Institute For Policy Innovation

IPI CENTER FOR TAX ANALYSIS

A Monument of Deficient Wisdom:

The Constitutional Conflict in Federal Income Tax Law Enforcement

By Daniel J. Pilla

POLICY REPORT 165

DECEMBER 2001

The Road Map to Tax Reform™ Series

Executive Summary

The Constitution originally forbade direct, invasive taxes. The Sixteenth Amendment removed this protection and gave birth to the modern income tax, sacrificing our individual liberties, our legal principles and protections to government's insatiable desire for revenue. A primary criterion for tax reform should be the restoration of the individual liberties intended by the Founders.

Although America is engaged in a serious debate over the question of far-reaching tax reform, absent from the discussion is the question of how the current tax system and our system of constitutional limited government are at odds with one another. The Founders of the republic established a government with limited, enumerated powers. Through the Constitution and Bill of Rights, the Founders reserved to the people their fundamental rights to life, liberty and property.

As a part of the overall mechanism for operating our government, the Founders established a tax system that could fund the new government while at the same time, respect the limitations placed upon it by the Constitution and Bill of Rights. However, the Sixteenth Amendment radically altered this delicate balance. It removed the protection of Article I, section 9 of the Constitution, which prohibited the federal government from laying a "direct tax" unless "in proportion to the census or enumeration." The Sixteenth Amendment gave birth to the modern income tax and its enforcement agency, the Internal Revenue Service.

Since its adoption in 1913, the modern income tax has been a source of constant, sweeping legislative alterations and judicial interpretations. The tax code now consists of more than 18,000 pages of mind-numbing complexity that touches the lives of nearly every citizen. In its haste to use the personal income tax to expeditiously raise greater amounts of revenue, Congress erected a statutory scheme that strikes at the heart of our most important liberties. And while the Supreme Court was established as a barrier against such encroachments upon liberty, it in fact has allowed Congress to all but eradicate individual liberties upon the proposition that the government's "overriding need for revenue" outweighs the citizens' interest in individual rights.

In the debate over sweeping tax reform, we must address the question of whether and to what extent we desire that individual liberties should be preserved. The instant examination plainly illustrates that the income tax, as a direct tax, is a frontal assault upon the most fundamental of our constitutional liberties. It is made abundantly clear why the Founders rejected direct taxation such as an income tax in favor of indirect taxes as the chief means of raising revenue. The enforcement of a system of direct taxation necessarily requires the systematic invasion of individual liberties and destruction of constitutional restrictions on the power of government. Otherwise, a direct tax is simply unenforceable. It is for that reason that an income tax of any kind is wholly antithetical to liberty. This discussion clearly shows that liberty and an income tax cannot co-exist in the same society. One must necessarily drive out the other. The question for policy makers is simple: which is the American people more willing to learn to live without?

Stand by the roads, and look, and ask
for the ancient paths, where
the good way is; and walk in it,
and find rest for your souls.
— Jeremiah 6:16

Direct all inquiries to:

Institute for Policy Innovation
250 South Stemmons, Suite 215
Lewisville, TX 75067

(972) 874-5139 [voice] Email: **ipi@ipi.org**
(972) 874-5144 [fax] Website: **www.ipi.org**

The Road Map to Tax Reform™

Table of Contents

A Monument of Deficient Wisdom

The Conflict Between the Constitution and Federal Income Tax Law Enforcement

By Daniel J. Pilla

Introduction

The debate over fundamental tax reform necessarily embraces numerous questions concerning the economic and social viability of the various alternative proposals. At the core of the debate is whether a given proposal is more or less meritorious than the graduated income tax system presently in effect. What has not yet been thoroughly examined in the course of this debate is the question of whether and to what extent the present system is in keeping with the scheme of ordered liberty envisioned by our Founding Fathers.

It has been said that the genius of the Founders was their capacity to understand human nature and the nature of governments in general and then to strike a delicate balance between the interests of liberty on the one hand and the need for social order on the other. The Founders understood that a condition of absolute liberty necessarily implied social chaos or anarchy, while a government powerful enough to quash all discord was prone to abject tyranny.

As a result, the Founders created a Constitution under which specific powers were delegated from the people to the government. This concept, known as the doctrine of "enumerated powers," recognizes that in their natural state, citizens enjoy unlimited rights but that in the course of social interaction, certain acts that operate to the detriment of others must be restrained. Government is the institution through which such restraint is imposed.

> ***Government has an affirmative duty to respect the rights of the citizen while it undertakes to raise its needed revenue.***

The new government under the Constitution was afforded only those powers necessary to protect the life, liberty and property of the citizens. At the same time, the government was expressly precluded from hindering citizens in the peaceful exercise of their basic liberties in the midst of industrial and social intercourse. Thomas Jefferson, the author of the Declaration of Independence, referred to these liberties as "inalienable rights," or rights that are not subject to being bought, sold or transferred from one person to another or from a citizen to his government. Such rights are clearly expressed in the Constitution and the Bill of Rights.

Throughout history, there has been a well-documented and undeniable friction between the cause of liberty and the growth of government. Jefferson observed that the nature of things is for government to encroach upon liberty and for liberty to yield. In the context of the American experiment with liberty, nowhere has this friction been more apparent—and more detrimental to the interests of liberty—than in the area of taxation.

Former Chief Justice John Marshall observed that the "power to tax involves the power to destroy."[1] Such destruction manifests itself in many forms, including political, personal and economic. Even beyond these, the unchecked power to tax and enforce the collection of taxes has the direct, proximate result of dispossessing citizens of their otherwise inalienable rights.

The challenge for planners is to erect a system of taxation that allows the government to raise the revenue it needs for its legitimate functions, but to do so in a manner that is not offensive to the inalienable rights of the people. That is to say, the government must raise the revenue in the least invasive manner.

To say it another way, government has an affirmative duty to respect the rights of the citizen while it undertakes to raise its needed revenue.

This study examines exactly how the current graduated income tax system has eroded—and in some instances eviscerated—certain inalienable rights. To erect a tax scheme that respects these rights we must: 1) understand how the current system offends them, and 2) make a conscious decision that as a society, it is necessary and desirable to limit the reach of government's taxing power to the fullest extent possible. If we cannot agree upon the importance of the latter proposition, there is little reason to change the current system.

The Growth of the Income Tax Code: *"It fills and disgraces our voluminous codes."*[2]

An objective examination of our current tax system leads to an inescapable conclusion: it is a mess. Since the inception of the income tax as we know it in 1913, the tax code has exploded to more than 18,000 pages of law and regulation. This says nothing of tens of thousands of pages of Revenue Rulings and Procedures issued by the IRS, nor the voluminous guidance papers issued by the Office of Chief Counsel, nor the hundreds of thousands of pages of court decisions that pour forth from the nation's judiciary each year, all in an attempt to guide citizens and tax professionals through what all agree has become a hopeless quagmire of tax law.

The language of section 509(a)(4) provides a glimpse of exactly how complex and convoluted the code is. It reads in part,

> *For purposes of paragraph (3), an organization described in paragraph (2) shall be deemed to include an organization described in section 501(c)(4), (5), or (6) which would be described in paragraph (2) if it were an organization described in section 501(c)(3).*

Most citizens do not cheat. Rather, they are tripped up by the code's countless and often hidden traps.

To illustrate the level of vicissitude that characterizes the code, consider this: during the decade of the 1980s alone, the code was changed more than one hundred times, including the massive Tax Reform Act of 1986. Moreover, between the three years 1996 to 1998, six major tax reform laws changed more than three *thousand* code sections and subsections. Since the 1986 Tax Reform Act amended the tax code from beginning to end, Congress saw fit to change the code *seventy-eight* different times.[3] To make matters even worse, of the numerous changes made during the three years mentioned, eighty were made to apply retroactively and of those, twenty-seven were applied retroactively more than one year.[4]

The Effects of Tax Law Changes

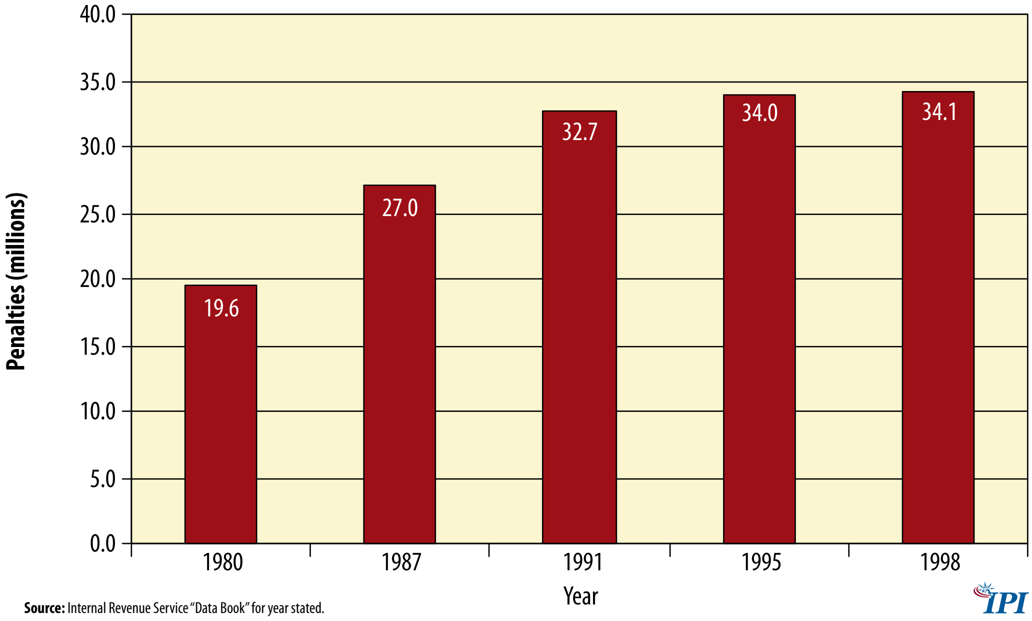
The effects of these repeated and sweeping tax law changes are staggering, both for taxpayers and tax administrators. Taxpayers are expected to comply with the statutory morass under threat of additional tax assessments, penalties, interest, and in the worst case, criminal fines and imprisonment. To carry out enforcement of the code, the IRS has a potpourri of over 140 different penalty provisions it uses with increasing frequency. By contrast, the 1954 code contained just thirteen civil penalties.

The increasing incidence of penalty assessments is an excellent measure of tax code complexity. And while the IRS often points to tax penalties as a measure of non-compliance, such is certainly not the case with the overwhelming majority of citizens who struggle to comply with a code that grows more complex by the day.[5] The fact is, most citizens do not cheat. Rather, they are tripped up by the code's countless and often hidden traps. In this regard, former IRS Commissioner Shirley Peterson testified to Congress in 1992, saying,

> *The law is now so complex that it affects taxpayers' ability to comply—and often affects their willingness to comply, as well…A good part of what we call non-compliance with the tax laws is caused by taxpayers' lack of understanding of what is required in the first place.…Many taxpayers fail to comply because they are unaware of the requirements of the law or because they cannot easily understand what they are supposed to do.*[6]

The following chart illustrates the growth of penalty assessments by the IRS over the past twenty years, during the period when Congress passed well over 150 tax law changes.

Chart 1 Number of Penalties Assessed by IRS



Source: Internal Revenue Service "Data Book" for year stated.

As more burdens are heaped upon citizens and businesses, it becomes increasingly difficult, and in some cases, impossible to assimilate and comply with the burdens. This leads to penalties.

Commissioner Peterson's remarks are echoed by extrinsic evidence gathered today by the IRS' Office of National Taxpayer Advocate (TA). The TA's annual report to Congress describes the top twenty problems faced by taxpayers in complying with the code. The Taxpayer Advocate reports that both business and personal tax law complexity are the top problems faced by citizens. The FY 2000 report reads,

> *Complexity remains the number one problem facing taxpayers and is the root-cause of many of the other problems on the Top 20 List. Despite IRS restructuring to target services to taxpayer needs, the fact remains that the Internal Revenue Code is riddled with complexities that often defy explanation.*[7]

Consider the myriad of demands placed upon small businesses. This problem was recently addressed by the General Accounting Office. The findings were submitted to the Senate Small Business Committee on April 12, 1999, by Margaret T. Wrightson, the associate director, Tax Policy and Administration Issues, General Government Division of the GAO. Wrightson testified that small businesses are subject to multiple "layers of filing, reporting and deposit requirements" depending upon the nature of the business. She points out that,

> *By our count, there are more than 200 requirements—which we grouped into four layers—that may apply to small businesses as well as large businesses and other taxpayers.*[8]

To be sure, not all 200 requirements apply to every business or individual taxpayer. However, it is equally true that the list of requirements imposed upon a given taxpayer is growing annually and so are the consequences for failure to do so.

Too Complex Even for the IRS

For help with compliance, taxpayers naturally turn to the IRS. To accommodate citizens, the IRS operates several taxpayer assistance programs designed to disseminate information and answer questions. The chief program is the IRS toll-free telephone assistance operation. During the 2000 filing season, the IRS received 79.6 million toll-free calls. More than 57 million of those calls were made during the months of January through June, the peak of the filing season. The number of calls was up from the 1999 filing season, when about 65.2 million calls were made.

What is more troubling than the increase in the number of calls for help, is the quality of help the IRS provides. According to the IRS' annual measure of the accuracy of the information provided to taxpayers through this service, the agency answered 72.5 percent of taxpayers' questions accurately in 1999. This is a drop of 10.7 percentage points from the 1998 figure. It means that 17.93 million citizens obtained incorrect information from the IRS in 1999.[9]

> ***IRS' tax audit results are wrong between 60 and 90 percent of the time.***

Why does IRS find it increasingly difficult to correctly answer taxpayers' questions? Commissioner Rossotti addressed this very issue in a recent report on the IRS' telephone assistance operation. His remarks illustrate better than anything else just how far the situation of tax law complexity has degenerated. These remarks, *standing alone,* should prove to even the most casual observer that the system in its present form is untenable. Commissioner Rossotti stated,

> *Fundamentally, we are attempting the impossible. We are expecting employees and our managers to be trained in areas that are far too broad to ever succeed, and our manuals and training courses are, therefore, unmanageable in scope and complexity.*[10]

Very simply, Commissioner Rossotti conceded that the job of providing accurate information *cannot be done* given the scope, breadth and complexity of the current tax code.

This also explains why tax auditors themselves (IRS employees actively engaged in the task of ascertaining the correctness of tax returns) cannot keep up with the ever-changing and increasingly complex code. In 1994, Lynda D. Willis of the General Accounting Office testified before the House subcommittee on IRS Oversight regarding compliance problems faced by businesses. Ms. Willis explained,

> *The complexity of the code has a direct impact on IRS' ability to administer the code. The volume and complexity of information in the code make it difficult for IRS to ensure that its tax auditors are knowledgeable about the tax code and that their knowledge is current.*[11]

This is one reason why IRS' tax audit results are wrong between 60 and 90 percent of the time.[12]

The law is now so complex that the typical citizen and small business owner are no longer comfortable going it alone. In growing numbers, these taxpayers are turning to paid preparers—tax professionals—for help complying with the law. In 1981, just 41 percent of taxpayers used paid professionals. Today, the number is in excess of 50 percent and it is estimated that as many as "94 percent of small business owners used a paid preparer or accountant to prepare their 1998 tax return." The reason given was "complexity."[13]

The sad reality is that tax professionals suffer from the same frustrations as everybody else when it comes to deciphering the code. Too often, the efforts of paid professionals to navigate the swirling waters of the tax code are just as futile. The blizzard of reform legislation and tax litigation makes it functionally impossible for any one person to stay on top of every element of the law.

This fact is evidenced by *Money* Magazine's annual study of tax law complexity. The study began in 1987, one year after the 1986 Tax Reform Act "simplified" the code. In the study, *Money* constructs a hypothetical family financial profile based upon the demographics of its readers. The facts are presented to fifty different private sector tax professionals with this simple instruction: compute the tax liability of the sample family based upon your understanding of the tax code and facts given.

