The IRS can take any information you provide and turn around and use it against you under any circumstances, both civilly and criminally. In an instant, the IRS can have you under criminal investigation and potential indictment. Therefore, compelling you to give information (evidence) against yourself would violate your Fifth Amendment rights.

Code sections 6103(h) and (j) says that tax returns and return information may be given to the U.S. Attorney and Justice Department for

## On the Liability for Tax

criminal prosecution. In fact, even the IRS Privacy Act Notice so states:

We may give the information to the Department of Justice and to other Federal agencies, as provided by law.

Obviously, this is a warning to you, almost like a “Miranda Warning.” If you choose to disregard the warning and waive your right to remain silent and your right to privacy, understand that it is your choice alone.

Now you know why “our system of taxation is based on voluntary assessment and payment.” You also know why you were never made “liable” by the code in the first place. By making you liable, the IRS would have created a full requirement for you to submit information on the 1040, thereby compelling you to be a witness against yourself in direct violation of your rights.

You can see now that *it is essential that you know and understand your Constitutional rights*. Integral to your own “research” on the income tax is that you obtain a copy of the United States Constitution and study not only the entire Bill of Rights but also the relevant Articles on taxation. In this opinion letter I have covered what I believe to be the essential elements of the requirements of the income tax system. They are relatively simple, as you have seen, once analyzed and broken down to the elements.

Again, we started (and ended) with the IRS Privacy Act Notice to you whereby the IRS “tries” to comply with the requirements of the Privacy Act Law of 1974. Its efficiency in doing so leaves a lot to be desired as IRS Notice #609 falls short, particularly in telling you plainly whether you are “liable” or not, i.e., whether you were required to give the requested information or not. For those who even take the time to read this important IRS notice, it is confusing and misleading, at best. The clearest aspect of the notice is when it tells you that the IRS can give the information to the Department of Justice and to other federal agencies.

I would like to again point out that on the whole, our system of tax laws is deplorably confusing to everyone, even to the IRS. A recent poll, whose results were nationally publicized, showed that IRS agents were incorrect 39% of the time in answers to fairly simple questions posed by citizens. Equally unfortunate is the fact that the professional community

is confounded by the code and the various tax reform acts heaped upon them.

This problem was apparent a decade ago when the Chief Justice of the Supreme Court of West Virginia, Richard Neely, commented on taxes in his book *How Courts Govern America*. He said,

In 1978, I attended a seminar on federal estate and gift tax sponsored by the American Law Institute, where the Internal Revenue Service lawyers responsible for this area frankly confessed that they did not understand the Tax Reform Act of 1976... Not only did they not understand the law, they opined that the Congress which wrote it did not understand it and that the courts would seem to understand it only because the courts make it up as they went along and pretend to understand it.

Also, during the Nixon Administration, Johnnie M. Walters, IRS Commissioner at that time, made a pitch for simplicity. Walters said,

I do not care whether it is a flat tax, a value-added tax, or a consumption tax, the complexities and perceptions of our present system are causing larger numbers to wander off the reservation. We cannot afford that.

The tax laws were complicated then, as they are now. There has never been such a thing as tax "reform!"

So what is the government's posture today, after having admitted that the income tax system is voluntary? The government is desperate, based on remarks such as that from Roger M. Olsen, Assistant Attorney General, Tax Division, Department of Justice, where he said to a group of professionals, "We encourage voluntary compliance by scaring the heck out of you." Olsen, in so many words, is not only admitting that the system is voluntary, he is admitting that the tax system today can only "work" if the IRS uses Gestapo tactics against the American people.

President Reagan himself spoke out in a speech in May of 1985 when he said, "The current (tax) system just doesn't work anymore." He further said, "Our federal tax system is, in short, utterly impossible, utterly unjust and completely counter-productive." He went on to infer that the "system itself is a cheat."

## On the Liability for Tax

IRS Commissioner Roscoe Egger (1984), also expressed this truth when he said in Nov. of 1984,

Any tax practitioner, any tax administrator, any taxpayer who has worked with the Internal Revenue Code knows that it is probably the biggest 'mishmash' of statutes imaginable. Congress, various Administrations and all the special interest groups have tinkered with it over the years, and now a huge assortment of special interest and pet economic theories have been woven into the great hodge-podge that is today's Internal Revenue Code.

Members of Congress are cheating the middle-income citizens and placing the tax burden upon them. The United States Supreme Court hit the nail on the head as long ago as 1874, in the case of *Loan Association v. Topeka*:

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it on favored individuals... is none the less robbery because it is done under the forms of law and is called taxation.

This unfairness has reached epidemic proportions. Special interest groups are still being catered to. Recently, a top Philadelphia newspaper ran a feature story exposing how certain Congressmen, through their tax-bill writing committees, offered tens of billions of dollars in tax dollar savings to the rich and powerful. Secret exemptions included in a "tax shelter investment" bill resulted in a \$47 million break for friends of George Bush and George Shultz!

Briefly, the story goes like this: A 562 foot passenger liner was bought in 1980 and was turned into a state of the art ship at a cost of \$47 million. It was offered to a group of wealthy investors as a "tax shelter investment" and operated at an artificial loss—for tax purposes—of \$436 million in '84 and '85. When the tax reform act of '86 made major changes (amendments) in the laws detrimental to artificial losses, this "elite" group needed "help." An amendment was provided and it can be found in the 925-page Tax Reform Act as follows:

The amendment made by section 201 shall not apply to a

562 foot passenger cruise ship, which was purchased in 1980 for the purpose of returning the vessel to the United States service, the approximate cost of refurbishment of which is approximately \$47 million.

The beneficiaries of this huge tax break are none other than the Bechtel family, who just happens be the former employers of George Shultz! I could go on with other detailed examples of “criminal” activity practiced daily by our elected public servants in Congress, but I do not want to digress too far from the primary issues in this letter.

The reason I am enlightening you with news of Congressional and IRS scams is because you need to be aware of the “larger picture,” particularly if all of what I have said is totally new to you. By being knowledgeable, you are in a better position to help correct some of the problems and wrongdoing that are being perpetrated in America today. The solutions have to do with how you exercise your God-given rights on a private and public basis.