In each of the surveys from 1987 to 1991, fifty different tax preparers came up with fifty different answers. What is worse, none calculated the correct answer. The results of the 1992 study were the same, except that two preparers dropped out before the study was complete. In commenting on the fact that no preparer hit the target tax, *Money* editors stated that, "While there were no perfect scores, a dozen returns were exemplary. Because of the tax code's ambiguity, the target tax of $26,619 was not the only acceptable answer."[14]

In each of the Money surveys from 1987 to 1991, fifty different tax preparers came up with fifty different answers. None calculated the correct answer.

It is this kind of ambiguity that leads to inconsistent and sometimes arbitrary law enforcement and substantially drives up the cost of the compliance with the code.

The Constitution and Ambiguous Law

One of the fundamental rules of constitutional law is that citizens have a right to know in advance what acts are proscribed or required by law. This premise grows from the Fifth Amendment's guarantee that no person shall be "deprived of life, liberty or property, without due process of law…"

When a law imposes sanctions for its violation, the due process clause is offended where the statute in question is so vague that a reasonable person cannot understand that his contemplated conduct is proscribed. This concept is known as the "void for vagueness" doctrine and generally applies to criminal statutes containing penalties for proscribed behavior.

The tax code contains more than 140 penalty sanctions, both criminal and civil in nature. Both the criminal and civil sanctions apply to the accuracy of tax returns and the manner in which a taxpayer treats a given transaction. Every time a tax return is filed, a citizen exposes himself to potential law enforcement action associated with that return. Yet, all are agreed that it is virtually impossible to fully comply with the code or to understand its full import. As illustrated above, not even the IRS or paid tax professionals understand the code's scope or breadth. It is an assault upon the doctrine of fundamental fairness to hold common citizens accountable to a law that nobody can understand.

The Supreme Court, in the case of *Connally v. General Construction Co.*, stated it this way:

> *[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.*[15]

Congress owes our citizens and businesses a stable and understandable tax code. More than any other area of law, the tax law touches and affects every American by imposing a growing list of affirmative duties. Given the sweep of this law, the Fifth Amendment's guarantee of due process mandates a simple, stable tax code that is capable of being followed from year to year. Such a code would allow both individuals and businesses to plan their financial affairs with confidence and certainty from one year to the next. A stable and understandable tax code is in keeping with the first object of good government, to protect the property of its citizens.

In Federalist No. 62, Madison spoke of the importance of stability in the legislative process. He likened legislative instability to an individual without a plan to "carry on his affairs." He noted that such a person is marked "as a speedy victim to his own unsteadiness and folly." Madison described in detail the negative effects that a "mutable" legislative policy has on the internal affairs of a nation. He wrote,

> *It poisons the blessing of liberty itself. It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined as a rule of action; but how can that be a rule which is little known and less fixed?*

Madison pointed to the condition of America's legal system at the time of his writing. He observed,

> *What indeed are all the repealing, explaining, and amending laws, which fill and disgrace our voluminous codes, but so many monuments of deficient wisdom; so many impeachments exhibited by each succeeding against each preceding session; so many admonitions to the people of the value of those aids which may be expected from a well-constituted senate?*

Madison might have been referring to our current tax code, as it is indeed a "monument of deficient wisdom," lacking order, stability, simplicity and consistency.

The Reason Tax Laws are Complicated: *"Congress shall have the power to collect taxes to provide for the general welfare of the United States."*

Reasonable people naturally ask, "Why can't the tax laws be more simple?" The answer is they *can be.* The reason they are not is that Congress uses the tax laws for reasons other than that for which they were intended. Misuse of the tax laws accounts for the complexity of the system.

As early as 1969, well before we witnessed the explosion in the size, scope and complexity of the code, certain members of Congress voiced concerns about the direction of the law. Sensitive to growing concerns over tax law complexity even then, former Oklahoma Senator Henry Bellmon testified before the Senate Finance Committee as follows:

> *I believe the main purpose of our tax system should be to raise revenue. During the period of the 1930s, the idea of using our revenue-raising laws to accomplish certain social aims has complicated and caused great confusion in the administration of these laws.*
>
> *With the passage of vast quantities of social legislation in other fields, with the increased socially oriented activities of the United States Supreme Court, and with the creation of many additional federal programs to deal with social problems, it occurs to me that any tax reform legislation passed by the present Congress might will take note of the fact that the need for using our tax system for social purposes may no longer require the same high priority.*

If this concept could be adopted, the law can be vastly simplified. It can be much more easily understood and followed by individual taxpayers, and it can be much more effectively enforced by those who are charged with its administration.[16]

What Bellmon observed as the reason for complexity in the 1960s continues to be the reason the tax law is such a mess today. This is confirmed by the IRS Commissioner in his Annual Report to Congress on tax law complexity. In the 2000 report, the Commissioner notes,

Complexity is frequently introduced as policymakers make trade-offs between simple tax designs and the desire to make the tax system fair and equitable in a fashion that supports social and economic as well as tax policy goals.[17]

For more than fifty years, Congress has used the graduated income tax system as a means of enforcing the now transient notion of "social justice." Rather than simply raising revenue, the tax laws are used to modify behavior by rewarding certain conduct perceived by current policymakers as desirable and penalizing other conduct perceived as undesirable for purely social reasons.

Examples of this abound, but perhaps the best is found in the 1993 budget proposal of former President Clinton. The former president was in his first term of office after being elected on the promise of cutting taxes for the middle class and raising them on the richest Americans. His reasoning was to equalize what he perceived to be the "uneven prosperity of the last decade."[18] To accomplish this, his plan imposed a $326 billion tax hike, the largest single tax increase in American history.

This is an illegitimate use of Congress' taxing power. Our Founders imparted taxing authority to the federal government for the sole purpose of allowing it to raise revenue to fund its legitimate, clearly defined constitutional functions. It has no authority to use its taxing powers for any other reason, including the achievement of social ends.

The idea of using the power of taxation to accomplish purely social goals was espoused by Karl Marx.

Congress' legitimate power to tax derives from Article I, section 8 of the Constitution. The power to tax, like all powers delegated to the federal government under the Constitution, is limited. The section reads, in relevant part,

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States.[19]

Thus, the taxing power is narrowly applied to just three categories: (1) paying the debts of the nation, (2) providing a national defense, and (3) ensuring the general welfare (read, "soundness") of the United States. There exists, neither in this clause nor any other in the Constitution, a power to employ Congress' taxing authority for social purposes.

The Founders never intended such a power to exist for one simple, very logical reason. The social agenda of the nation is subject to change with each change of power in Washington. Each faction has its own idea of how things should be. Each individual election at every level represents, at least ideologically, a shift in power. If each faction were allowed to use the public's standard of living as the means of affecting its social agenda, citizens are deprived of their most basic rights guaranteed by the Constitution. They are deprived of their property and the pursuit of happiness so that others may impose their notions of social justice upon them without their consent.

The idea of using the power of taxation to accomplish purely social goals was espoused by Karl Marx. The Marxist philosophy of socialism was designed to create an all-powerful state and to eliminate individual property rights. As we know from experience in eastern Europe and the former Soviet Union, socialism does not work. With all incentive to produce removed from their economies, Soviet nations and their satellites simply stagnated. All citizens but the ruling class were reduced to abject poverty with no hope of bettering their conditions.

In Marx's Manifesto, he described the process of achieving the destruction of individual property rights. He writes,

> *The proletariat [defined by Marx as the "wage-labor working class"] will use its political supremacy to wrest, by degrees, all capital from the bourgeois [defined as "middle-class property owners"]; to centralize all instruments of production in the hands of the State, i.e., of the proletariat organized as the ruling class; and to increase the total of productive forces as rapidly as possible. Of course, in the beginning this cannot be affected except by means of despotic inroads on the rights of property, and on the conditions of bourgeois production…*[20]

To achieve the state-enforced transfer of wealth he envisioned, Marx developed a ten-point plan to impose in "advanced countries" through the process of legislation. Points two and three read,

> *2. A heavy progressive or graduated income tax.*
>
> *3. Abolition of all right of inheritance.*[21]

The concept of transferring wealth to impose a social agenda is an idea repugnant to the Constitution and our system of limited government.

The concept of transferring wealth (or denying the right to transfer wealth as through an estate tax) to impose a social agenda is an idea repugnant to the Constitution and our system of limited government. To solve America's fiscal problems, we must therefore abandon this practice in favor of a politically and socially *neutral* system of taxation. To satisfy the financial needs of the nation and remain true to our heritage, our tax system must not favor particular industries, factions or individuals at the expense of others. It must not fall more or less heavily upon one faction or industry solely because of its social standing.

Taxation to Provide for the "General Welfare"

The Constitution's taxing authority to "pay the debts" of the nation and to provide for its "defense" seem clear enough. But what of the power to provide for the "general welfare?" This clause is the source of great misunderstanding. Its meaning has been debated from the outset.

It might seem that the "general welfare" clause of Article I, section 8, imparts broad authority on Congress to enact funding measures that it alone deems appropriate. Indeed, does not the use of the phrase "general welfare" itself grant license to utilize taxing powers to achieve social goals? After all, is not "welfare" the quintessential social undertaking? This certainly is the contemporary interpretation. However, to ascertain the true meaning of the term, we must visit the opinions of those who wrote the Constitution.

The term "welfare" as used today implies all manner of programs designed to uplift the poor, the disabled, the uneducated, the orphaned or widowed, and those harmed by natural disasters or other economic conditions. Such programs are responsible for hundreds of billions annually in government spending.

However, if the Founders intended to allow government spending for such programs, they would not have used the term "welfare" to describe them. In his singular essay entitled, "The General Welfare," noted historian and constitutional scholar Clarence B. Carson observes that,

> *What Americans began calling welfare programs in the late 1930s, or thereabouts, the Founders would have known by the name of "poor relief," so far as they were familiar with it at all.* [22]

At length, Hamilton and Madison addressed the taxing power under the "general welfare" clause of Article I, section 8.

Both Madison and Hamilton were in agreement that the power of taxation did not involve the power to redistribute wealth.

Madison expressed what today might be termed the "conservative" viewpoint. He reasoned that since the specific powers of the federal legislature were limited to but six narrow areas, the taxing power of Article I, section 8 could be no broader. Congress has the power to raise an army and provide a common defense. It is empowered to maintain domestic tranquility and facilitate intercourse among the several states and with foreign governments. Certain utilitarian functions are imparted to the national legislature, such as the maintenance of post offices and post roads. Madison affirmed that the federal government enjoyed no power that was not expressly delegated under the Constitution. It therefore could not use its taxing authority for anything other than effecting the clear and limited purposes of the Constitution.

During the public debate, some claimed that Article I, section 8 imparted unlimited taxing powers to the federal government because of the undefined "general welfare" clause. Madison retorted, "No stronger proof could be given of the distress under which these writers labour for objections, than to their stooping to such a misconception." He explained there is no authority for Congress to rely upon the "general welfare" expression to expand its taxing power, if in so doing, it disregarded "the specifications which ascertain and limit" its authority.[23]

Hamilton, on the other hand, asserted what we would today refer to as a more "liberal" view of the Constitution's taxing authority. Like all our Founding Fathers, he recognized the powers imparted to the new government were *limited,* but clearly aspired to create a more proactive federal government. In Federalist No. 34, he explained the taxing power was "indefinite." He viewed the clause as imparting to Congress "the discretion to pronounce" the objects of taxation which "concern the general welfare."[24]

Programs benefitting only selected groups or classes of citizens cannot possibly meet the constitutional test of relating to the nation's "general welfare."

Despite the divergence of opinion of the two authors on the topic, both were in agreement that the power of taxation did not involve the power to redistribute wealth. The "general welfare" clause does not grant license to establish a welfare state under which largess is distributed to one class of citizens at the expense of another. Even in Hamilton's liberal view of matters, he cautioned,

> *The only qualification of the generality of the phrase in question, which seems to be admissible, is this: That the object of which an appropriation of money is to be made be general, and not local; its operation extending in fact or by possibility throughout the Union, and not being confined to a particular spot.*[25]

If it is true that appropriations must be general in nature, not confined to "a particular spot," it must logically follow that programs benefiting only selected groups or classes of citizens cannot possibly meet the constitutional test of relating to the nation's "general welfare."

If Madison represented the more conservative view, and Hamilton the more liberal view, then Jefferson likely expressed the *balanced* view. He sheds further light upon the issue, remarking,

> *The laying of taxes is the power, and the general welfare is the purpose for which the power is to be exercised. They [Congress] are not to lay taxes ad libitum [defined, "at pleasure"] for any purpose they please; but only to pay the debts or provide for the welfare of the Union. In like manner, they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose.*[26]

These remarks indicate that taxation and government spending is intended for the welfare of the *nation* as a whole, not its *individual* inhabitants or locales, and certainly not individual classes of citizens or industries. The authority to tax exists only to further the greater concerns of the Union itself. We must therefore conclude that the power to provide for the "general welfare" does not authorize distributions from the treasury to the benefit of private interests, individual concerns, or purely local pursuits. More importantly, there exists no authority to employ the power to tax as a means to correct perceived social or economic injustice.

Taxation under our Constitution, even from the liberal view, was never designed to favor one business over another or one property interest over another. Taxation is nothing more than the simple expedient of raising money for the operation of the legitimate functions of government.

> ***Taxation under our Constitution, even from the liberal view, was never designed to favor one business over another or one property interest over another.***

Professor Carson concludes his essay by writing,

> *In sum, then, it is most unlikely that the makers of the Constitution would have chosen the phrase, "general welfare," to authorize the federal government to provide what they understood to be poor relief. It would have violated both their understanding of the meaning of the words and the common practice as to what level of government should provide the relief. On the contrary, it appears that relief came to be called welfare to give it a semblance of constitutionality. Indeed, close analysis within the sentence and the context of the Constitution points to the conclusion that the reference "to provide for the general welfare" was the restriction of the taxing power rather than a separate grant of power.*[27]

In 1936, the Supreme Court visited this very question in the case of *United States v. Butler,* wherein the court considered the constitutionality of an excise tax imposed by the Agricultural Adjustment Act, passed in 1933. The stated purpose of the act was to correct an "economic emergency [that] has arisen, due to disparity between the prices of agricultural and other commodities, with consequent destruction of farmers' purchasing power."[28] The act imposed excise taxes upon processors of commodities as specified in the act. The proceeds were to be used, among other things, to pay farmers to take acreage out of production, thus increasing the price of certain commodities by reducing their supply. There was clearly a social agenda behind the tax. Its constitutionality was challenged by Butler, a processor against whom the tax was levied.

In its decision holding the act unconstitutional, the Supreme Court struck at the core of what today has become habitual congressional action; that is, using the power to tax under Article I, section 8 as a means of imparting special benefits to certain classes of society or rewarding those who behave in a "socially acceptable" manner. The Supreme Court stated,

> *A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the government. The word has never been thought to connote the expropriation of money from one group for the benefit of another.*[29]

Drawing upon the historical writings surrounding the clause in question, the court determined that congressional expenditures must be consistent with the specific powers delegated to Congress in the Constitution. To hold otherwise would be to suggest that Congress could do anything it wants under the authority of the taxing clause. In the words of the Supreme Court, such a conclusion would transform the United States "into a central government exercising uncontrolled police power in every state of the Union."[30]

Because there is no specific authority in the Constitution for Congress to regulate the price of agricultural commodities, any such expenditure (and a plan of taxing to raise revenue to support them) must be unconstitutional.

Jefferson spoke plainly about the effects of using the taxing power to carry out transfer payments for social purposes. He said,

> *To take from one, because it is thought his own industry and that of his father has acquired too much, in order to spare to others who (or whose fathers) have not exercised equal industry and skill, is to violate arbitrarily the first principle of association, "the guarantee to everyone a free exercise of his industry and the fruits acquired by it."*[31]

Whether politically conservative or liberal, our Founders shared a common goal. As seen from the juxtaposition of Madison and Hamilton, they may have approached it differently, but their purpose was the same. Each possessed a burning desire to establish and ensure the greatest measure of individual liberty possible. They recognized that unlimited taxing power is a direct threat to liberty. Therefore, to restore sanity to the tax code itself, we must restore Congress to the constitutional limits of its taxing authority.

The Core Principle of the American Experiment: *"All men are created equal."*

Abraham Lincoln referred to the equality clause of the Declaration of Independence as the "gem of liberty." Because "all men are created equal," and therefore stand equal before the law, all have an equal opportunity to pursue, use and enjoy their own labor and the fruits thereof. The proposition that liberty demands equality is drawn from John Locke, the seventeenth century English jurist whose writings shaped a preponderance of the thinking of our Founders. In his classic essay, "Concerning Civil Government," Locke declares that the "freedom of men under civil government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it."[32]

From the teachings of Locke and others like him, the Founders fashioned Article IV, section 2 of the Constitution. It reads, "The citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States."

This is the so-called "equal protection" clause of the Constitution. Its intention is to ensure that all citizens are treated equally by the law and that no special favor or grant of privilege is extended to one class of citizens at the expense of another by mere virtue of their social or economic standing.

Of course, in the early years of the Republic, there was a great scourge in America—slavery. By the 1850s, the debate raged as to whether African slaves enjoyed the same rights as any other American. The contest over the States' right to permit slavery led to the Civil War, after which the Fourteenth Amendment was promulgated. Section 1, clause 2 of the Fourteenth Amendment reads much the same as Article IV, section 2, but also encompasses elements of the Fifth Amendment. Section 1, clause 2 of the Fourteenth Amendment provides that,

> *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Since the Constitution and its amendments were plain limits on the national government and not the state governments, the consequence of the Fourteenth Amendment was to allow the national government to enforce upon the states the promises of liberty for all citizens. The Civil Rights Bill of 1866, introduced by Senator Lyman Trumball of Illinois, birthed the Fourteenth Amendment. In bringing the idea before Congress, Trumball stated,

> *Good faith requires the security of the freedmen in their liberty and their property, their right to labor and their right to claim the just return of their labor. Monopolies, perpetuities and class legislation are contrary to the genius of free government, and ought not to be allowed. Here there is no room for favored classes or monopolies; the principle of our Government is that of equal laws and freedom of industry. Wherever monopoly attains a foothold, it is sure to be a source of danger, discord and trouble. We shall but fulfill our duties as legislators by according "equal and exact justice to all men," special privileges to none.*[33]

In this premise lies the core principle of American government. All men are created equal. No man ought to enjoy a standing before the law that imparts special privilege or advantage over that of his neighbor. For, as Thomas Paine observed, "the riots and tumults" that occur from time to time are more often occasioned by government itself, because "instead of consolidating society, it divided it; it deprived it of its natural cohesion." According to Paine, the chief culprits in this regard are "excess and inequality of taxation," through which the great mass of society is "thrown thereby into poverty and discontents."[34]

Our current tax code is replete with examples of unfair and unequal treatment.

Yet despite these teachings, our current tax code is replete with examples of unfair and unequal treatment, the result of which is not only a confusing code but one wherein otherwise similarly situated citizens are treated differently under the law. Nothing has changed in the nature of man since the time of Paine's writings because even today, one of the chief sources of social frustration is the idea that our tax law and its burdens are unfair.

In 1990, the IRS visited the question of the public's perception of tax law fairness. The question was posed specifically in light of the Tax Reform Act of 1986, which was marketed to the public as a massive tax simplification measure intended to level the playing field. Regardless of what the '86 act in fact accomplished, the IRS' study found that "most people feel the tax system is less fair now that it was before tax reform."[35] Citing surveys back to 1977, the IRS observed,

> *Consistently, surveys show that the majority, (about 60 percent), feel the tax system is either somewhat unfair or quite unfair. Initially, the 1986 Tax Reform Act appears to have improved people's perception of the tax system's fairness. In 1987, about as many people (roughly 45 percent) felt the tax system was fair as unfair. However, as illustrated in Figure 4 [not reproduced here] recent surveys show that these percentages have returned to pre-tax reform levels, suggesting that these perceptions are a result of widespread public skepticism and a dissatisfaction with the tax system in general.*[36]

While that 1990 study is the latest produced by the IRS, a more recent study by *Reader's Digest,* pointed more at the tax burden itself, confirmed the IRS' own finding. The poll asked respondents a number of questions regarding the fairness of the tax they pay. The findings reveal "astounding unanimity," "remarkable consensus" and "broad dissatisfaction" among Americans with the amount of tax paid:

> *Self-described conservatives agreed with self-described liberals. Singles agreed with marrieds. Blacks agreed with whites. Americans in nearly every group—across racial, economic, age, ideological, religious, educational and sexual lines—had the same median response…*[37]

The response was that the tax system is unfair.

The following discussion addresses just a few examples of the inequities in the system.

The graduated income tax rates—The graduated rates guarantee that citizens are treated differently under the law based solely upon their economic or social standing and nothing else. Our current system sports six different tax rates, beginning with a 10 percent bracket and progressing to a 38.6 percent bracket for the highest income earners. The establishment of these brackets is based upon nothing other than the socialist proposition that those who earn more income should pay a greater percentage of that income in taxes. The Clinton Administration expressed this sentiment clearly in its 1993 call to increase the top tax bracket from 31 percent to 39.6 percent.[38] Speaking of what was then a proposed increase, the White House stated,

> *It will require those who have profited to bear the greatest burdens and do right by the people who work hard and play by the rules.*[39]

The graduated tax rates guarantee that citizens are treated differently under the law based solely upon their economic or social standing and nothing else.

The chief problem with graduated tax rates is that they are arbitrary. They are not based upon any sound legal or economic principle, only that those who make more should pay more. This is evidenced by the wild fluctuation in the brackets since the inception of the modern income tax in 1913. When the income tax as we know it was adopted, the bottom tax bracket was 1 percent of income over $20,000 and the top bracket was just 6 percent and applied to incomes in excess of $500,000 (the "super-rich" when measured in today's dollar).

Even before the first income tax law was birthed, it was apparent to legislators that the rates and brackets would be arbitrary. While debating the 1913 Income Tax Act, North Dakota Senator Porter J. McCumber declared,

> *Mr. President, it is quite evident that no two Senators will agree upon the number of steps [tax brackets] in the sliding scale in this bill, and it is equally clear that no two of them will agree upon the ratio of rate for each particular step.*[40]

Since that time, and beginning in earnest in the 1940s, America has been subjected to an increasing number of tax brackets and a growing percentage of their incomes goes to government at all levels. The cry of those who would raise progressive rates is always based upon the concept of invidious discrimination; that is, the notion that it is somehow "unfair" that some among us earn more than others and that the masses of middle income citizens can "get even" with those better off by raising their taxes.

Of course, it is functionally impossible to define "fairness" when it comes to graduated tax rates. Why, for example, is it "fair" for one person to pay at a 27 percent rate while another should pay at the 38.6 percent rate? Both the rates of tax and the levels of income at which those rates apply are arrived at in a purely arbitrary and subjective manner. On this basis, why is it not fair for the person paying 38.6 percent to pay at 50 percent? In fact, if 38.6 percent is "fair" for high-income earners, is not 50 percent even "more fair?" And if 50 percent is more fair then 38.9 percent, where is the point at which the highest bracket becomes "unfair?" As any reasonable person must agree, these questions have no answers. As a consequence, the notion of a graduated income tax is therefore, fundamentally *unfair.*

One illustration of the absurdity of the progressive rates lies with the history of the highest tax bracket. This bracket exists as a result of a 10 percent surtax imposed in 1993 on what was then the highest tax bracket of 36 percent. The surtax was dubbed the "millionaire's tax." However, when it took effect, it applied to taxable incomes of $250,000 or more—not $1 million.[41]

As demonstrated in the above discussion, the historic ideals of due process and equal protection mandate that citizens be treated equally as they stand before the law. The lack of objective guidelines upon which to base graduated tax rates renders them fundamentally flawed from a constitutional perspective. What is "fair" in one year is suddenly "unfair" as soon as the power base in Congress shifts. This fact has kept tax rates on a roller coaster for over five decades.

America's frustration with graduated income tax rates manifested itself in the past several years in the form of a debate over the so-called marriage penalty. The marriage penalty operates to increase the amount of tax paid by a married couple over that which they would have paid on the same income if they stayed single. The debate betrays a fundamental misunderstanding of why the so-called marriage penalty exists in the first place. Whatever else may be said, the marriage penalty is inextricably intertwined in the graduated income tax system itself. Let me illustrate.

Suppose two single people each earn $26,000 per year taxable income. Based upon the 2000 income tax rates and brackets, that income is taxed at the 15 percent rate and consequently, each would pay $3,904 in income tax. The total tax paid by both citizens is $7,808. When these people marry and file a joint return, they combine their respective incomes. As a result, their total taxable income is $52,000. However, this income is no longer taxed exclusively at the 15 percent rate. Taxable income in excess of $43,850 is taxed at the 28 percent bracket. As a result, the total income tax liability for these same people earning the same money is $8,867—$1,059 more than they paid as single people.[42]

The graduated tax rates impose greater burdens on certain elements of society merely as a result of their social standing.

The graduated income tax rates impose greater burdens on certain elements of society merely as a result of their social standing.

Tax return filing status—The code provides for five different filing status classifications. They are,

- Single
- Married filing jointly (even though only one spouse has income)
- Married filing separately
- Head of Household
- Surviving Spouse

Each of these separate classifications ensures preferential treatment to different classes of citizens based solely upon their social standing. Like the graduated tax rates, the filing status classifications are arbitrary and not subject to any objective standard of law or economics. They are subject to change at the whim of the legislature and have the direct effect of imposing unequal burdens upon citizens who might otherwise be equal in the economic standing.

For example, a married person filing a joint income tax return for 2000 paid at the 15 percent rate on the first $45,200 of taxable income even if the income on the joint return was earned by just one spouse. However, for a single person, the 15 percent rate ceased to apply at $27,500. The income of the single person in excess of $27,500 was taxed at the 28 percent level. So merely because he is not married, the single person paid substantially more than a married person, even though the latter, like the former, may be the sole income-earner and have no children to support.

On the other hand, a single person with dependent children (head of household) was taxed at 15 percent on the first $36,250 of taxable income. This is true even though he has children to support while the married couple may not. Depending upon the number of children involved, the dependent exemptions for those children are not likely to level the playing field between the married person with one income and the single head of household with dependents.

If a married person filed a separate return to report his own income, the 15 percent rate ceased to apply at $22,600 of taxable income. Thus, the tax on $45,000 of taxable income at the married filing separately rate was $9,662, while the tax on the same income at the married filing jointly rate was $6,750, a difference of $2,912. This was true even if the married filing jointly income was earned by just one spouse.

Including the so-called marriage penalty and the filing status classifications discussed here, there are a total of fifty-nine provisions of the tax code where tax liability depends, in whole or in part, upon the question of whether an individual is married or single. In its 1996 study of the matter, the GAO reported the following:

> *The different ways that married and single people are treated under the income tax code could lead to situations where the tax liability of married taxpayers is not the same as that of two similarly situated single taxpayers.*[43]

The AMT guarantees that certain classes of taxpayers do not enjoy the same deductions, credits and exemptions as others similarly situated.

The disparate treatment accomplishes nothing other than to polarize citizens within their various social groups and ensure that each group is treated differently based upon their social status. These contradictions grow directly from the use of the taxing power of the United States as a means of arbitrarily grafting federal social policy into our tax laws. The first casualty in such a process is the doctrine of equality before the tax law.

For example, the growing awareness that single parent households were the primary source of children in poverty is chiefly what led to targeted welfare entitlements to that group, as well as the expansion of the 15 percent tax bracket and the exemption for a preferential "head of household" filing status. However, while that filing status affords preferential treatment to unwed mothers, it is in fact inequitable to married families with children—especially those also living in poverty. Moreover, that filing status effectively operates as a tax subsidy for unwed motherhood, which when considered with other welfare subsidies, contributes to the growth in the number of unwed mothers.

In the same way, in 1969 social planners seeking to eliminate the perceived benefits of marriage under the tax code restructured brackets and exemptions for married couples. Previously, such brackets and exemptions were double those of single persons. By replacing them with narrower marital brackets and a lesser personal exemption, the new structure now clearly discriminates against two-income married families. Moreover, it also effectively discriminates against single income marriages as the only legal partnership not allowed to split income. As a consequence, an increasing number of cohabitating couples, either with or without children, deliberately avoid or conceal marriage.

The Alternative Minimum Tax—The Alternative Minimum Tax (AMT) is a secondary tax system that runs alongside the "regular" tax system. Established in 1978, the AMT was initially intended to ensure that high-income taxpayers pay some tax even if allowable deductions, credits, etc., substantially reduced or eliminated their "regular" liability. AMT rates and tables are entirely different than those that apply to the regular income system. The AMT is, in essence, a flat tax system that operates coterminously with the graduated tax system. In application, the AMT guarantees that certain classes of taxpayers do not enjoy the same deductions, credits and exemptions as others similarly situated.

The AMT is an admission by Congress that the system in its present form is fundamentally unsound and inequitable. After realizing that certain taxpayers could substantially reduce or eliminate their tax liability using tax exemptions and deductions expressly provided for within the code, Congress decided that it should erect a safety net to ensure that everybody paid some taxes, even those otherwise entitled to legal deductions and exemptions. That safety net is the AMT. But as the National Commission on Restructuring the IRS observed in its report to Congress, "If the tax base was designed to be truly fair and comprehensive, there would be no need for a minimum tax."[44]

In the first place, the AMT is horrifically complicated. It was referred to by the IRS itself as "intricate and ambiguous."[45] It has been changed fourteen times since originally enacted. The AMT requires that certain taxpayers calculate their tax liability using two differing sets of rules and procedures, one under the normal income rules and the other under the AMT rules. Consider this description from the Commissioner's Annual Report on Tax Law Complexity:

> *If married filing separately taxpayers think they are subject to AMT and follow all the procedures, they could end up calculating four different tax outcomes—regular tax filing jointly and separately and AMT filing jointly and separately. Publication 17 recommends that all married taxpayers calculate their tax liabilities filing jointly and separately to minimize their tax liability. As a result, a married taxpayer could conceivably have to make six sets of calculations to determine the actual taxes owed, including the exemption surtax.*[46]

The tax code contains six definitions of the term "child."

It is chiefly for this reason that the National Taxpayer Advocate recommended to Congress on at least two occasions that the AMT be "eliminated" as its "first choice" among several reform alternatives.[47]

The law requires a citizen to pay the higher of the normal income tax or the AMT. In calculating the AMT, the taxpayer must add back to income various items the AMT describes as "preferences" and "adjustments." These include but are not limited to the standard deduction, dependent exemptions, miscellaneous itemized deductions, some mortgage interest, a portion of medical expense deductions, real estate and personal property tax deductions, etc.[48]

In this way, the AMT virtually ensures that not all citizens are treated equally under the law. By its very nature and inherent structure, the AMT deprives certain taxpayers of otherwise perfectly legal deductions, credits, exemptions, etc., that other similarly situated taxpayers may claim. By operating this system, Congress capriciously offers deductions with one hand then withdraws them with the other. Even worse, many citizens are not even aware of the AMT or the increased tax liability it imposes until they are so notified by the IRS.