I have discussed subjects that are “controversial.” Be aware that certain ignorant bureaucrats—the IRS, for example—may not always treat you kindly, particularly if you decide not to file tax returns or volunteer for audits. But do not allow yourself to be intimidated by any bureaucrat at anytime. Knowledge of the law breeds confidence, and confidently exercising your Constitutional rights is essential to maintaining your freedom and protection against bureaucrats who violate due process of law.

If you are contemplating a “non-filer” position, please exercise “due diligence.” Seek a number of professional opinions and continue your research in good faith as there is always new information to strengthen your foundation of knowledge. Be sure that the advice you receive is sound and credible. Do not, for example, settle for verbal, off-the-cuff remarks. *If a professional is not willing to put his advice in writing and substantiate it with sound, detailed legal analysis, steer clear of him.* Any advice he could give you would tend to be unreliable.

As a final point, even the IRS will not claim responsibility for its advice to you on the Code, especially when the IRS agents are dead wrong. President Reagan attested to this when he said in a 1984 Associated Press (AP) release:



## On the Liability for Tax

The government has the nerve to tell the people of the country, 'You figure out how much you owe us—and we can't help you because our people don't understand it either (the Code)—and if you make a mistake, we'll make you pay a penalty for making the mistake.

And to further ensconce itself in its "ivory tower," the IRS came up with Publication 17, which states:

The publication covers some subjects on which certain courts have taken positions more favorable to the taxpayers than the official position of the Service. Until these interpretations are resolved by higher court decisions, or otherwise, the publication will continue to present the viewpoint of the Service.

The above is a disclaimer and it is also a tacit admission that IRS publications do not necessarily present the law, but only the law as the IRS wants you to understand it.

The final twist in the IRS maze comes in IRS Publication 21, where the IRS essentially tells you that you must decide whether you are required to file or not. Ultimately, the decision of whether to file tax returns is truly your responsibility.

In this section, as an expert in communications and interpretation of the English language, I have given you my opinion that you are not liable for the Federal Income Tax by statute and you are not required to waive your Fifth Amendment Rights on a 1040 Return, and I have substantiated my suggestions so that you may fully rely on it and utilize it as a springboard to further your knowledge and research in this area.

Since I am not an attorney, but a paralegal, I must tell you to seek legal counsel from a licensed attorney on the above issues. I must also inform you that even though there is no statute that makes individuals liable to pay an income tax and since a requirement to file returns would have serious Fifth Amendment contradictions, the IRS will continue through double-speak and brute force to enforce the concept that individuals are "required" to voluntarily waive their Constitutional Rights and assesses themselves.

## *Why No One Is Required to File Tax Returns*

Remember also that individuals who do not file may be subject to criminal and civil penalties in spite of the above argument if the IRS claims that they owe substantial taxes. For this reason, I suggest that *if you are an employee, you should allow the employer to send withholding to the IRS on your behalf and if you are an independent contractor, working on a 1099, I suggest that you post a bond against any assessment that the IRS may make for you under 26 USC 6020B*. If you wish to contest issues with the IRS, you will then be in an *offensive position* instead of a *defensive position*.

If you find an attorney or anyone else that can prove I am wrong, please let me know by sending an email to me at the following address: **info@billconklin.com**.

# U.S. v. Argomaniz

United States v. Argomaniz, 925 F.2d 1349, (11th Cir. 1991)

UNITED STATES of America and L. Simmons,  
Revenue Officer, of Internal Revenue Service,  
Plaintiffs-Appellees,

v.

Alberto E. ARGOMANIZ,  
Defendant-Appellant.

No. 89-5925.

United States Court of Appeals, Eleventh Circuit.

March 11, 1991.

David M. Garvin, Philip T. Weinstein, Weinstein & Garvin, Miami, Fla., for defendant-appellant.

Dexter W. Lehtinen, U.S. Atty., Lisa A. Hirsch, Asst. U.S. Atty., Miami, Fla., Kevin M. Brown, Gary R. Allen, Chief, Charles E. Brookhart, U.S. Dept. of Justice, Tax Div., Washington, D.C., for plaintiffs-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before CLARK and BIRCH, Circuit Judges, and HENDERSON, Senior Circuit Judge.

BIRCH, Circuit Judge:

Appellant Alberto Argomaniz (Argomaniz) appeals from an order of the United States District Court for the Southern District of Florida, directing him to comply with a summons issued by the Internal Revenue Service (IRS). Compliance with this IRS summons could violate Argomaniz's fifth amendment privilege against self-incrimination. Accordingly, we REVERSE the district court's order and REMAND for further proceedings consistent with this opinion.

## I. BACKGROUND

IRS records indicate that Argomaniz did not file income tax returns for the years 1984 through 1987. Therefore, the IRS initiated an investigation into Argomaniz's tax liability for those years. As part of this investi-

gation, the IRS issued an administrative summons, pursuant to 26 U.S.C. Sec. 7602 (FN1),<sup>[1]</sup> directing Argomaniz to appear before IRS Officer Simmons to give testimony and produce relevant records and documents.<sup>[2]</sup> On June 20, 1988, the summons was served on Argomaniz. On July 12, 1988 and again on October 13, 1988, Argomaniz appeared before Simmons, in compliance with the summons, but refused to produce any of the summonsed documents. He claimed that production of the documents would violate his fifth amendment privilege against self-incrimination. Simmons then referred the matter to the United States Attorney for enforcement action. On February 21, 1989, the United States filed a petition in the United States District Court for the Southern District of Florida, pursuant to 26 U.S.C. Secs. 7402(b)<sup>[3]</sup> and 7604,<sup>[4]</sup> to enforce the summons. Attached to the petition was Simmons' declaration, stating that proper IRS summons procedure had been followed and that the documents and information sought by the summons were necessary to the IRS investigation and not otherwise available. The district court referred the case to a magistrate, who ordered Argomaniz to show cause why he should not be compelled to comply with the summons. On April 18, 1989, the show cause hearing was held. Argomaniz again raised his fifth amendment privilege. After instructing Argomaniz that he could raise his fifth amendment privilege on a question-by-question basis, the magistrate entered an order directing Argomaniz to comply with the summons. On April 28, 1989, Argomaniz appeared before Simmons and again refused to answer any questions or produce any documents relating to his tax liability for the years 1984 through 1987.<sup>[5]</sup> The United States then filed a motion requesting that the magistrate enter a report and recommendation. The magistrate complied and recommended that the district court direct Argomaniz to respond to the summons. In an order entered on August 7, 1989, the district court adopted the magistrate's report and recommendation. Argomaniz was ordered to comply with the summons within fifteen days. If he failed to do so, he would have twenty days to show cause why he should not be held in contempt. On August 22, 1989, Argomaniz appealed to this court from the district court's order, and filed a motion in the district court for a stay of enforcement of the order. By order dated October 10, 1989, the district court granted Argomaniz's motion and stayed enforcement of the summons pending his