The conflicting definitions of the term "child"—The tax code contains six definitions of the term "child," each applying to different elements of the code. The six definitions apply to the head of household filing status, dependent exemptions, the Hope and education tax credits, child and dependent care credits, the Earned Income Tax credit and the general child credit.[49]

In each of the code sections in question, Congress uses various fact tests to determine whether a child meets the definition offered by Congress. If so, the child's parents may claim the particular benefit on their tax return. Within the six definitions of the term "child," there is a combination of up to five different fact tests that must be met in order to comply with the rule. These fact tests are,

- The relationship or member of household test;
- The support test;
- The residency or keeping up a home test;
- The age test; and
- The income test.

The six definitions provided for in the code use a combination of at least two and up to all five of the tests listed. However, not all factors within a given test are the same. For example, the age test is applied this way:

- The child and dependent care credits apply only to children under age thirteen;
- There is no age test for dependents or for the education credits;
- The general child tax credit is limited to those under age seventeen; and
- The Earned Income Tax Credit applies for children under nineteen, unless the child is a full-time student, in which case the age limit jumps to twenty-four.

In addition to the above, still another age test applies to the so-called "Kiddie Tax."[50] This is the rule that imposes tax upon a child's unearned income at the parents' marginal rate, if the parents' rate is higher than the rate that would otherwise apply to the child. The "Kiddie Tax" applies to children under the age of fourteen.

This quagmire of definitions ensures that a child living with a given taxpayer is treated one way under one code provision, while that *same child* may be treated another way—or entirely disregarded—for purposes of other code provisions.

The imposition of these gimmicks ensures that otherwise similarly situated citizens are treated differently under the tax code.

Deduction and exemption phase-outs—The tax code provides deductions for non-business expenses including state and local taxes, mortgage interest, medical expenses, charitable contributions, etc. However, code section 68 phases out those deductions for certain citizens. The phase-out operates to cut the otherwise deductible personal expenses and the phase-out is based solely upon a citizen's economic standing.

Under current law, when the adjusted gross income of a married couple filing jointly exceeds $100,000 ($50,000 for married filing separately), those citizens lose the benefit of legal deductions under the code that other taxpayers are legally entitled to claim.

Likewise, code section 151(d)(3) phases out personal dependent exemptions in like manner, but based upon other, equally arbitrary adjusted gross income amounts. For example, the dependent exemption phases-out beginning at $150,000 adjusted gross income for married filing jointly ($75,000 for married filing separately). On the other hand, for a single person, the phase out begins at $100,000. Single people lose the full benefit of their dependent exemptions faster than married people, even if the married people have no children.[51]

There are examples of phase-outs, exclusions and disparate tax treatments within the code that are too numerous to itemize. They have one thing in common: they are arbitrary in their application as to income thresholds and ceilings. The imposition of these gimmicks ensures that otherwise similarly situated citizens are treated differently under the tax code.

Constitutional Protections Against Arbitrary Taxation

Specific protections against arbitrary and oppressive taxation were built into the Constitution in two specific ways. First, Article I, section 2 provides that "direct taxes shall be apportioned among the several States which may be concluded within this Union." The second protection is found in Article I, section

8, where Congress is given the power to lay and collect taxes for the purposes prescribed, and further states, "but all duties, imposts and excises shall be uniform throughout the United States." Following this model, we could never have the kind of tax system that operates in America today.

The requirement that direct taxes be apportioned was to accomplish two purposes. First, it took the federal government out of the business of collecting taxes directly from the people. In this way, the federal government would never have direct contact with the masses of citizens and the latter would never be answerable to a remote federal bureaucracy. To collect a direct tax, the federal government had to present a bill to the respective states equal to each state's pro rata share of the total, based upon the population of the state. Each state collected the tax through whatever scheme was permitted under its own laws. The state in turn paid it to the federal government.

Secondly, apportioned taxes could never be arbitrary or based upon some other capricious scheme. As Hamilton wrote in Federalist No. 36,

> *Let it be recollected that the proportion of these taxes is not to be left to the discretion of the national legislature, but is to be determined by the numbers of each State, as described in the second section of the first article. An actual census or enumeration of the people must furnish the rule, a circumstance which effectually shuts the door to partiality or oppression. (Emphasis added.)*

On the other hand, indirect taxes, such as excises, etc., must be uniform.[52] In this way, every person pays the same tax, regardless of his social or economic standing. This provision expressly prohibits Congress from using its taxing power as a means to carry out social planning through the vehicle of taxation. That is a key reason Hamilton favored excise taxes over all others as the chief means of raising revenue for the new government. He observed that, "taxes on consumable articles have, upon the whole, better pretensions to equality than any other."[53] Expounding, Hamilton observed that,

The fundamental protections against tax tyranny as envisioned by the founders were dissolved with the adoption of the Sixteenth Amendment in 1913.

> *The consequence of the principle laid down is that every class of the community bears its share of the duty in proportion to its consumption; which last is regulated by the comparative wealth of the respective classes, in conjunction with their habits of expense or frugality. The rich and luxurious pay in proportion to their riches and luxury; the poor and parsimonious, in proportion to their poverty and parsimony.*[54]

The fundamental protections against tax tyranny as envisioned by the founders were dissolved with the adoption of the Sixteenth Amendment in 1913. This amendment allowed Congress for the first time to lay a tax on income "without apportionment among the several states, and without regard to any census or enumeration." Without the Sixteenth Amendment, such a tax was unconstitutional and was so declared by the Supreme Court in the 1895 case of *Pollock v. Farmers' Loan and Trust Co.*,[55] the case that addressed the first permanent income tax passed by Congress in 1894.

The Sixteenth Amendment opened the door to a condition that was feared by several lawmakers during the debates on the first income tax act in 1913. The fear was that the tax would degenerate into the means whereby it could be used in a "spirit of hatred" simply because certain individuals were more financially successful than others. This concern was best expressed by Massachusetts Senator Henry Cabot Lodge, who said,

> *It will be an ill day for this country when we raise the cry that success honestly won is to be punished; that money honestly gained is the badge of criminality; and that we are to go to the*

people of the United States in the search for popularity, and say to them: "Follow us. We will plunder the people who have got the money. You shall spend it, and it will not cost you anything." That is a dangerous cry to raise in any country, for when you unchain that force you cannot tell where it will stop, and in your eagerness to destroy property and rob men of hope and ambition you may bring your boasted civilization down in ruins about you.[56]

The Proscription Against *Ex Post Facto* Laws: *"Security from the mischief of the legislature."*

The first object of government is to protect the life, liberty and property of its citizens. The Constitution is a delegation of power to the federal government for the purpose of ensuring the security of the people. Powers not specifically delegated are reserved to the states or the people respectively, or in some cases, denied altogether. The Founders knew that in order to preserve liberty, not only would the broad powers of the legislature have to be restrained, but there would have to be an independent judiciary to ensure that Congress could not overstep its bounds. As Hamilton stated in Federalist No. 78, "Without this, all the reservations of particular rights or privileges would amount to nothing."

The Founders knew well that the unrestrained power of the legislature was a formula for tyranny. Therefore, in order to preserve the rights of the citizens and insulate them from the mischief of the legislature, several lawmaking powers were outright denied. One such power is the power to pass *ex post facto* legislation. An *ex post facto* law is one made to apply retroactively from the date of its enactment. In fact, the Founders were so concerned with *ex post facto* laws that they precluded both the federal government *and* the state governments from passing such legislation. These proscriptions are found in Article I, section 9, clause 3 and Article I, section 10, clause 1 of the Constitution.

Retroactive tax laws not only violate the proscription against ex post facto laws, but also violate the Fifth Amendment's due process clause, in that citizens are denied reasonable prior notice.

The language of these provisions is quite plain and simple. In the case of Article I section 9, it states, "No bill of attainder or ex post facto law shall be passed." There is no proviso or exception expressed in the rule. It was written to apply to all acts of the federal legislature. The Founders understood that all such laws were prohibited, regardless of their subject. In Federalist No. 44, Madison writes,

Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations pre-fixed to some State Constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us nevertheless, that additional fences against these dangers ought not to be omitted. Very properly therefore have the Convention added this constitutional bulkwark in favor of personal security and private rights.

The simple reason for the multiple layers of protection against *ex post facto* laws was so "the tenure of any property at any time held under the principles of the common law, cannot be altered by any act of the future general legislature."[57]

Tax laws are particularly offensive when made to apply retroactively. Under such laws, the citizen is denied the right to plan his personal and business affairs so as to provide for the payment of the tax on time and in the correct amount. Such laws operate to deny the citizen the right to arrange his affairs in such a manner as to legally reduce his tax burden. Moreover, retroactive tax laws unreasonably deny to a person the full use and enjoyment of his property. The power to pass retroactive tax legislation can be particularly oppressive under the current code with its intricate scheme of over 140 civil and criminal penalty provisions.

One example of this is found in the 1993 tax laws promulgated by the Clinton Administration. Section 13208 of the Omnibus Budget Reconciliation Act of 1993,[58] was signed into law by President Clinton on August 10, 1993. The law set the maximum federal estate and gift tax rates at 53 percent and 55 percent—effective January 1, 1993.[59] This represented an *increase* of the 50 percent maximum rate that was in effect on January 1, 1993. Thus, under the law, a person dying after January 1, 1993, but prior to August 10, 1993, would have his estate subjected to an increase in tax liability even after death.

Such legislation is expressly forbidden by the plain language of the Constitution. It has been argued that such legislation not only violates the proscription against *ex post facto* laws, but that retroactive laws actually violate the Fifth Amendment's due process clause, in that citizens are denied reasonable prior notice of the requirements of the law. Unfortunately, the courts do not see it this way. For years, the Supreme Court and others flaunted the Constitution's plain language, thereby authorizing retroactive tax laws.

The latest Supreme Court discussion of the issue came in the case of *United States v. Carlton.*[60] In that case, the court visited the question of retroactive estate tax laws designed to correct a flaw in legislation passed by an earlier Congress. The government argued that retroactive legislation was "necessary" to preclude the use by taxpayers of what amounted to an unintended loophole that otherwise existed. Carlton argued that the laws were in violation of the Constitution for a number of reasons.

Neither the Constitution itself nor the Founders in any of the historical documents authorize the use of ex post facto laws in cases where there is a "rational legislative purpose."

Writing for the court, Justice Blackmun reiterated prior expressions of the Supreme Court in which retroactive tax and other laws were upheld. The effect of these rules is to wholly gut the protections against legislative intrusion as envisioned by the Founders. For example, the *Carlton* court said,

> *Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.*

The court also stated that *ex post facto* legislation is permitted when the retroactive period is "modest and not excessive.[61] Stated another way, so long as "the retroactive application of the legislation is itself justified by a rational legislative purpose," Congress has the authority to pass retroactive laws virtually at will, provided the retro active period does not reach back "too far."

It is interesting to note that the neither the Constitution itself nor the Founders in any of the historical documents authorize the use of *ex post facto* laws in cases where there is a "rational legislative purpose." More specifically, the Constitution plainly prohibits the passage of any *ex pose facto* law—even if such legislation is retroactive by one day.

Throughout the ages, governments have imposed rapacious violations of liberty in the name of "national need" or "compelling governmental purpose." The clear intention of the Founders, through the plain language of the Constitution, was to eliminate such violations by carefully delimiting legislative power. However, as a result of court decisions such as that discussed above, it seems that citizens are afforded little protection from such legislative intrusions.

Reversing the Foundation of American Jurisprudence: *"Innocent until proven guilty."*

The idea of placing the burden of proof upon the accuser derives from English common law. The common law was deeply entrenched in the colonies during the time of the founding and continues as the basis of American law. The common law itself derives from the Great Charter of Liberties, *Magna Charta. Magna Charta* was the declaration of the liberties of English freemen signed by King John in 1215 AD. It was extracted from the King at the point of a sword as the price for retaining his throne. *Magna Charta* was reconfirmed numerous times by English monarchs over the ensuing centuries to the point where its principles became engrained in the fabric of English—and by extension, American—jurisprudence.

Chapter 39 of the Great Charter sets forth many of the fundamental rights of citizens in the judicial process. It established the concepts of both due process of law and the burden of proof as we know them today. Chapter 39 (chapter 29 in the 1225 version) reads,

> *No freeman shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land.*

By this declaration, citizens were not to be considered guilty at any level in the judicial process until after a trial. In the Notes on the Great Charters, English jurists declared that the protections afforded by *Magna Charta* chapter 39/29 are so important that they alone "would alone have procured for it the title of the Great Charter."[62] In practice, this principle created the axiom of law holding that the accuser, whether in the criminal or civil context, was solely responsible to prove the verity of his claims against the accused before any punishment could apply.

In the mind of the Supreme Court, the government's "imperious need" for money justifies the abandonment of one of the most important elements of American liberty.

Income tax laws and regulations heap upon the shoulders of citizens innumerable requirements to carry out affirmative duties under the pain of imprisonment, civil penalties, additional tax and interest assessments. Moreover, the code allows the IRS to make determinations with respect to a citizen's filing status, annual income, deductible expenses, dependent exemptions, etc. In all but a few exceptions, the IRS never has to prove that its actions or determinations are correct. The Supreme Court, in the 1933 case of *Welch v. Helvering*[63] declared that the IRS is entitled to the "presumption of correctness" with regard to its determinations. As such, the citizen "has the burden of proving" such actions to be wrong. In a very real way, the consequence of this is that the citizen is essentially guilty until proven innocent, a reversal of the fundamental rule of law regarding the burden of proof. The Supreme Court, in the case of *Bull v. United States,* used this explanation to describe how the litigation process is fundamentally altered in tax cases:

> *Thus, the usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense, and the burden of proof, normally on the claimant, is shifted to the taxpayer. The [tax] assessment supersedes the pleading, proof, and judgment necessary in an action at law, and has the force of such a judgment. The ordinary defendant stands in judgment only after a hearing. The taxpayer often is afforded his hearing after judgment and after payment, and his only redress for unjust administrative action is the right to claim restitution.*[64]

The shift in the burden of proof does not apply to the various criminal provisions of the tax code. To place the burden of proof on the accused in a criminal matter is a clear deprivation of due process and flatly unconstitutional. However, the vast majority of the penalty provisions of the tax code are civil in nature and it naturally follows that the overwhelming number of penalty assessments are likewise civil in nature. As a result, the courts seem content to dissolve the historic protection in most civil cases.

But despite the fact that the imposition of civil penalties does not carry the risk of loss of liberty, such imposition, as well as civil collection in general, most certainly does imply the loss of *property,* a condition *Magna Charta* referred to as being "dispossessed." As the evidence presented above clearly shows, the Founders put the importance of property and the protection thereof on par with that of personal liberty. The due process clauses of both the Fifth and Fourteenth Amendments speak clearly to the protection of life, liberty *and* property.

What could justify a departure from the settled principles of due process such that the burden of proof is shifted from the government to the citizen? The answer is found in a statement by the *Bull* court that has become a common thread woven into the fabric of tax litigation for more than six decades. That statement is, "But taxes are the lifeblood of government, and their prompt and certain availability an imperious need."[65] Thus, in the mind of the Supreme Court, the government's "imperious need" for money justifies the abandonment of one of the most important elements of American liberty.

The concept of "need" was reiterated in the case of *Carson v. United States,* where the Fifth Circuit Court of Appeals more pointedly declared that such departure is justified based upon "the government's strong need to accomplish swift collection of revenues and in the need to encourage taxpayer recordkeeping."[66]

This reasoning presents a recurring theme: government's need for money is, by itself, sufficient to override settled constitutional protections. This notion is antithetical to liberty and to the notion of a government with limited, narrowly prescribed powers. If the courts are able to set aside specific constitutional protections on the mere assertion by the government of a "compelling need," all the rights declared sacrosanct in the Constitution are but empty vessels.

The extensive focus on the burden of proof issue led Congress to enact code section 7491 as part of the Internal Revenue Restructuring and Reform Act of 1998.

This shift in the burden of proof is responsible for innumerable abuses by the IRS. Many of these were brought to light during the 1997 Senate Finance Committee hearings into IRS abuse. Specifically, the practice of placing the burden on taxpayers has the effect of allowing the IRS to issue penalty assessments at will, without regard to the specific facts of a case and in violation of its own stated policy on penalty assessments. A good share of the more than thirty million penalties issued every year are issued through automatic computer assessments. In this way, the IRS does not even make an effort to determine whether the facts of a case justify imposition of the penalty. The taxpayer is left to assert defenses if he is able to navigate the procedural quagmire.

This is equally true of the millions of computer notices issued by the IRS annually. Many such notices claim to correct errors allegedly made by citizens in their tax returns. And while the law provides a means for a citizen to challenge these notices,[67] the burden is on the citizen to correctly respond to the notice in a timely fashion, craft a response sufficient to apprise the IRS of the objection and prosecute the objection through the system while carrying the burden of proving not only that the IRS' determination is incorrect, but what the correct determination should be.

The unfortunate reality is that the vast majority of citizens embrangled with the IRS do not understand their rights or legal remedies under the code. As such, people fail to realize that they are in fact "prosecutors" when it comes to correcting errant IRS action. That is to say, the citizen must instigate appeal actions, both administrative and judicial, in order to challenge a tax audit determination. The citizen must instigate proper challenges to collection actions in order to prevent the loss of property in the collection process. The citizen must instigate administrative or judicial challenges to the IRS' investigative powers in the hope of maintaining any right of privacy. In the context of all such challenges (with rare and narrow exceptions), the citizen must carry the burden of proving IRS error, with respect to *both* the law and facts of the case.

The extensive focus on the burden of proof issue led Congress to enact code section 7491 as part of the Internal Revenue Restructuring and Reform Act of 1998. This provision received much attention because it purports to shift the burden of proof to the IRS, thereby curing the problems set forth above. On careful inspection, however, it can be said that that law cannot possibly attain that goal.

Section 7491(a)(1) states as follows,

> *If, in any court proceeding, a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed by subtitle A or B, the Secretary shall have the burden of proof with respect to such issue.*

The statute indeed purports to shift the burden to the IRS but only if the citizen first "introduces credible evidence" concerning the issue. In other words, the citizen bears the burden of proof necessary to shift the burden of proof. What constitutes "credible evidence" is undefined by statute and promises to be the subject of ongoing litigation. Thus, the citizen retains the duty to present initial evidence to show the IRS is wrong with regard to a "factual issue."

Even if he is successful in this first task, the burden shifts only in "any court proceeding." The fact is, 97 percent of all IRS actions are carried out, not in a judicial context, but rather, in the *administrative* context. For example, virtually all penalty assessments and computer tax assessments are administrative in nature. The initial determination of tax liability by the IRS is administrative in nature. Likewise, the vast majority of IRS' collection actions are administrative in nature. And while some courts have limited jurisdiction to review collection actions, the taxpayer must instigate the review. Moreover, as the statute declares, the taxpayer bears the initial burden to introduce "credible evidence" with regard to the "factual issues."

> ***In the final analysis, the burden of proof was in no way shifted to the IRS.***

In the larger sense, as examined in more detail later in this report, federal laws expressly prohibit the courts from taking jurisdiction over the IRS in collection cases. This is because of the Anti-injunction Act, code section 7421. It expressly denies jurisdiction to the federal courts to enjoin or restrain the ascertainment, computation, assessment or collection of any internal revenue tax.

Moreover, subsection (a)(2)(A) of code section 7491 places two serious limitations on the supposed shift. The first is that the citizen must have "complied with the requirements under this title to substantiate any item." This language vitiates all the foregoing language to the extent that such could have been read to shift the burden to the IRS. In countless places in the tax code, the law places the burden on the citizen to "substantiate" a given claim. The substantiation requirement is in practical effect, a burden of proof. Without providing evidence to support one's claim under a particular code section, he has failed to "substantiate" his entitlement to the relief or benefit provided by that section.

Consider further the language of subsection (a)(2)(B). It provides that the burden shifts only if "the taxpayer has maintained all records required under this title and has cooperated with the reasonable requests of the Secretary for witnesses, information, documents and interviews." The terms "reasonable requests" and "cooperated" are undefined. The practical effect of this is for the IRS to assert a laundry list of demands for documents, evidence, exhibits, witnesses, etc., and for the IRS to allege "lack of cooperation" in order to prevent the burden from shifting.[68]

This is standard procedure for the IRS and is precisely what happened in the Tax Court case of *Higbee v. Commissioner,* the first case in which the Tax Court addressed the new burden of proof statute. Higbee asserted that the burden shifted to the IRS under the new law. IRS argued that because Higbee "failed to meet the requirements of code section 7491(a)(1) and (2)," the taxpayer and not the IRS should retain the burden of proof. As to each of the three issues presented by Higbee, the court ruled against Higbee, claiming,

> *Again, we reiterate that petitioners have failed to provide this Court with credible evidence for us to allow petitioners' claims with respect to the disallowed deductions. We therefore reject all of petitioners' contentions as to these issues.*[69]

In the final analysis, the burden of proof was in no way shifted to the IRS.

Two other Restructuring Act amendments are claimed to positively impact the burden of proof for citizens. The first is code section 6751. The second is section 7491(c). Subsection 6751(a) states that with respect to an assessment,

> *The Secretary shall include with each notice of penalty under this title information with respect to the name of the penalty, the section of this title under which the penalty is imposed, and a computation of the penalty.*

Code section 7491(c) provides that the "burden of production" is upon the IRS with respect to any penalty assessment that is the subject of a court proceeding.

Neither the language of code section 6751 nor section 7491(c) operates to shift the burden of proof to the IRS. Section 6751 is merely a notification provision. It says nothing whatsoever regarding a burden of proof.

The impact of section 7491(c) is clearly addressed by the *Higbee* Court. Analyzing the statute and the legislative history, *Higbee* concludes,

> *Congress' use of the phrase "burden of production" and not the more general phrase "burden of proof" as used in section 7491(a) [discussed in detail above] indicates to us that Congress did not desire that the burden of proof be placed upon the Commissioner with regard to penalties.*[70]

The natural constitutional order of things suggests that a person who legitimately disputes an IRS claim should have the dispute heard and resolved prior to being required to pay the tax.

In the overall scheme of the tax code, these laws do little to place the burden of proof upon the shoulders of the IRS. In sum, both the IRS and taxpayers rest in essentially the same position now as they did before these provisions were enacted.

The Precious Right to Trial by Jury: *"It is not to be supposed that juries would enforce a tax upon an individual which he had never agreed to pay."*[71]

Denial of the right to trial by jury was named as one of the "long Train of Abuses and Usurpations" charged against the English Crown and enumerated by Jefferson in the Declaration of Independence. The Founders were well aware of the fact that the precious right to trial by jury was one of surest ways to guard against tyranny. This right was considered an indispensable element of personal liberty, on the same high plain as the need for an independent judiciary.

That the Founders held the right to trial by jury in such high esteem is evidenced by the fact that the right is mentioned three separate times in the Constitution. At Article III, section 2, it pointedly states that "all crimes, except in cases of impeachment, shall be by jury."[72] The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." The Seventh Amendment states, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The first two references plainly apply to criminal cases. The third applies to civil disputes.

Within the Seventh Amendment the Founders fashioned a protection that would assure all citizens of the right to have the facts of a civil case heard and determined by an impartial jury. Yet this right has been effectively eliminated in most tax disputes by the careful crafting of rules and statutes that block the average citizen's access to a jury trial. This occurs as a result of the system Congress established for remedying civil tax disputes.

There are two remedies available to most taxpayers engaged in a dispute with the IRS over tax liability issues. The first is the so-called pre-payment remedy. In this environment, the citizen is entitled to a review of the IRS' determination *prior* to paying the tax. The second remedy is the so-called post-payment remedy. In this environment, the citizen must first pay the tax prior to obtaining judicial review of its propriety.

The Pre-payment remedy

The natural constitutional order of things suggests that a person who legitimately disputes an IRS claim that he owes additional taxes should have the dispute heard and resolved *prior* to being required to pay the tax. This notion is the essence of the due process requirement, under which a person may not be deprived of "life, liberty or property," without due process of law. However, what we exposed earlier as the government's compelling "need" to collect the revenue has allowed the courts and Congress to substantially alter this basic and fundamental protection.

The courts take the position that litigants before the Tax Court are not entitled to constitutional protections that otherwise exist, such as the right to a jury trial.

This is manifest in Congress' creation of the United States Tax Court. The Tax Court is a mutation of the former Board of Tax Appeals, which was fashioned by Congress in 1924 as an administrative tribunal specifically to hear disputes between the IRS and citizens. Because the Board was an administrative tribunal and not a "court" as outlined in Article III of the Constitution, the Board did not have the power to hold jury trials. Such rights exist only in the judicial context. However, in 1969, with the passage of the Tax Reform Act of 1969, the Board of Tax Appeals was transformed from "an independent agency of the Executive Branch" into the United States Tax Court. Specifically, the Board was made "a court of record."[73]

Still, the courts take the position that litigants before the Tax Court are not entitled to constitutional protections that otherwise exist, such as the right to a jury trial. The reasoning that supports this contention is that the Tax Court is an "Article I court," not an Article III court. That is to say, the Tax Court is created through Congress' power "To constitute Tribunals inferior to the supreme Court," under Article I, section 8, clause 9 of the Constitution. The Tax Court itself reasoned that Congress may erect court-like agencies that are not in fact courts, in which otherwise constitutionally protected rights do not exist. In the case of *Burns, Stix Friedman Co. v. Commissioner,* the Tax Court stated that,

> *The fact that the Tax Court has the characteristics of a court and performs its functions in a judicial manner, as we think it does, see Stern v. Commissioner, 215 F.2d 701, 707 (C.A. 3, 1954), and has no legislative, administrative, or advisory powers, does not necessarily mean that it must be established under article III of the Constitution.*[74]

Such a claim seems spurious since the very concept of constitutional government is based upon the separation of powers. The powers of the judiciary cannot be exercised by the executive. Moreover, Article III, section 1 of the Constitution expressly provides that all "judicial power" is vested in the supreme court and "in such inferior Courts as the Congress may, from time to time, ordain and establish." That

Congress has the authority under Article I to create courts does not authorize the creation of courts that are not "judicial" in nature under Article III. Still, that is precisely the conclusion of the Tax Court in claiming that litigants in the Tax Court need not be vested with the constitutional rights (such as the right to trial by jury) that otherwise apply in Article III courts. The net effect of this is to say that while the Tax Court *looks* like a court, and *acts* like a court, and *talks* like a court, it is in fact *not* a court. Therefore, litigants are not entitled to constitutional protections while appearing before it.

But the Tax Court is the only avenue of litigation available to a citizen who both disagrees with the IRS' tax liability determination and who is unwilling or unable to pay the tax prior to obtaining review of the IRS' actions. Such citizens are effectively dispossessed of otherwise inalienable rights under what has become the pervasive notion that the government's "compelling need" to collect revenue overrides the constitutional protections of the people.

The Post-payment remedy

If one wishes to enjoy all his constitutional rights in connection with a dispute over the propriety of a tax, including the right to a jury trial on the facts, he must lodge his case in the United States District Court, not the Tax Court. District courts are clear Article III courts and as such, litigants therein are entitled to all constitutional rights. In civil cases, including tax cases, litigants are entitled to have the facts of the case decided by a jury as prescribed in the Seventh Amendment.

However, placing a case under the jurisdiction of a district court carries its own problem unique to tax cases. This problem is often insurmountable and effectively denies most litigants access to the district court. That is exactly why they opt for the Tax Court remedy and are thus dispossessed of the right to a jury trial. The reason is that a person cannot gain access to the district court unless he first pays the disputed tax *in full.* Congress has carefully erected a statutory scheme that effectively forecloses judicial review of IRS' actions until the tax is paid.

Citizens must choose between their right to trial by jury or their right to the peaceful use and enjoyment of their property.

As we discuss in more detail later in this report, this scheme is known as the Anti-injunction Act and the Anti-declaratory Judgment Act. Both have a long history as an integral part of tax administration. They are based upon the proposition that the government's need for revenue is paramount to the constitutional rights of the people. This concept was expressed plainly by the Supreme Court in the case of *Phillips v. Commissioner,* where it was held that, "Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied." [75]

As a result, citizens are forced to pay the tax prior to judicial determination. Not only must the citizen pay the tax, but the related penalties and interest must be paid in full before the federal district courts have any authority to hear the citizen's complaint. Only then is the matter presented to the courts in the context of a claim for refund, fashioned under code section 7422. Even at that, the citizen cannot file a *suit* for refund until he has first filed an administrative *claim* for refund with the IRS.

All during this time, the citizen is deprived of the use and enjoyment of his property. This is true even in cases where the IRS' determination is contrary to law. The 1960 Supreme Court case of *Flora v. United States* affirmed this long-standing rule, stating,

> *The Government has a substantial interest in protecting the public purse, an interest which would be substantially impaired if a taxpayer could sue in a District Court without paying his tax in full.*[76]

In the name of satisfying the government's compelling need for money, Congress and the courts have placed citizens on the horns of a dilemma. They must choose between their right to trial by jury or their right to the peaceful use and enjoyment of their property. On the one hand, citizens must pay the disputed tax—including additions—in full then follow the time-consuming administrative procedures before filing a suit in the district court. Only then can they enjoy their constitutional right to a trial by jury. On the other hand, those who cannot pay the tax by reason of hardship or otherwise, must effectively waive their right to a jury trial by opting for a review before the Tax Court, which is nothing more than an administrative tribunal wherein typical constitutional protections *do not apply.*

This scheme is specifically designed and intended to remove the constitutional barriers of due process and jury determinations that the Founders expressly erected to protect citizens from government intrusion.

Eroding the Right to Due Process of Law: *"The IRS can do anything it wants."*

Drawing upon its historic origins in *Magna Charta,* the idea of due process of law was a concept with which the Founders were well versed. As a fundamental principle of American law, the Founders ensured this important protection by declaring in the Fifth Amendment that no person shall "be deprived of life, liberty, or property, without due process of law." A similar provision, pointed expressly at the States, is found in the Fourteenth Amendment.

Due process is a necessary ingredient in the recipe for liberty. It holds governmental enforcement action at bay until after a citizen has been adjudged liable at law or guilty of a crime. The very notion of due process necessarily implies that such judgment can occur only in the ordinary course of established judicial process. Early Supreme Court decisions established plain rules to define what constitutes due process. They can be summarized with this simple declaration: due process requires that a notice be issued to the citizen and a hearing be held *prior* to executing any enforcement action. The Supreme Court stated it this way:

> *An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.*[77]

The courts have somehow come to the conclusion that property rights are not on the same level as other rights.

Unfortunately, as shown from the above discussions, "any proceeding" seems to mean any proceeding *except* a tax proceeding. Despite the fact that tax assessments are final in nature and affords the IRS the opportunity to resort to all its enforcement tools to collect the assessment, the accepted notion of due process does not apply to tax assessments. The case of *Phillips v. Commissioner* asserts that summary enforcement proceedings in tax cases, as contrasted with normal civil proceedings in which a hearing is offered in the first instance, are perfectly acceptable. The Court held that,

> *Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate.*[78]

The courts have somehow come to the conclusion that property rights are not on the same level as other rights. How such a conclusion could be reached, given the plain language of both the Fifth and Fourteenth Amendments and the historical context of each, is beyond comprehension. Yet, the distinction is based upon the now familiar theme: governmental need. The high court in *Phillips* minced no words on the matter, declaring that "property rights must yield provisionally to governmental need."[79]

In keeping with that philosophy, Congress erected substantial barriers to traditional due process that apply only in tax cases. These barriers have led to the belief, common among citizens, that "the IRS can do anything it wants." The first barrier is tax code section 7421, the Anti-injunction Act. The second and companion barrier is the Anti-declaratory judgment act, found in Title 28 United States Code, section 2201. Together, these statutes effectively deprive federal courts of general jurisdiction to enjoin or restrain the assessment or collection of taxes. Stated another way, the courts cannot stop IRS enforcement action outside the narrow scope of available statutory remedies. While there are limited exceptions to this harsh rule, the factual applications are rare and unusual to the point where courts almost universally dismiss judicial challenges to IRS enforcement actions.[80]

The chief statutory remedy within the tax code is the co-called deficiency procedures, established under sections 6212 and 6213. These rules provide that when the IRS makes a final administrative determination regarding tax liability, the agency must issue a notice of deficiency. The notice of deficiency provides the citizen with the opportunity to petition the Tax Court for review prior to assessment of the tax. However, as described in detail above, the Tax Court option effectively locks a taxpayer out of the constitutional rights he otherwise might enjoy. On the other hand, failure to petition the Tax Court leads to a summary assessment of the tax, which in turn triggers the application of IRS' full collection arsenal. This includes wage and bank levies, property seizures and tax liens. If the Tax Court option is not invoked, the taxpayer may seek judicial review in an Article III court, but only *after* paying the disputed tax in its entirety and then filing an administrative claim for refund with the IRS.