appeal, indicating that Argomaniz had shown a reasonable fear of criminal prosecution and that enforcement of the summons could force Argomaniz to waive his fifth amendment privilege against self-incrimination.[6]

## II. DISCUSSION

The fifth amendment privilege against self-incrimination[7] “protects a person ... against being incriminated by his own compelled testimonial communications.” *Fisher v. United States*, 425 U.S. 391, 409, 96 S.Ct. 1569, 1580, 48 L.Ed.2d 39 (1976). It “can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory.” *Kastigar v. United States*, 406 U.S. 441, 445, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972). Accordingly, a taxpayer may invoke this privilege in response to requests for information in an IRS investigation.

The taxpayer seeking the protection of this privilege to avoid compliance with an IRS summons “must provide more than mere speculative, generalized allegations of possible tax-related prosecution.... [T]he taxpayer must be faced with substantial and real hazards of self-incrimination.” *United States v. Reis*, 765 F.2d 1094, 1096 (11th Cir.1985) (per curiam). Thus, the question before us is whether Argomaniz has shown such a “substantial and real hazard of self-incrimination” that the fifth amendment will excuse his noncompliance with the IRS summons. The answer to this question will depend on whether compliance with the summons would provide information incriminating to Argomaniz, and, if so, whether the privilege properly was invoked. See *Grosso v. United States*, 390 U.S. 62, 65, 88 S.Ct. 709, 712, 19 L.Ed.2d 906 (1968).

### A. Compliance With The IRS Summons Could Be Incriminating

“The central standard for the ... application [of the fifth amendment privilege against self-incrimination is] whether the claimant is confronted by substantial and ‘real’, and not merely trifling or imaginary, hazards of incrimination.” *Marchetti v. United States*, 390 U.S. 39, 53, 88 S.Ct. 697, 705, 19 L.Ed.2d 889 (1968). The privilege applies only in “instances where the witness has reasonable cause to apprehend danger” of criminal liability. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). The government claims that because the

IRS investigation was of a civil nature (its alleged purpose was to determine Argomaniz's civil tax liability for the years 1984 through 1987), Argomaniz's fear of self-incrimination is remote and speculative, and, therefore, not sufficient to invoke the fifth amendment privilege. However, the structure of the IRS, the nature of the summons procedure, and the facts of this case compel the conclusion that the government's position is incorrect. There can exist a legitimate fear of criminal prosecution while an IRS investigation remains in the civil stage, before formal transfer to the criminal division.[8] See *United States v. Sharp*, 920 F.2d 1167, 1170 (4th Cir.1990) (The privilege against self-incrimination "may apply in the context of an IRS investigation into civil tax liability, given the recognized potential that such investigations have for leading to criminal prosecutions.").

In *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1978), the Supreme Court examined the nature of the IRS investigatory system, and, relying in part on the legislative history of the Internal Revenue Code, concluded that the system's "criminal and civil elements are inherently intertwined." *Id.* at 309, 98 S.Ct. at 2363. The IRS summons procedure reflects the interrelationship of these components. The IRS summons served on Argomaniz required that he produce all documents and records related to income he received during the years 1984 through 1987.[9] If Argomaniz did produce these documents, assuming that he did possess them, then both the civil and criminal aspects of the IRS system would be implicated. The IRS would be able to determine Argomaniz's civil tax liability for the years in question. However, although "[i]t is true that a 'routine tax investigation' may be initiated for the purpose of a civil action rather than criminal prosecution[,] ... tax investigations frequently lead to criminal prosecutions." *Mathis v. United States*, 391 U.S. 1, 4, 88 S.Ct. 1503, 1505, 20 L.Ed.2d 381 (1968) (holding that even in routine tax investigations a person in custody, regardless of the reason for his detention, must be given the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). Thus, production of these documents and records, if incriminatory (as will be determined by the in camera inspection directed below), also likely would cause Argomaniz to incur criminal liability for violation of the Internal Revenue Code.

Section 7203 of the Internal Revenue Code[10] makes willful failure to file an income tax return a crime. Accordingly, production of these documents would establish two of the essential elements of this crime—it would prove that Argomaniz did have taxable income for the years in question, yet failed to file income tax returns. Under these circumstances, this civil tax “investigation has become ‘an inquiry with dominant criminal overtones’ ... [such that Argomaniz was] entitled to raise his fifth amendment objections.” *United States v. Roundtree*, 420 F.2d 845, 852 (5th Cir.1969). The criminal penalties with which Argomaniz was faced “were scarcely ‘remote possibilities out of the ordinary course of the law’ “ and his “hazards of incrimination can only be characterized as ‘real and appreciable.’ “ *Grosso v. United States*, 390 U.S. 62, 66, 67, 88 S.Ct. 709, 713, 19 L.Ed.2d 906 (1968). See also *United States v. Moss*, No. 88-2676 (D.Md. July 24, 1990) (WESTLAW, 1990 WL 169256); *United States v. Cates*, 686 F.Supp. 1185 (D.Md.1988). Therefore, Argomaniz’s apprehension of criminal prosecution clearly was reasonable, assuming that the records in his possession would be incriminatory under the circumstances existing at the time of production.[11]

We stress, however, that it is the role of the district court, not the taxpayer, to evaluate the taxpayer’s claim of incrimination and determine whether it is reasonable. “The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified....” *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). See also *Sharp*, 920 F.2d at 1170 (“Whether there is sufficient hazard of incrimination is of course a question for the courts asked to enforce the privilege.”).