The IRS plays the role of judge, jury and executioner in connection with the tax liability in question

The key to these procedures is that the responsibility lies solely with the citizen to take action. He must file court documents, invoke statutory remedies, etc., *prior* to being deprived of his property. Should he fail to take such action, either through ignorance or otherwise, or take action in an improper or untimely manner, the assessment becomes final. It is then subject to enforcement action. Given the structure of these procedures, the IRS—though it is the claimant in the traditional legal sense of the word—never has to darken the door of a courtroom to establish the verity of its claim or distrain collection.

That this summary assessment process is prone to excessive abuse and error is undeniable. For example, in its 1996 Annual Report to Congress, the Taxpayer Advocate placed erroneous audit results (and concomitant enforcement actions) as number one on the list of the ten major reasons why taxpayers turned to the Taxpayer Advocate for assistance.[81] In 1999, the Taxpayer Advocate scored this issue number twelve on the list of the twenty "most serious problems facing taxpayers."[82] And in 2000, the issue was ranked number eighteen on the same list.[83]

Lack of due process was one of the major complaints against the IRS heard by Congress in the 1997 abuse hearings. As a result, Congress enacted what it calls "collection due process" protections—code sections 6320 and 6330. These statutes afford the citizen the right to a "collection due process hearing" prior to the IRS undertaking collection enforcement action. Section 6330(b) affords the citizen the right to a "fair" hearing before collection begins and section 6330(c)(2) states that citizen may present at the hearing "any relevant issue relating to the unpaid tax or the proposed levy." In the event of an adverse determination, the citizen has the right to seek judicial review of the issues presented.[84]

While the collection due process statutes are a step above the process that existed prior to enactment, they fall well short of the constitutional model for several key reasons. First, the onus is on the citizen at every level to invoke the protections, such as they exist. Section 6330 requires the IRS to give notice to the citizen of his right "to request a hearing." Thereafter, the duty rests entirely with the citizen to follow all necessary procedures to timely and correctly invoke the hearing provisions. The burden of proof as to all factual and legal matters rests squarely with the citizen. Because the collection due process hearing is purely administrative in nature, the provisions of code section 7491 do not apply. The only exception is that the IRS must ascertain that all administrative procedures required under the code were followed.

The judicial review provided for under section 6330(d) does not give the citizen more latitude to invoke the judicial process than existed prior to the enactment of code section 6330. If the Tax Court is the court where jurisdiction of the case would normally lie, the judicial review must be sought in the Tax Court unless the tax is first paid in full. In this way, a citizen is no more entitled to a jury trial then he would have been had Tax Court review been sought in the first instance.

Where the Internal Revenue Service is concerned, however, there seems to be no zone of privacy the law respects.

The most important problem with the collection due process procedures is that the hearing is held before the IRS rather than an arm of an independent judiciary. And while the IRS insists that the process—handled by the Appeals Office—is "fair," the fact is the IRS plays the role of judge, jury and executioner in connection with the tax liability in question. In reality, the one fear that haunted the Founders the most is present in the case of the IRS. That is, all three powers of government—legislative, executive and judicial—are vested in the hands of a single authority.

In the final analysis, the process of assessment and collection retain the character of summary proceedings in which the normal judicial protections are bypassed to accommodate the government's overriding need to swiftly collect its revenue. Without having introduced into the equation the artificial consideration of government's "compelling need," there is no way our current system of assessment and collection would pass constitutional muster.

Fourth Amendment Right Against Unreasonable Searches: *"The worst instrument of arbitrary power."*

The bitter experiences the colonists had with the King's general warrants and arbitrary property seizures were directly responsible for the birth of the Fourth Amendment. In addition, the use of writs of assistance occasioned every imaginable privacy violation. A writ of assistance is a general order issuing from the Crown to the sheriff requiring him to be in the aid of the King's tax collectors or other agents. The Founders recognized that the right to be secure in their homes and possessions was a fundamental right with a rich history in English common law. The most famous English case is that of *Entrick v. Carrington and Three Other King's Messengers,*[85] a case our own Supreme Court hailed as "one of the landmarks of English liberty."[86]

Entrick was an associate of John Wilkes, whose pamphlets attacked not only government policy but the King himself. To suppress Wilkes, the King's agents raided homes and other places in search of evidence of Wilkes' writings and materials for use by the Crown in the seditious libel and treason trials that were so prevalent at the time. Entrick commenced a civil action for trespass against the King's agents for entering his home in November, 1762, and breaking open his desks, boxes, etc., and searching and examining his papers. In condemning the raids, English Lord Camden declared that the use of such raids was "subversive of all the comforts of society" and the conduct associated with them was "contrary to the genius of the law of England."[87]

In the colonies, the experience with general warrants and writs of assistance had less to do with seditious libel and more to do with smuggling. The King's agents used the arbitrary and invasive process as a means of enforcing England's sweeping revenue laws and to seize both prohibited and untaxed goods. James Otis held the office of advocate-general of the colony of Massachusetts at the time George III assumed the Crown. In that position, Otis was required to defend the use of writs of assistance before the courts in Massachusetts that they may be reinstated as binding upon the colony. He refused, resigned his position and represented the people in opposition to the use of such writs. He described the practice as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book" since they placed "the liberty of every man in the hands of every petty officer."[88]

The Fourth Amendment was written to end this practice in the United States. The amendment reads,

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

That the Fourth Amendment protects a person's property is without question. This premise was quickly established and followed in early cases, such as the landmark case of *Boyd v. United States.*[89] But the protections of the amendment are not limited only to property interests. They extend to the individual and his general expectation of privacy in the conduct of his affairs. As the Supreme Court said in *Katz v. United States,* the amendment "protects people, not places."[90] Thus, where the individual has an expectation of privacy and that expectation is reasonable, this "zone of privacy" precludes governmental intrusion.

The IRS is free to summons any person and all records to aid an investigation or examination of a person's tax return and potential criminal liability.

Where the Internal Revenue Service is concerned, however, there seems to be no zone of privacy the law respects, at least insofar as the civil enforcement of the tax code is concerned. In granting the IRS broad civil and criminal investigatory powers under code sections 7601 and 7602, Congress gave the IRS what amounts to the power to issue English-style writs of assistance.

Code section 7601(a) reads,

> *(a) General rule. The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.*

Under this language, the IRS is set free to literally "canvass and to inquire"[91] throughout the "district," (read—the countryside) in search of persons who may have violated the taxing statutes at some level. Pay particular attention to the fact that the statute establishes no requirement that the IRS possess or have knowledge of any tangible evidence of any tax law violations, nor must the IRS even so much as *suspect* a person of such violations. Rather, the agency is authorized to conduct such fishing expeditions as IRS alone "deems it practicable" to enforce the laws.

Code section 7602 reads,

> *(a) Authority to summon, etc. For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any*

person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) Purpose may include inquiry into offense. The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

Under code section 7602, the IRS is free to summons *any* person and *all* records to aid an investigation or examination of a person's tax return and potential criminal liability. Under this authority, the IRS can and routinely does gain access to bank records, employment records, mortgage and credit card records, insurance records, records concerning personal and business relationships of every description, records of auto loans, records concerning investments and brokerage accounts, records concerning real estate transactions, phone records, records of correspondence, business contracts, internal memoranda, travel agency and airline records, records sought by a foreign country pursuant to a tax treaty, even records from one's accountant and attorney, to the extent that they relate to the tax liability of the individual under investigation. In addition to documents, the summons authority allows agents of the IRS to elicit testimony under oath from any witness, including the taxpayer whose affairs are subject to the investigation and to provide handwriting exemplars. One summons went so far as to direct a taxpayer to be fingerprinted at a local police station.[92]

Not even the legal privilege that normally protects the confidential communications between an attorney and his client can stand against an IRS summons seeking records.

Not even the legal privilege that normally protects the confidential communications between an attorney and his client can stand against an IRS summons seeking records created in connection with the accounting aspects of his client's tax affairs. What is more, code section 7525, added by the IRS Restructuring Act, does not create a new right to an accountant/client privilege that can be used to shield his client's tax and accounting records from the IRS.[93]

In short, if there is a transaction or event that occurred in the life of a taxpayer, the IRS can gain access to the information using its summons power under code section 7602. And while it is true that the summons is not self-enforcing, the taxpayer bears the burden to invoke procedures under the code in an effort to block the IRS' access to the documents or testimony it seeks. As in all such areas of tax law, the burden of proof is on the citizen and unless the citizen is aware of the cumbersome procedures under the code, the IRS never needs judicial approval to gain access to a limitless range of otherwise private records and testimony.

One might naturally raise the question why the Fourth Amendment's otherwise stringent probable cause requirement does not limit the IRS' access to these records. The answer is quite simple, at least insofar as the Supreme Court is concerned. The Supreme Court has taken the rather expedient position that the probable cause does not apply in the issuance or enforcement of an IRS summons. The Supreme Court determined that not only is there no probable cause standard that applies to summons, but that Congress intended no judicial interference with the IRS' investigative process. In the case of *United States v. Powell,* the high court stated,

> *For us to import a probable cause standard to be enforced by the courts would substantially overshoot the goal which the legislators sought to attain. There is no intimation in the legislative history that Congress intended the courts to oversee the Commissioner's determinations to investigate.*[94]

Even more ominous is the Court's declaration that the IRS has "a power of inquisition, if one chooses to call it that, which is not derived from the judicial function."[95] Such a power, of course, is precisely the kind of arbitrary authority the colonists abhorred and which Otis so righteously protested by resigning his post in colonial Massachusetts.

Even stranger is the manner in which the *Powell* court arrived at its conclusion. Rather than examine the plain language of the Constitution and the rich history of the Fourth Amendment, the Court merely examined the legislative history of the code sections in question. Finding that Congress intended no probable cause consideration in the issuance of summons, the Supreme Court refused to impose one.

Since the Tax Reform Act of 1986, there has been an explosion in the requirements for submitting information returns.

One might also question why the "zone of privacy" contemplated by the Fourth Amendment does not extend in a more general sense to private records held by third parties. Here too, the Supreme Court answered the question in simple and abrupt terms. In the case of *United States v. Miller,* the court determined that a person essentially waives his right of privacy with respect to any matter shared with a third party. For example, when a person voluntarily opts to do business with a bank, "The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government."[96]

The lack of any probable cause safeguard, the view that one has no reasonable expectation of privacy in his affairs with a third party, and the Supreme Court's unwillingness to hold the IRS to any standard of reasonableness in connection with its "inquisitions," has understandably led to the agency's belief that it is entitled to any and all information whatsoever. This is best illustrated by a 1994 agency announcement concerning its plans to obtain "on-line" access to the nation's *private* databases, including,

> *commercial sources, state and local agencies, construction contract information, license information from state and local agencies, currency and banking reports (CBRS), data regarding assets and financial transactions from state and local agencies, and information on significant financial transactions from reviews of periodicals and newspapers and other media sources.*[97]

The same notice goes on to describe exactly who would be the target of the proposed invasion. The people covered under the aggressive electronic surveillance system are described as,

> *any individual who has business and/or financial activities. These may be grouped by industry, occupation, or financial transactions included in commercial databases, or in information provided by state and local licensing agencies.*

There is no description more broad or all encompassing than "any individual who has business and/or financial activities." This is, in practical effect, no limitation whatsoever, since every American, including a growing number of minor children, engage in "business and/or financial activities" at some level.

This lust for information is grounded in what the agency refers to as holes in the "information reporting safety net." The idea is that the more the agency knows, the more likely it is that individuals will "voluntarily" report all their income and pay all taxes owed. If a particular transaction falls through that safety net, the IRS immediately believes this to be a source of tax cheating. The first order of business in plugging the holes is to mandate information reporting on every transaction.

Since the Tax Reform Act of 1986, there has been an explosion in the requirements for submitting information returns. These are documents that report to the IRS the nature and scope of a transaction that one individual or business has with another. At last count, more than 1.3 *billion* information returns are filed with the IRS annually. These documents are in addition to the more than 225 million business and personal income tax returns.

The information reporting rules cover real estate transactions, stocks and securities, interest payments, and a myriad of others. Even payments to baby sitters must be reported to enjoy the childcare credit available under code section 21.[98] As of 1986, cash transactions in excess of $10,000 must be reported to the IRS on Form 8300. The report must be filed by the person who received the cash in the course of his business. The law is said to be designed to track down those engaged in tax evasion by using cash to hide their activities from the IRS. Ironically, the penalty for merely not filing the form can be as serious as the tax evasion penalty itself.[99]

> ***In its report, the GAO referred to the SSN (Social Security Number) as a "national identifier."***

To assimilate this mountain of data the agency collects each year, the IRS determined to brand all citizens with a particular number by which a citizen's business and other financial affairs can be tracked. The Social Security Number (SSN) has become the preferred tool for this task.

What began as a seemingly innocuous requirement during the 1960s has grown to a heavy burden with pernicious implications. It began inauspiciously in the early 1960s when the IRS began implementing rudimentary computer technology. For obvious reasons, it was necessary to organize computer files by number rather than name. Since most working Americans already had a peculiar number assigned to them by the Social Security Administration, the IRS adopted it as the "taxpayer identification number." Citizens began filing income tax returns and businesses filed Forms W-2 and 1099 using the SSN as the identifying link between the named individual and the reported data.

By the late 1970s, however, the IRS became convinced that tax evasion through the use of improper dependent exemptions was on the rise. IRS studies purported that between 1965 and 1979, the revenue lost from such exemptions grew from $1.9 billion to $8.2 billion.[100] As a result of the claimed loss of revenue, the IRS began pressuring Congress as early as 1976 for authority to require SSNs for dependent exemptions. However, that proposal "was not pursued at that time because of anticipated concerns of Congress and taxpayers."[101]

Over time, the environment changed substantially. By the mid-1980s, Congress was more willing to overlook the privacy and religious concerns of the public so long as it could show that increased revenue would flow to the Treasury. In 1986, the Treasury prepared a report to Congress projecting lost revenue of $4.3 billion in 1987 and $22 billion for years 1987 through 1991, due to illegitimate exemptions. IRS' legislative proposal implored Congress to mandate that citizens have SSNs for minor children in order to claim them as dependent exemptions. This proposal was adopted in modified form as part of the Tax Reform Act of 1986 in the form of code section 6109(e).