In this case, the district court did opine that Argomaniz would have a legitimate fear of criminal indictment if he complied with the IRS summons. In its order granting Argomaniz’s motion for a stay of enforcement of the summons pending this appeal, the district court stated that Argomaniz had “shown more than a generalized fear of criminal prosecution” and had “good reason to believe that his answers may tend to incriminate him....”[12] Although this finding does suggest that Argomaniz was entitled to raise his fifth amendment privilege, it does not

sufficiently determine the applicability of Argomaniz's privilege against self-incrimination to the summons at issue in this case. "A court must make a particularized inquiry, deciding, in connection with each specific area that the questioning party wishes to explore, whether or not the privilege is well-founded." *United States v. Melchor Moreno*, 536 F.2d 1042, 1049 (5th Cir.1976). See *United States v. Rue*, 819 F.2d 1488 (8th Cir.1987).

The district court must review Argomaniz' assertions of the privilege on a question-by-question basis. This will best be accomplished in an in camera proceeding wherein Argomaniz is given the opportunity to substantiate his claims of the privilege and the district court is able to consider the questions asked and the documents requested by the summons. See *United States v. Roundtree*, 420 F.2d 845, 852 (5th Cir.1969) ("The district court may then determine by reviewing ... [the taxpayer's] records and by considering each question whether, in each instance, the claim of self-incrimination is well-founded.").<sup>[13]</sup> The district court already has determined that Argomaniz does face a real and substantial hazard of incrimination. However, we must remand this case to the district court, to enable that court to conduct an in camera proceeding, on a question-by-question basis, to determine the actual extent to which Argomaniz may rely on his fifth amendment privilege to avoid compliance with the IRS summons. Stated differently, the district court must ascertain: first, whether the taxpayer has the records sought and, second, whether under the existing circumstances they are incriminatory.

#### B. The Fifth Amendment Privilege May Exist

Even though compliance could be incriminating, the government argues that Argomaniz must comply with the IRS summons because Argomaniz did not properly invoke his fifth amendment privilege. First, the government claims that the fifth amendment is not applicable to this situation because the contents of business records are not privileged. Second, the government asserts that Argomaniz made an impermissible blanket claim of self-incrimination. Both of these arguments are without merit.

The government correctly states that the contents of voluntarily prepared business records are not protected by the fifth amendment privilege against self-incrimination. See *United States v. Doe*, 465 U.S.



605, 610-12, 104 S.Ct. 1237, 1241-42, 79 L.Ed.2d 552 (1984). However, Argomaniz is not invoking his privilege as to the contents of the documents described in the IRS summons, but as to the act of producing the documents. The Supreme Court "has emphasized that the mere act of producing documents whose contents were not privileged could be sufficiently testimonial and incriminating in nature to trigger the fifth amendment privilege." *In re Grand Jury No. 86-3 (Will Roberts Corp.)*, 816 F.2d 569, 571 (11th Cir.1987) (citing *United States v. Doe*, 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984) and *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976)). To be testimonial, a "communication must itself, explicitly or implicitly, relate a factual assertion or disclose information," *Doe v. United States*, 487 U.S. 201, 210, 108 S.Ct. 2341, 2347, 101 L.Ed.2d 184 (1988); it must "add ... to the sum total of the government's information...." *Fisher v. United States*, 425 U.S. 391, 411, 96 S.Ct. 1569, 1581, 48 L.Ed.2d 39 (1975).

By producing documents in compliance with the IRS summons, Argomaniz would be establishing the existence and authenticity of the documents listed in the summons, as well as verifying that these documents were in his possession. *Doe v. United States*, 487 U.S. 201, 209, 108 S.Ct. 2341, 2347, 101 L.Ed.2d 184 (1987). He would actually be informing the government that he had income in the years in question yet failed to file income tax returns. This act of production would be sufficiently testimonial and incriminating to activate Argomaniz's fifth amendment privilege.

The government's final argument, that there was no fifth amendment justification for Argomaniz's blanket invocation of the privilege against self-incrimination, is also without merit. It is true that a blanket refusal to produce records or to testify will not support a fifth amendment claim. *United States v. Roundtree*, 420 F.2d 845, 852 (5th Cir.1969). However, Argomaniz did not refuse to comply with the summons in a blanket manner. Instead, Argomaniz followed the general rule that a taxpayer "must present himself with his records for questioning, and as to each question and each record elect to raise or not to raise the defense." *Id.* Argomaniz answered the non-incriminating questions posed by the IRS officer, and, in response to each incriminating question or document request refused to answer and cited his privilege against self-

incrimination. When the IRS officer realized that Argomaniz would raise the privilege in response to each of her document requests and to each of her questions concerning Argomaniz's tax liability for the years in question, the IRS officer terminated the interview.[14] Argomaniz could not respond to questions that he was not asked. Thus, the effect of the interview was as if the IRS officer had asked all relevant questions and for each document listed in the summons, and Argomaniz had responded by repeatedly raising his fifth amendment privilege in response. Under the circumstances in this case, a blanket invocation of the privilege against self-incrimination did not occur.

### III. CONCLUSION

Because compliance with the IRS summons could violate Argomaniz's fifth amendment privilege against self-incrimination and because the district court failed to make a particularized inquiry necessary to determine whether Argomaniz properly refused to comply with the summons, we REVERSE the district court's order compelling Argomaniz to comply with the summons. We REMAND this matter to the district court with instructions to determine, through an in camera inspection, the existence of Argomaniz's fifth amendment privilege in this case.

REVERSED and REMANDED.

[1] Section 7602 of the Internal Revenue Code provides:

(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 to 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.

[2] The summons required Argomaniz to produce:

All documents and records you [Argomaniz] possess or control that reflect income you received for the year(s) 1984, 1985, 1986, [and] 1987. These documents and records include, but are not limited to: Forms W-2, Wage and Tax Statement, Forms 1099 for interest or dividend income, employee earnings statements, and records of deposits with banks or other financial institutions. Also include any and all books, records, documents and receipts for income from, but not limited to, the following sources: wages, salaries, tips, fees, commissions, interest, rents, royalties, alimony, state or local tax refunds, annuities, life insurance policies, endowment contracts, pensions, estates, trusts, discharge of indebtedness, distributive shares of partnership income, business income, gains from dealings in property, and any other compensation for services (including receipt of property other than money). This includes any and all documents and records pertaining to any income you have assigned to any other person or entity.

[3] Section 7402(b) of the Internal Revenue Code provides:

(b) To enforce summons.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

[4] Section 7604 of the Internal Revenue Code provides:

(a) Jurisdiction of district court. If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by ap-

propriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section ... 7602 neglects or refuses to obey such summons, or to produce books, papers, records or other data, or to give testimony as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or the commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

[5] The transcript of this hearing reads, in pertinent part, as follows:

Q [Simmons]: State your name.

A [Argomaniz]: Al Argomaniz.

Q: Your social security number?

A: 267-11-1925.

Q: Your home address, your present home address?

A: 601 Vila Bella....

Q: What city?

A: Coral Gables.

Q: Zip code?

A: 33143.

Q: Do you have your W-2 forms for the years 1984, '85, '86 and '87?

A: This box together with the boxes which I have brought but cannot carry upstairs at one time contain such as [sic] the requested documents [that] were under my custody or control at the time of service of the summons or at this time. However, I respectfully decline to produce, identify or authenticate such documents based upon my Constitutional privilege [sic] against self incrimination. In making this claim I rely upon

the advice of counsel ....

Q: Do you have your deposit information or bank records and other financial information with you for the periods '84, '85, '86 and '87?

A: Based upon my Constitutional rights, I refuse to answer that question.

Q: ... Can you name the employees that you have had, can you give me the names of the employees you have had over the last four years, '84, '85, '86 an[d] '87?

A: Based upon my Constitutional rights, I refuse to answer.

Q: Have you received any interest income?

A: Based upon my Constitutional rights, I refuse to answer the question.

Q: Do you have any other income sources other than salaries, or wages?

A: Based upon my Constitutional rights, I refuse to answer the question.

Q: Have you made any payments to these taxes for '84, '85, '86 or '87?

A: Based upon my Constitutional rights, I refuse to answer the question.

Q: You have the records and they apparently are sealed. Now I am going to ask you to turn them over to me. I will give you a document receipt—turn the sealed boxes over to me.

A: This box together with the boxes that I brought, cannot carry upstairs at one time, contain such as [sic] the requested documents that were under my custody or control at the time of service of the summons or at this time. However, I respectfully decline to produce, identify or authenticate such documents based upon my Constitutional privilege against self incrimination. In making this claim I rely upon the advice of counsel....

Q: All right. Well, I see no other recourse than to adjourn the meeting and proceed with the enforcement under the summons and the court order.

Q: This concludes the interview.

[6] In its October 10, 1989 order granting Argomaniz's motion to

stay enforcement of the summons, the district court stated:

Under the U.S. Supreme Court's holding in *United States v. Doe*, 465 U.S. 605 [104 S.Ct. 1237, 79 L.Ed.2d 552] (1983) Petitioner [Argomaniz] can demonstrate at least some likelihood of prevailing on his Fifth Amendment claim on appeal. Furthermore, petitioner has shown more than a generalized fear of criminal prosecution. He was notified that he was to be questioned regarding his failure to file income tax returns for a three year period. Certainly petitioner [Argomaniz] has good reason to believe that his answers may tend to incriminate him, whether or not criminal proceedings have been instituted against petitioner [Argomaniz]. By not staying enforcement of the summons pending appeal, this Court would, in effect, deprive petitioner [Argomaniz] of his appeal on his Fifth Amendment claim and would force him to waive his constitutional right against self-incrimination. (emphasis added).

[7] The fifth amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself..." U.S. Const.Amend. V.

[8] The government relies on the following language from our decision in *United States v. Reis*, 765 F.2d 1094 (11th Cir.1985) (per curiam), to support its position that there can never be a reasonable fear of criminal prosecution while an IRS investigation is still in the civil stages:

When the I.R.S. properly issues a summons in support of a civil investigation to determine a taxpayer's legal liability, the mere fact that evidence might be used in a later criminal prosecution will not support a blanket claim of self-incrimination. *Id.* at 1096 (emphasis in original).

However, this passage does not state that the privilege may never be invoked in a civil IRS investigation. See *United States v. Cuthel*, 903 F.2d 1381, 1384 (11th Cir.1990) ("A witness may properly invoke the privilege when he 'reasonably apprehends a risk of self-incrimination, ... though no criminal charges are pending against him ... and even if the risk of prosecution is remote.' " (quoting *In re Corrugated Container Anti-Trust Litigation*, 620 F.2d 1086, 1091 (5th Cir.1980), cert. denied sub nom *Adams Extract Co. v. Franey*, 449 U.S. 1102, 101 S.Ct. 897, 66 L.Ed.2d 827 (1981))). Instead, it stands for the proposition that a blanket

claim of self-incrimination will not be successful in a civil IRS investigation. See *United States v. Allee*, 888 F.2d 208, 212 (1st Cir.1989) (citing *Reis* for the proposition that a blanket fifth amendment objection to an IRS summons is not a viable defense). To the extent that *Reis* could be read otherwise, it is obiter dictum. Below we discuss the government's argument that Argomaniz's fifth amendment claim was a blanket claim.

[9] See *supra* note 2.

[10] 26 U.S.C. Sec. 7203 reads as follows:

Sec. 7203. Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U.S.C. Sec. 6012 reads as follows:

Sec. 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 ...

[11] In the "Petition to Enforce Internal Revenue Summons" Simmons filed on February 21, 1989, she stated: "The books, records, papers, and other data sought by the summons are not already in the possession of the Internal Revenue Service." In the Declaration attached to this petition, Simmons declared, under penalty of perjury, that "[t]he books, papers, records or other data sought by the summons are not already in the possession of the Internal Revenue Service, or are not readily accessible to us." It should be noted

that it would be improper for the IRS to seek enforcement of a summons, the objects of which already were in its possession. *United States v. Powell*, 379 U.S. 48, 57-58, 85 S.Ct. 248, 255, 13 L.Ed.2d 112 (1964). Therefore, because the IRS, by its own declaration, has no other ready access to the summonsed documents, Argomaniz's production of these documents, assuming the district court finds them to be in Argomaniz's possession, very well could be incriminatory.