At the time adopted, the requirement applied to dependent children ages five or older. Shortly thereafter, the IRS surveyed those still lacking SSNs for their dependents. What the agency discovered provided the impetus to push for even stricter requirements. The survey found that,

> *Of the parents who did not have SSNs for their children in May of 1987, 62 percent had no concerns about getting those SSNs. This figure rose to 66 percent in October and by January 1988 to 73 percent. In January 1988, only 11 percent of those who did not already have SSNs for their children (or 1.2 percent of the total population) were concerned about becoming a 'numbered society' and only about 8 percent of these individuals (0.9 percent of the total population) had privacy worries.*[102]

Steeled by the notion that precious few citizens cared about the implications of branding their minor children with SSNs, the requirement was soon made to apply to children aged two years or more. It then dropped to one-year olds. And the culmination came on December 8, 1994, when President Clinton signed the Uruguay Round Agreements Act, implementing the much-debated General Agreement on Tariffs and Trade (GATT).[103]

Because GATT consisted of fifteen *hundred* pages of legislation pointed primarily at trade policy, the public's attention never focused upon the few provisions dealing with domestic tax issues. One such provision is found in section 742(b) of the GATT legislation. It set forth a requirement that children—*at birth*—have Social Security Numbers if they are to be claimed as dependent exemptions. The requirement applies to all tax returns beginning in 1996.

Concerns about the growing use of the SSN by the IRS and others prompted a study by the United States General Accounting Office on the pervasiveness of the number. In its report, the GAO referred to the SSN as a "national identifier."[104] The GAO noted that the SSN has evolved into widespread use because "Congress recognized the universal nature of the SSN and subsequently enacted laws requiring SSN uses for some purposes not related to Social Security." The GAO declared at page four of its report,

> *Simply stated, the uniqueness and broad applicability of the SSN have made it the identifier of choice for government agencies and private businesses, both for compliance with federal requirements and for the agencies' and businesses' own purposes.*

In litigation that has followed the imposition of the SSN requirement on minor children at birth, courts have refused to recognize any privacy, Fourth Amendment or other constitutional violations inherent in this mandate since it is a tool of the IRS to collect money. As such, the Social Security Number has indeed become a universal identifier for all citizens imposed in the name of administrating this current income tax code and raising revenue.[105]

In 1765, British courts expressed outrage that the King's agents would enter a man's home then break open his "drawers, boxes, etc.," for the purpose of gathering evidence for use in legal proceedings. Our own Supreme Court, in the remarkable *Boyd* decision, was equally outraged that our own national legislature would erect a statutory tax collection scheme that in essence, accomplished the same thing. The *Boyd* Court noted,

> *It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching among his papers, are wanting, and to this extent the proceeding under the act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself.*[106]

Modern technology has rendered the need to "break into a man's drawers, boxes, etc.," nearly unnecessary. The statutory scheme erected by Congress and the use of technology to track personal and business transactions give the IRS the tools to accomplish what amounts to the same act without the necessity of soiling the hands of the investigators in the process. But the mere fact that searches are accomplished through electronic means renders them no less a search, given that a search in this sense is the act of gathering evidence. As the *Boyd* Court observed,

> *The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, [referring to the Entrick case] with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord CAMDEN's judgment.*[107]

The current income tax system simply could not function if the full scope of protections intended by the Fifth Amendment were upheld in tax cases.

The reality is that any income tax system cannot operate without the IRS' ability to invade each citizen's "right of personal security, personal liberty and private property" at will. The Founders were well aware of this fact. That is why they expressly rejected direct taxes as the chief means of raising revenue since the very nature of direct taxes requires that the federal government have personal contact with each citizen such as outlined in this treatise. On the other hand, indirect or excise taxes are generally free of such wholesale invasions of liberty and therefore, were adopted as the primary means of funding the new government.

Fifth Amendment Right Against Self-incrimination: *"The law obligeth no man to accuse himself."*

If the colonists' experience with writs of assistance and general warrants was chiefly responsible for the birth of the Fourth Amendment, their knowledge of the infamous Court of Star Chamber and its use of the oath *ex officio* was responsible for the Fifth Amendment. Formalized in 1487, Star Chamber allowed the king to dispense with all the normal protections of common law in the trials of criminal offenses. There were no grand jury indictments, the accused were often denied counsel and had no right to call witnesses on their own behalf or to confront the witnesses against them. Judges tried the case, determined the law and facts and passed judgment. The principle pre-trial procedure, used to obtain confessions, was torture. "Justice" was swift and outcomes sure in any Star Chamber proceeding.

A key element of Star Chamber proceedings was the oath *ex officio.* This was an oath administrated by Star Chamber prosecutors "by reason of their office." Defendants were required to take an oath to tell the truth then submit to all manner of interrogation regarding any subject whatsoever. Thus, the character of Star Chamber proceedings followed that of the Roman process of *inquisition,* rather than the traditional English process of *accusation.* The oath *ex officio* played an important role in the inquisitional process. It allowed the fiat of prosecutors to bend the proceeding in any direction they chose, dragging the accused behind them, generally using the defendant's own testimony (usually gleaned through torture) as the basis of the inquiry.

In what Blackstone referred to as the "obnoxious jurisdiction" of Star Chamber, defendants found themselves on the horns of a most menacing trilemma: they could, a) take the oath and incriminate themselves in a proceeding the outcome of which was predetermined, b) lie after taking the oath and face perjury charges, the results of which were likewise predetermined, or c) refuse the oath, remain silent as to all inquires—and be tortured.

The process of inquisition is abhorrent to that of a free society. The Founders knew this and expressly rejected all elements of it by adopting the Fifth Amendment, the protections of which half the colonies already expressed in their own constitutions. The Fifth Amendment's guarantee that no person "shall be compelled in any criminal case to be a witness against himself" is based upon the ideal, articulated by Lord Camden in the *Entrick* case, that,

> *It is very certain that the law obligeth no man to accuse himself, because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that the search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty.*[108]

Over the hundreds of years of litigation surrounding the self-incrimination protection, the courts have expressed over a dozen reasons why the policy is sound and necessary in a free society. Of those, three stand out. The first, stated by Lord Camden, is that the policy is to stand as shield behind which the innocent citizen may find protection from over-zealous executive officers.

The second, expressed by the Supreme Court in *Tehan v. United States,* is to preserve the "integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution shoulder the entire load." Going on, the court noted that the values set forth in the Fifth Amendment, like those of the Fourth, "reflect the concern of our society for the right of each citizen to be let alone."[109] In this sense, the Fifth Amendment is an indispensable component to maintaining an accusatorial rather than an inquisitorial system of justice.

The third is to provide to every individual an impenetrable sanctuary of personal privacy where he may be secure in his liberties. In advancing this premise, the *Boyd* court observed that "the Fourth and Fifth Amendments run almost into each other."[110] Numerous courts restated this premise with equal fortitude. For example, in *Murphy v. Waterfront Commission,* the Supreme Court described the right as reflecting "our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life."[111]

> ***The invasion of the citizen's Fifth Amendment sphere is occasioned by the need to raise revenue.***

And while the Fifth Amendment speaks to self-incrimination in a criminal case, the courts have historically afforded the amendment liberal and broad construction, as well they should, extending its protections beyond the criminal process. The general rule is that Fifth Amendment applies in any situation where answers to questions may provide a link in the chain of evidence which may tend to incriminate the citizen. This is true whether the process be that of grand jury investigation, civil cases where there is a risk of penalties, even administrative and legislative hearings.[112] The caveat is that the risk of incrimination must be real and not imagined.

Against this historical backdrop, as well as the intended inviolable nature and broad scope of the Fifth Amendment, one reaches the inescapable conclusion that the current income tax system simply could not function if the full scope of protections intended by the Fifth Amendment were upheld in tax cases. Not surprisingly, such protections are not upheld. Let us examine a few key areas in which courts find it expedient to depart from the plain language of the amendment.

The Fifth Amendment and the Tax Return

The individual tax return is required to be signed under penalty of perjury. A return not signed under penalty of perjury is not considered a proper return. This fact sets before the citizen realities which, taken as whole, force him to effectively abandon his rights under the Fifth Amendment, thereby incriminating himself—or face criminal prosecution.

We start with the basic premise that when a citizen fills out a tax return, he has the same posture as that of a witness in a civil case. In such a situation, a witness may not refuse to testify on ground of the Fifth Amendment, that is, he cannot make a blanket objection to every question. He can, however, interpose specific objections to specific questions if the answers may tend to incriminate him. However, by answering the question, the witness waives his rights under the Fifth Amendment. All disclosures can therefore be used against the citizen in any civil or criminal proceeding.[113]

On the other hand, the law provides criminal penalties for willful failure to file the return. Section 7203 provides a misdemeanor offense for failure to file, carrying a penalty of up to $25,000 ($100,000 in the case of a corporation) and one year in prison, together with the costs of prosecution. Thus, one clearly cannot simply refuse to file a return on the ground of the Fifth Amendment. But the act of claiming the Fifth Amendment on the return does not shield the taxpayer from criminal prosecution either. The courts have systematically stated that a return that does not contain information from which a tax can be computed is not a return within the meaning of the law. Thus, for decades, citizens have been prosecuted and convicted for failure to file where their only crime was to plead the Fifth Amendment on the return itself.[114]

Thus, here is the dilemma: A person wishing to preserve the privacy of his financial affairs from IRS inquisition must assert the Fifth Amendment on the tax return. But by doing so, he opens himself up to prosecution under code section 7203 for willful failure to file the return.[115] On the other hand, providing the information on the return operates as a waiver of the Fifth Amendment right. As a result, the IRS—and all other government agencies—can use the information against the citizen in subsequent tax *and* non-tax civil and criminal law enforcement veins.[116]

Designed to ferret out unreported income from even the most common citizens, the economic reality audit resembles a seventeenth century Star Chamber inquisition aided by the oath ex officio.

How is it that the IRS can force the citizen to choose between waiving his constitutional rights or being prosecuted under section 7203? The answer is found in the language of the Ninth Circuit case of *United States v. Carlson.* In expounding upon a position initially advanced by the Supreme Court in *United States v. Sullivan* (though not so clearly stated), the *Carlson* court took the position that "the requirement of filing an annual income tax return is primarily designed to facilitate revenue collection, not criminal prosecution."[117]

Even more directly, *Carlson* stated that the taxpayer's Fifth Amendment rights must be supplanted to "the character and urgency of the opposing revenue interests." That is to say, the invasion of the citizen's Fifth Amendment sphere is occasioned by the need to raise revenue.

Going further, contemporary decisions such as *Carlson* take the position that the questions on the tax return are "neutral on their face" or "innocuous" in nature. Because of that, the citizen faces no "real or substantial" risk of self-incrimination, provided he merely tell the truth.

But are the inquiries of a tax return innocuous? One who is familiar with the intricacies of the tax code could hardly so conclude. The simple fact that the law ascribes civil and criminal liability to the answers renders the questions *per se* deleterious. The sheer breadth, scope, complexity and ambiguity of the code render it impossible upon any reasonable examination to claim that the answers to the questions in a tax return, including all its "accompanying forms and schedules," are innocuous. All such answers have both criminal and civil implications with which the taxpayer is, in most cases, wholly unaware.

The confusing and convoluted nature of the tax code necessarily exposes otherwise honest citizens to intensive scrutiny, civil penalties and criminal prosecution. Egregious examples are found in the cases of *United States v. Critzer* and *United States v. Garber.*[118] Both Critzer and Garber were prosecuted in situations where the law was so confusing that even the qualified experts disagreed as to the correct tax treatment of the items in question. But even if these citizens had not been prosecuted, their treatment of the transactions in question opened them up for assessment of additional taxes, civil penalties and interest, all grounded upon the citizens' own statements as set forth in the tax returns they were compelled by law to file.

And what of the inquiries of tax examiners? Are they also innocuous? That cannot be so since the IRS takes the official position that tax cheating occurs across the board, especially in the area of underreporting income. In testimony before the National Commission on Restructuring the Internal Revenue Service, Lynda D. Willis, the GAO's director of tax policy and administration, described the results of IRS research on the source of the growing tax gap.[119] She stated,

> *At present, the largest component of the US income tax gap arises from individuals not fully reporting their income, particularly income that is not subject to tax withholding. This knowledge has helped IRS to train its auditors to better detect unreported income.…IRS' estimate attributes about three-fourths of the gross income tax gap to individuals and one-fourth to corporations. For 1992, the individual tax gap primarily arose from individuals not fully reporting their income on filed tax returns.*[120]

Willis identified sixteen different income categories in which IRS believes cheating occurs. The categories include everything from wages to farm income to sole proprietors to taxable Social Security benefits. In sum, the IRS believes cheating occurs in every income category. And while certainly some categories are considered more egregious than others, not one category of income earner is believed to be reporting all taxable income.

Willis referred to the fact the IRS put its auditors through additional training to "better detect unreported income." That training was incorporated into a program known as the "economic reality audit." Designed to ferret out unreported income from even the most common citizen, the economic reality audit resembles a seventeenth century Star Chamber inquisition aided by the oath *ex officio.*[121] The only difference is the IRS has not yet resorted to physical torture to extract useful information.

IRS manuals define the economic reality audit as one "whereby the financial status of an individual taxpayer, as measured by his/her standard of living and operating in the community, is evaluated in relation to information reported on the return."[122] The IRS describes the objectives of economic reality audits as follows:

> *Evaluate the whole taxpayer (including consideration of related tax entities) from an economic reality point of view instead of only focusing the audit on some narrow aspect of tax consequence.…Perform investigative audits instead of verification audits."*[123]

Agents are expected to "create an economic profile of the taxpayer." Through the use of the "profile," the agency sets out to determine the extent to which a citizen is likely hiding income. To build the "profile," the agent is to evaluate up to forty-seven different elements of a person's lifestyle. They include:

- Neighborhood
- Home
- Age and number of dependents
- Investment Income
- Number of years in business
- Recreation Vehicles
- Automobiles
- Changes of address
- College Tuition

- Trips
- Club Memberships
- Hobbies
- Weddings of Children
- Legal actions
- Level of Sophistication
- Cultural Background
- Education and Work Experience
- Type of Business
- Insurance coverage/what covered
- Marital history
- Gambling
- Personal Property
- Loan Information.[124]

Another aspect of the economic reality puzzle is one's personal living expenses. Agents are instructed to have citizens itemize all personal living expenses paid during the audit years.[125] These are but a few of the items a citizen may be called upon to document:

- Food, consumed at home and away from home
- Alcoholic beverages
- All housing expenses
- All utility expenses
- Expenses for household operations
- Housekeeping supplies
- House furnishings and equipment
- Apparel and services
- Entertainment
- Personal care
- Reading
- Education
- Tobacco and smoking supplies, and so on.

And while it might seem that questions relative to what one spends on bath soap and beer are innocuous, the fact is, personal living expenses such as these are the key to the entire audit. Since such items do not appear on a tax return, the IRS must get the data from the citizen in order to have any idea whether he is living beyond his apparent means. IRS explains its reasoning as follows:

> *Most taxpayers will not intentionally deposit skimmed funds, but will use the cash to increase their standard of living. This will include day-to-day cash expenditures for payment of living expenses, down payments and/or purchases of assets and other investments. …The more information an examiner can develop, the larger the understatement [of tax]. The development of the personal living expenses can be extremely critical in this process.*[126]

From just a cursory review of this highly invasive audit process, it should be apparent to even the most casual observer that no information the IRS seeks, regardless of how innocent or disconnected to the tax return it may seem, is innocuous. The fact is, ignorance of the tax code renders the average taxpayer incapable of determining whether the requested information is innocuous.

Even if one continues to insist that tax return information is innocuous vis-à-vis the IRS, the fact is, the IRS is not the only government agency privy to the records and tax law enforcement is not the only use for which tax records are employed. The fact is, code section 6103 permits the IRS to disclose tax return information to any federal, state or local government agency for use in connection with the administration of its laws, whether or not related to tax.

For example, code section 6103(i)(1) allows IRS to disclose otherwise confidential tax records to any federal agency for the following reasons:

- preparation for any judicial or administrative proceeding pertaining to the enforcement of a specifically designated Federal criminal statute (not involving tax administration) to which the United States or such agency is or may be a party;
- any investigation which may result in such a proceeding, or
- any Federal grand jury proceeding pertaining to enforcement of such a criminal statute to which the United States or such agency is or may be a party.