[12] See *supra* note 6.

[13] As the Second Circuit observed in *Estate of Fisher v. Commissioner of Internal Revenue*, 905 F.2d 645, 650 (2d Cir.1990), similar in camera proceedings have been repeatedly looked upon with favor by the Supreme Court. See also *In re Grand Jury Subpoena*, 831 F.2d 225, 226 (11th Cir.1987) (directing the district court to conduct either a hearing or an in camera inspection on a document-by-document basis to ascertain the applicability of the attorney-client privilege).

[14] See *supra* footnote 5 for the pertinent transcript of Argomaniz's appearance before the IRS officer.



# U.S. v. Sharp

United States v. Sharp, 920 F.2d 1167, (4th Cir. 1990)

UNITED STATES of America; David E. Mitchell,  
Revenue Office of the Internal Revenue Service,  
Plaintiffs-Appellees,

v.

Roger L. SHARP,  
Defendant-Appellant.

No. 89-2109.

United States Court of Appeals, Fourth Circuit.

Argued Oct. 5, 1990.

Decided Dec. 6, 1990.

As Amended Dec. 20, 1990.

Stephen Jon Cribari, Acting Federal Public Defender, argued (Fred Warren Bennett, Federal Public Defender, Beth M. Farber, Asst. Federal Public Defender, Baltimore, Md., on brief), for defendant-appellant.

Doris Denise Coles, Tax Div., U.S. Dept. of Justice, Washington, D.C., argued (Shirley D. Peterson, Asst. Atty. Gen., Gary R. Allen, Charles E. Brookhart, Tax Div., U.S. Dept. of Justice, Washington, D.C., Breckinridge L. Willcox, U.S. Atty., Baltimore, Md., on brief), for plaintiffs-appellees.

Before PHILLIPS and WILKINSON, Circuit Judges, and WILSON, United States District Judge for the Western District of Virginia, sitting by designation.

PHILLIPS, Circuit Judge.

The fifth amendment exists, in part, to “assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action.” *Maness v. Meyers*, 419 U.S. 449, 461, 95 S.Ct. 584, 592, 42 L.Ed.2d 574 (1975). This case raises the question whether the fifth amendment provided a taxpayer with a basis for refusing to answer questions propounded by the Internal Revenue Service (IRS) in the course of an investigation of possible civil liability. The dis-

strict court held that it did not provide that protection and ordered the taxpayer to answer or be held in contempt. We disagree and reverse.

I

The IRS initiated an investigation of Roger Sharp to determine his tax liability for the years 1977, 1978, 1980, 1981, and 1982, after determining that Sharp had failed to file a federal income tax return for those years.[1]) As part of the investigation, an IRS Revenue Officer issued a summons in December of 1987, requiring Sharp to appear for questioning and to produce financial records and documents for the years in question. Sharp failed to comply with the summons, and the government, pursuant to 26 U.S.C. Secs. 7402(a), (b), and 7604(a), petitioned the district court for judicial enforcement. The district court, after a hearing, entered an order enforcing the summons and directing Sharp to appear and comply with the summons. Sharp did appear on the appointed day but he refused to testify or produce any documents.

The government then petitioned for an order holding Sharp in contempt. Because he faced criminal penalties, the court appointed counsel for Sharp, who had been unrepresented up to this point. At the show cause hearing, Sharp provided some records to the IRS but these documents proved useless. As a result the court ordered Sharp to answer IRS questions concerning his employment and his assets for the years in question. Sharp, accompanied by counsel this time, appeared for further questioning by the IRS and was asked a series of questions designed to elicit information on (1) his income for 1977-1982; (2) bank records or real estate records pertaining to any income and assets for those years; (3) his employment; and (4) the location of the banks in which he kept income or assets. Sharp, through his court-appointed counsel, invoked his fifth amendment privilege against self-incrimination in response to each IRS question.

The district court then ordered Sharp to answer the IRS questions. The court rejected Sharp's fifth amendment claim, finding that "in light of the government's representation (implicit, if not express) that it has no present intention of pursuing criminal prosecution of respondent, ... respondent's fear for self-incrimination is merely 'trifling or imaginary.'" The court added that if Sharp faced criminal prosecution in the future,

the court could then, if appropriate, either dismiss the charges or suppress information obtained from the compelled testimony.

Upon Sharp's request, the district court certified the question for interlocutory appeal under 28 U.S.C. Sec. 1292(b), and we granted leave to appeal.

## II

At the outset, we reject the government's contention that Sharp's claim of privilege came too late to be considered. Specifically, the contention is that he might have raised it earlier in resisting the court's enforcement order; that he did not; that the order was therefore a final one from which he might have appealed but did not; and that he was therefore precluded by principles of *res judicata* from raising it thereafter.

Such a failure may in appropriate cases operate to preclude later assertions of the privilege, see, e.g., *United States v. Rylander*, 460 U.S. 752, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983), but this is not such a case. *Res judicata* does not operate inexorably, and it should not operate here to deprive a litigant of a fundamental constitutional right because of his failure to assert it in technically proper form while unrepresented by counsel. Once represented, it was properly asserted.

## III

The fifth amendment's protection against self-incrimination applies in any type of proceeding whether civil, criminal, administrative, investigatory, or adjudicatory. *Maness*, 419 U.S. at 464, 95 S.Ct. at 594. And it applies not only to evidence which may directly support a criminal conviction, but to "information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution." *Id.* at 461, 95 S.Ct. at 592 (citing *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951)).

Accordingly, it may apply in the context of an IRS investigation into civil tax liability, given the recognized potential that such investigations have for leading to criminal prosecutions. *Mathis v. United States*, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968); *United States v. Edgerton*, 734 F.2d 913 (2d Cir.1984); *Shaffer v. United States*, 528 F.2d 920 (4th

Cir.1975); *United States v. Cates*, 686 F.Supp. 1185 (D.Md.1988). In particular, the privilege may properly be invoked in this context on the basis that the information being sought could serve as a link in the chain of evidence in a prosecution for criminal violation of the tax laws. See, e.g., *Edgerton*, 734 F.2d at 921.

In this context, as generally, the privilege may not, however, be invoked on no more than the mere assertion by one claiming the privilege that information sought by the government may be incriminating. Whether there is a sufficient hazard of incrimination is of course a question for the courts asked to enforce the privilege. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951).

In making this determination, a court asks essentially two things. The first is whether the information is incriminating in nature. This may appear in either of two ways. It may be evident on its face, in light of the question asked and the circumstances of its asking. *Id.* at 486-87, 71 S.Ct. at 818-19. If it is so facially evident, that ends this inquiry. If it is not, the person asserting the privilege may yet demonstrate its incriminating potential by further contextual proof. See, e.g., *Rylander*, 460 U.S. at 758-59, 103 S.Ct. at 1553-54.

If the incriminating nature of the information is established by either route, there remains the question whether criminal prosecution is sufficiently a possibility, all things considered, to trigger the need for constitutional protection. As to this, the proper test simply assesses the objective reasonableness of the target's claimed apprehension of prosecution. And on the better view of things here, the reasonableness of a claimed apprehension should simply be assumed once incriminating potential is found, unless there are genuine questions about the government's legal ability to prosecute.[2]) That is to say, once incriminating potential is found to exist, courts should not engage in raw speculation as to whether the government will actually prosecute, see *Edgerton*, 734 F.2d at 921 (quoting *United States v. Jones*, 703 F.2d 473, 478 (10th Cir.1983)), and should only pursue that inquiry when there are real questions concerning the government's ability to do so because of legal constraints such as statutes of limitation, double jeopardy, or immunity. In *re Folding Carton Antitrust Litigation*, 609 F.2d 867, 872 (7th Cir.1979).

Here, the incriminating nature of the information sought from

Sharp was evident from the very questions asked under the circumstances of their asking. Sharp was asked to provide information directly relating to his income and his knowledge of it for the years in which he was under investigation for failing to file returns. Willfulness is an essential element of the criminal offense of failing to file income tax returns. 26 U.S.C. Sec. 7203. Hence, it is evident that the information sought would “furnish a link in the chain of evidence that could lead to prosecution,” and that suffices. See *Hoffman*, 341 U.S. at 486, 71 S.Ct. at 818.

That leads to the second inquiry, whether Sharp’s asserted apprehension of criminal prosecution was a reasonable one under the circumstances. It was on this point that the district court rejected his claim—on the express basis that “in light of the government’s representation (implicit, if not express) that it has no present intention of pursuing criminal prosecution... [Sharp’s] fear of prosecution is merely ‘trifling or imaginary.’”[3] As our statement of the proper test has indicated, the district court erred in this conclusion.

With the incriminating nature of the information facially evident, the reasonableness of Sharp’s apprehension of prosecution should have been assumed, unless there were reasons (other than the government’s express or implied representation of its present intention) to question the government’s legal ability to prosecute. In the district court, the government suggested no such constraints, relying simply on its assertion of present intention, and the district court obviously relied on no extrinsic legal constraints on prosecution.

On this appeal, however, the government has sought to raise for the first time the proposition that the six-year statute of limitations applicable to willful failure to file, 26 U.S.C. Sec. 6531, has expired “with respect to all years under investigation and for which information has been sought.”[4] While we might be justified in declining to consider this newly advanced alternative theory for affirmance, see *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976), we believe we should address it in view of the general seriousness of allowing invocation of this privilege to thwart government investigations. Doing so, we find no merit in it.

Sharp was being investigated for, inter alia, tax years 1981 and 1982. According to the concededly thin case law on this question, see *United*

*States v. Doelker*, 211 F.Supp. 663, 665 (N.D. Ohio 1962); see also *United States v. Phillips*, 843 F.2d 438, 443 (11th Cir.1988), the six-year statute of limitations began to run on April 15, 1982 (for 1981) and April 15, 1983 (for 1982). The IRS issued the summons on December 17, 1987, and petitioned for judicial enforcement on March 11, 1988. On May 16, 1988, the court entered an order enforcing the summons. Thus, it would appear that as of the date of the court's order enforcing the summons (May 16, 1988), the statute of limitations had not run for at least tax year 1982. Having reached this conclusion, we need not wrestle with the tougher problems of tolling or the appropriate time to make the inquiry of whether the statute of limitations had run. Since the statute may not have run for tax year 1982, Sharp's fear of prosecution remains sufficiently well-founded.

#### IV

As indicated, the district court sought to buttress its rejection of Sharp's claim by observing that if prosecution did ensue, the court could then act to protect him by either dismissing the charges or suppressing evidence. Presumably recognizing that this cannot act as a substitute for the constitutional protections provided by the self-incrimination clause, the government does not rely upon this proffer by the district court as an alternative basis for affirmance. We nevertheless address the point briefly in view of the district court's apparent reliance upon it.

In brief sum, a court may not on this basis find a person's fifth amendment right sufficiently protectible by the court that his answers to incriminating questions may be compelled. The appropriate device for achieving this end is the grant of use immunity under 18 U.S.C. Secs. 6002, 6003, *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), a device that may only be used by the executive branch acting in its prosecutorial function, and is not available to the judiciary. *United States v. Doe*, 465 U.S. 605, 616, 104 S.Ct. 1237, 1244, 79 L.Ed.2d 552 (1984) (provision of "constructive use immunity" by judiciary would violate separation of powers); *Maness*, 419 U.S. at 463, 95 S.Ct. at 593 (compulsion under promise of judicial protection would violate self-incrimination clause).

V

For the foregoing reasons, we reverse the order of the district court compelling the appellant, at peril of a contempt sanction, to answer questions propounded by the IRS. This is of course without prejudice to the government's right to seek compulsion by other, valid means if so disposed.

REVERSED

[1]Sharp's counsel submitted at oral argument that Sharp is a "tax protester." That he may be is irrelevant to the fifth amendment issue he raises.

[2]An assumption sufficiently justified, indeed compelled, by the existence of the government's general constitutional obligation faithfully to execute its criminal (as other) laws, U.S. Const. Art. II, Sec. 3, principally by prosecuting (subject of course to prosecutorial discretion) all those whose commission of crime it has sufficient evidence to prove. Certainly an apprehension that in a particular case that general obligation will be carried out could not be thought unreasonable.

[3]In so holding, the district court relied on *United States v. Reis*, 765 F.2d 1094 (11th Cir.1985), which it seemed to read as requiring an independent inquiry by the court into the actual likelihood of prosecution, and a finding of probability rather than mere possibility to trigger fifth amendment protection. See *id.* at 1096 ("mere fact that evidence might be used" in criminal prosecution not sufficient) (emphasis in original). To the extent this is a proper reading of *Reis* (a matter not entirely clear from its rather cursory discussion of the point), we think the district court's reliance upon it was not well founded. Reliance more properly could have been placed on a recent decision of the same district court in *United States v. Cates*, 686 F.Supp. 1185 (D.Md.1988) (Black, J.), which appears to have applied essentially the test we hold to be the proper one. See *id.* at 1191 (mere fact that information sought was facially incriminating demonstrated sufficient likelihood of prosecution to trigger constitutional protection; fact that IRS had not revealed any present intention to prosecute irrelevant).

[4]There is the oddity about the government's position that if it has indeed understood from the outset—whether correctly or not—that it could not prosecute, it could long since have acted decisively on that understanding and proceeded with its civil investigation without interruption. As Sharp notes in responding to this newly raised theory, had the government committed itself on the matter in some binding way this appeal never would have occurred. Appellant's Reply Br. at 3. In the end, the government equivocates on the point even as it raises it. At one point in its brief it suggests that "when the possibility of prosecution appears to be remote (as when the statute of limitations has run) rejection of a claim of privilege is proper." Appellee's Br. at 10-11 (emphasis added). At another, it asserts even more disarmingly that "since the applicable statutes of limitations have expired, we cannot fathom how taxpayer could possibly be incriminated...." Id. at 11. What the government has not yet done is formally to relieve the target's apprehension—as obviously it could by either of several available means—that prosecution remains a possibility. So long as the government thus attempts to keep this anchor to windward while this appeal is pending, Sharp's apprehension is not relieved.



# U.S. v. Robbins

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

UNITED STATES OF AMERICA, et. al.

Petitioners,

v.

PAUL ROBBINS,

Respondent

Case #: C-04-4097-JH

ORDER GRANTING  
RESPONDENT'S MOTION  
TO DISMISS

[Doc. No. 11]

Respondent Paul Robbins moves to dismiss Petitioners' request to enforce a summons issued by the Internal Revenue Service ("IRS") summons, asserting that compliance with the summons would violate his Fifth Amendment privilege against self-incrimination. The Court has considered the moving and responding papers, oral argument presented at the hearing on December 17, 2004, and the documents provided to the Court by Respondent for *in camera* review. For the reasons set forth below, the motion to dismiss will be granted.

## I. BACKGROUND

On May 4, 2004, Petitioners summoned Respondent to appear before the Internal Revenue Service to give testimony and provide documentation pertaining to his federal income tax liability for the years 2000, 2001 and 2002.

On June 7, 2004, Robbins appeared before the IRS but refused to provide testimony or documentation pursuant to the summons. N Sep-

tember 20, 2004, Petitioners filed a verified petition to enforce the summons. On October 29, 2004, the Court ordered the Respondent to appear before it on December 10, 2004, to show cause why he should not be compelled to provide the testimony and documents required by the summons. The hearing date was continued until December 17, 2004. On November 24, 2004, Robbins appeared before the IRS for a second time and again refused to provide testimony or documentation, asserting his Fifth Amendment privilege against self-incrimination.

On December 2, 2004, Respondent moved to dismiss the instant petition. On December 13, 2004, Petitioners filed opposition to the motion on the ground that Respondent has failed to comply with the summons and requested that the Court conduct an *in camera* review of any financial documentation that Respondent may possess that pertains to the summons. On December 17, 2004, Respondent appeared before the Court, presented a reply to Petitioners' opposition, and was ordered to provide the documents requested in the summons to the Court for *in camera* review. On March 18, 2005, Respondent filed a written response, stating that he possesses no additional documents.

## II. DISCUSSION

The Court has reviewed the documents provided by Respondent *in camera* in order to determine (1) whether the documents would "support a conviction under a federal criminal statute" or "furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime," *United States v. Rendahl*, 746 F.2d 553m 555 (9<sup>th</sup> Cir. 1983), and (2) whether Respondent faces "substantial hazards of self-incrimination" that are "real and appreciable," *id.* The Court has made an "examination of the questions [set forth in the summons], their setting, and the peculiarities of the case," *id.*, and has determined that the documents provided by Respondent are subject to Respondent's Fifth Amendment privilege against self-incrimination under the standard articulated in *Rendahl*. Petitioners have declined to offer Respondent use immunity. *United States v. Doe*, 465 U.S. 605, 617 (1984); 18 U.S.C. §§ 6002-04. Accordingly, Court will grant Respondent's motion to dismiss.

**III. ORDER**

Good cause therefore appearing, IT IS HEREBY ORDERED that the motion to dismiss is GRANTED. The clerk shall close the file.

DATED: 04-27-05

(x) signed  
Jeremy Fogel  
United States District Judge

## About the Author

**W**illiam Conklin is a native of Colorado. He has a BA in Spanish and an MA in Communications from the University of Colorado. Mr. Conklin was a school teacher for 15 years at the elementary, high school and college levels. He began his battle against the IRS in 1976.

In 1981, Mr. Conklin quit his teaching job and devoted full time to his fight with the IRS. Within a few years, Mr. Conklin had six published wins and he began to research the issues relating to the Income Tax and the Fifth Amendment. He now has 25 years of experience on the front lines in the battle with the Internal Revenue Service and the Federal Income Tax.

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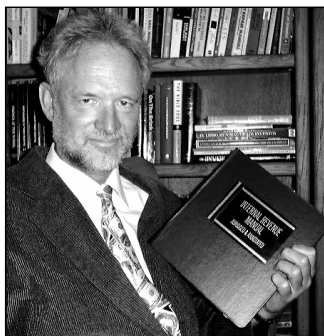
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