Section 6103 also permits disclosure of otherwise confidential tax information to any state or local government agency for its use in connection with tax or non-tax law enforcement investigations or operations. This includes state welfare agencies, child support enforcement programs and state criminal investigations of every description.

According to the General Accounting Office's survey of federal, state and local government agencies and their access to confidential tax records, "there were 37 federal and 215 state and local agencies that received, or maintained records containing taxpayer information under the provisions of code section 6103." Of these requests for records, 31 percent of the time the requested information was used by federal or state agencies in connection with non-tax related criminal investigations.[127]

Code 6103(i)(1) allows IRS to disclose otherwise confidential tax records to any federal, state or local government agency, whether or not related to tax.

Code section 6103(k)(4) goes even further to authorize the release of otherwise confidential tax information to "a competent authority of a foreign government" for the purposes of facilitating the enforcement of any tax treaty the United States has with such government.

There are so many non-tax uses to which private and otherwise confidential tax information is put, that it is impossible to say that even the most honest and accurate answers—for tax purposes—are not highly deleterious for purposes of some other federal, state, local, or even *foreign government* investigation.

The Fifth Amendment and Private Personal Records

Since the infancy of our nation, the Supreme Court recognized the sanctity of private records. It repeatedly held that the Fifth Amendment prevents government officials from forcing one to disclose private records. This protection was pointedly and unequivocally upheld by the Supreme Court in the 1886 *Boyd* decision. From that point, *Boyd* was a fixed star guiding future courts in the resolution of similar disputes. The courts respected the "zone of privacy" erected by the Fifth Amendment, recognizing that an individual is absolutely protected—both from compelled testimony *and* from the compulsory production of his private papers.

This view was articulated by Justice Brennen in *Fisher v. United States,* as follows:

> *The common-law and constitutional extension of the privilege to testimonial materials, such as books and papers, was inevitable. An individual's books and papers are generally little more than an extension of his person. They reveal no less than he could reveal upon being questioned directly. Many of the matters within an individual's knowledge may as easily be retained within his head as set down on a scrap of paper. I perceive no principle which does not permit compelling one to disclose the contents of one's mind but does permit compelling the disclosure of the contents of that scrap of paper by compelling its production.*[128]

Boyd stood as stalwart constitutional law for nearly one hundred years. However, in 1976, the *Fisher* court sent the Fifth Amendment into a tailspin. The language of Justice Brennen quoted above is not the opinion of the full court in *Fisher.* Rather, it is Brennen's separate opinion, written to challenge the *Fisher* court's rationale.

Fisher involved an IRS summons issued in connection with a joint IRS criminal and civil investigation. The summons was issued to Fisher, an attorney for the citizen under investigation. The summons demanded that Fisher relinquish the documents in his possession that his client transferred to him prior to the issuance of the summons. The documents were accountant workpapers prepared based upon the client's personal records of income and expenses. The client retrieved the records from the accountant and delivered them to Fisher, the attorney.

The Supreme Court determined that Fisher had an obligation to release the documents. The rationale was that the documents were in Fisher's possession, not the client's. The summons, directed to Fisher, required the client to do nothing. As a result, Fisher's act of relinquishing the documents was not a violation of the client's Fifth Amendment rights since the client was under no compulsion by virtue of the summons.

But the specific rationale that disturbed Brennen was the court's following statement:

> *Furthermore, as far as this record demonstrates, the preparation of all of the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled testimonial evidence, either of the taxpayer's or of anyone else. The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else.*[129]

Brennen's concern over this language proved prophetic. In his separate opinion, Brennen wrote,

> *This implication that the privilege might not protect against compelled production of tax records that are his "private papers" is so contrary to settled constitutional jurisprudence that this and other like implications throughout the opinion prompt me to conjecture that once again the Court is laying the groundwork for future decisions that will tell us that the question here formally reserved was actually answered against the availability of the privilege.*[130]

Bennen foretold of a day when the Supreme Court might find that the Fifth Amendment would not protect one from the forced disclosure of his own private papers. Bennen spoke of the *Fisher* opinion as constituting a "serious crippling of the protection secured by the privilege against compelled production of one's private books and papers."[131] Bennen's fear would be realized just eight years later.

In 1984, the Supreme Court decided the case of *United States v. Doe.*[132] *Doe* involved grand jury subpoenas demanding the personal records of the citizen under investigation. He objected to their production, arguing his Fifth Amendment right against self-incrimination. The Supreme Court ruled that the citizen's private papers were *not* protected from compelled disclosure.

In pointing to the language of *Fisher*—the very language Bennen believed occasioned a "serious crippling" of the Fifth Amendment—Justice Powell, writing for the *Doe* court, stated,

> *This reasoning applies with equal force here. Respondent does not contend that he prepared the documents involuntarily or that the subpoena would force him to restate, repeat, or affirm the truth of their contents. The fact that the records are in respondent's possession is irrelevant to the determination of whether the creation of the records was compelled. We therefore hold that the contents of those records are not privileged.*[133]

The court's reasoning can be summarized quite simply: because one voluntarily creates the written document—though that document be a mere reflection of his most private affairs—he has no Fifth Amendment right to a "zone of privacy" with regard to those records. Rather, he loses that right because he was not compelled to create the documents in the first place.

Justice O'Conner's concurring opinion is, by her own words, even more "explicit." She writes,

> *I write separately, however, just to make explicit what is implicit in the analysis of that opinion: that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind. The notion that the Fifth Amendment protects the privacy of papers originated in Boyd v. United States, but our decision in Fisher v. United States, sounded the death knell for Boyd.*[134]

In the interests of facilitating government's unfettered access to one's private papers, the Supreme Court eviscerated one of the most important of all our personal liberties. In the process, it overturned more than three hundred years of "settled constitutional jurisprudence" grounded in the desire to ensure an individual's "zone of privacy" even from the tyrannical King of England. What is worse is the sophomoric logic the court used to arrive at its determination. That is, the simple act of moving one's personal thoughts from his head to paper through the act of writing somehow constitutes a waiver of the right of privacy with regard to the data.

> ***The Supreme Court eviscerated one of the most important of all our personal liberties. In the process it overturned more than three hundred years of "settled constitutional jurisprudence."***

The Fifth Amendment and Income Tax Enforcement

It is undeniable that the protections of the Fifth Amendment have been, in the words of Justice Brennen, "seriously crippled" by decisions of the Supreme Court. The extent to which the legal dross has denigrated the Constitution and confused the question is disturbing. We see just how far we have come by examining two recent decisions reviewing the way in which federal judges applied the Fifth Amendment to IRS summonses in light of *Doe, Fisher* and their progeny.

The first case is *United States v. Troescher.*[135] IRS served a summons upon Troescher demanding that he produce records reflecting his income. Troescher appeared before the agent and asserted his Fifth Amendment right with respect to both the questions and the records. The IRS petitioned the district court for an order requiring Troescher to disgorge. In evaluating Troescher's Fifth Amendment claim, the court required him to submit a statement to the court under seal explaining more specifically how he might be incriminated by the disclosures. Troescher revealed that he failed to file tax returns for the periods covered by the summons. His self-incrimination concern grew from the criminal sanctions in the tax code.

Upon reviewing Troescher's statement, the court determined that Troescher was "faced with substantial hazards of self-incrimination that are real and appreciable not merely imaginary and unsubstantial." This finding should have been sufficient to hold that Troescher's Fifth Amendment right acted as a bar to any order requiring him to comply with the summons. However, the court did not stop there in its analysis. It went on to say that, "the Fifth Amendment just does not apply when the taxpayer fears prosecution for a tax crime."[136]

Based upon the published precedents, the district court was persuaded that there exists a "tax crimes exception" to the Fifth Amendment. That is, while the amendment's protections apply absolutely to bank robbers, murderers or rapists, it has no application whatsoever to tax crimes. This, of course, is not a correct statement of the law but Troescher was required to appeal the court's order to the Ninth Circuit to correct it.

The second case is *United States v. Grable.*[137] This case likewise involved an IRS summons issued to a taxpayer seeking personal records. After refusing to produce the records, the United States sought an order from the district court holding Grable in contempt. Grable asserted his Fifth Amendment rights in the face of the IRS' demand. Unlike the court in *Troescher,* however, the district court in *Grable* did not undertake a review of Grable's Fifth Amendment claim. The court disposed of the claim much more unceremoniously. The court merely advised Grable that "no Fifth Amendment privilege applies to an order from the IRS to provide tax information."

The transcript reveals the following dialog between Grable and the judge:

> *[Grable] inquired: "Do I understand that I do not have a fifth amendment right at all in this case?" The district court replied: "Yes, sir, that is basically what I am saying." Moments later, the court elaborated: "There is no fifth amendment right not to share information with the Internal Revenue Service, period. That is the law."*[138]

For all practical purposes, the IRS and the courts have resurrected the dreaded oath ex officio, at least in tax cases.

At the conclusion of the hearing, the court found Grable in contempt and ordered him into custody. The court then denied his motion for a stay of the contempt order pending appeal. As a result, Grable was jailed on February 8, 1996, and remained in custody until the Sixth Circuit reversed the district court on October 17, 1996, more than eight months later.

It seems clear that our constitutional compass is skewed to the point where otherwise learned federal judges can no longer navigate the Fifth Amendment's course where the IRS is concerned. It is also clear, that for all practical purposes, the IRS and the courts have resurrected the dreaded oath *ex officio,* at least in tax cases. The requirement that the tax return be signed under penalty of perjury, the legal rulings declaring that the claim of the Fifth Amendment on the face of the return is tantamount of not filing, the fact that answering questions in the return operates as a waiver of one's Fifth Amendment rights, and the IRS' purported power to delve into every aspect of one's private life, all work to the conclusion that the hated *inquisition* is the accepted procedural model in tax cases.

The First Amendment right to the free exercise of one's religion: *"Congress shall make no law…"*

The United States was established as a direct result of religious oppression in Europe in general and England in particular. State churches showed no tolerance for religious views that opposed those of the establishment. In England, the Court of High Commission punished ecclesiastical violations as arbitrarily and ruthlessly as Star Chamber punished secular offenses.

As a result, in the late 1600s and throughout the 1700s, religious sects of every description emigrated to the New World. The Congregationalists, Quakers, Presbyterians, the Catholics of England and Ireland, the Huguenots of France, German Lutherans, Calvinists and others, moved in growing numbers from the oppression in Europe to the culture of freedom in the colonies. One might say that the thirst for religious liberty is the pang that brought forth freedom on the American continent.

Our Founders were intent upon preserving religious liberty as the cornerstone of the Republic. Jefferson's famous oath, that he had "sworn on the altar of God eternal enmity against every form of tyranny over the mind of man," was shared—at least in spirit—by the Founders virtually across the board. The absolute right to freedom of religion was considered by Jefferson and others as a "natural right" and was expressed in those terms in the Virginia Statute of Religious Freedom. Penned by Jefferson, the act was adopted by the Virginia Legislature in 1786 and was the benchmark by which the First Amendment was measured.

The essence of the statute reads,

> *Be it therefore enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in nowise diminish, enlarge, or effect their civil capacities.*

Recognizing that subsequent legislatures could alter or abolish legislation enacted in a former session, Jefferson saw fit to preempt any future act that might dilute the above language. The statute concludes by saying,

> *yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall hereafter be passed to repeal the present or to narrow its operation, such an act will be an infringement of natural right.*

Just as Jefferson's work was the very foundation upon which America built its intellectual case against England in the court of world opinion, so was it also the foundation of the First Amendment.

The First Amendment language applicable to this discussion provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This language is a plain and unequivocal injunction against Congress. It deprives the body of any jurisdiction whatsoever in matters of religion, regardless of the purposes of the legislation or the perceived "need for" or "compelling interest" in any level of regulation. Nevertheless, it should come as no surprise that both Congress and the courts have found ways to chip away at that clear dictate. And however much the courts have chipped away at this liberty over the years, the Supreme Court essentially extinguished it in 1982—at least insofar as tax matters are concerned.

This occurred in the case of *United States v. Lee.*[139] Lee was a member of the Old Order Amish. He was also a self-employed carpenter and employed others in his business. As a member of the Amish faith, Lee opposed on religious grounds any form of public insurance, including old age and survivor benefits as provided through the Social Security program. Lee's religious beliefs dictate not only that he not receive benefits under the program, but that he not make contributions to it either.

In fact, as a self-employed person, Lee was exempt under long-established federal law from paying Social Security taxes on his own income.[140] However, this case went beyond merely the taxes on Lee's own income. As an employer, he was otherwise required to withhold Social Security taxes from the wages of his employees and to pay the employer's matching share of the tax. Lee did not do this and the IRS assessed the taxes against him. Lee challenged the assessment in the federal courts. Eventually, he found himself before the Supreme Court where he posed a simple question: does not the First Amendment's free exercise clause prevent the federal government from imposing burdens upon Lee that offend his religious principles?

To answer the question, the court first examined the friction between Lee's religious principles and the tax in question. It found, given the nature of the Amish faith and the nature of the tax, that,

> *both payment and receipt of social security benefits is forbidden by the Amish faith. Because the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights.*[141]

One would think that such a finding would resolve the issue in Lee's favor. In fact, the lower court that reviewed the case prior to the Supreme Court found the statutes in question unconstitutional as applied to Lee. But the Supreme Court went on to say that, "The conclusion that there is a conflict between the Amish faith and the obligations imposed by the social security system is only the beginning, however, and not the end of the inquiry." The Supreme Court posited the proposition that religious liberty could be restricted where the restriction is "essential to accomplish an overriding governmental interest."[142]

The court then addressed the nature of the Social Security system, pointing out that the benefits program "is by far the largest domestic governmental program in the United States today, distributing approximately $11 billion monthly to 36 million Americans." Upon this observation, the court then declared what the "overriding governmental interest" was that had to be balanced against Lee's undeniable First Amendment right. The court stated,

> *The design of the [social security] system requires support by mandatory contributions from covered employers and employees. This mandatory participation is indispensable to the fiscal vitality of the social security system.* [143]

The essence of the Court's opinion is quite simple: the federal government needs the money to operate the social security system. And because the government needs the money, Lee's First Amendment rights must be sacrificed on that altar of need. But this is not the most disturbing aspect of the *Lee* opinion. What is most disturbing is that it betrays a fundamental misunderstanding by the court of the nature of the Bills of Rights in general and the proscriptions of the First Amendment in particular. And to make matters worse, the *Lee* decision was unanimous.

> ***The Supreme Court essentially granted Congress the authority to do anything it wants as long as it can show that it "needs the money."***

The court further stated that, "Religious beliefs can be accommodated, but there is a point at which accommodation would radically restrict the operating latitude of the legislature."[144] To put it more simply, so long as individual rights do not get in the way of the will of the legislature, those rights will be "accommodated." However, at such time as individual rights do stand in opposition to what the legislature might envision, those rights cannot be allowed to stand. In Lee's case, his right to the free exercise of his religion could not be "accommodated" because that right may restrict Congress' ability to raise money.

Through this holding, the Supreme Court has turned the First Amendment on its head. The court essentially granted Congress the authority to do anything it wants as long it can show that it "needs the money." Whereas the First Amendment pointedly declares that "Congress shall make no law," the Supreme Court modified that to read, "Congress shall make no law, unless such law supports an overriding governmental need."

Does anybody reasonably believe that the Founders intended such a reading of the First Amendment? In light of the language of the Virginia Statute of Religious Freedom, can anyone reasonably say that Jefferson would have supported language that comes anywhere close to what the court endorsed in the *Lee* decision?

The First Amendment sets up no "balancing test" (as the courts are wont to say) between the rights of citizens on the one hand and governmental need on the other hand. The reason is quite simple and has been amply documented throughout this treatise. Any time governmental interests come into friction with individual liberties, individual liberties are cast asunder and the power of government grows. The "balancing test" that courts are fond of employing is nothing more than a means of declaring that the plain language of the Bill of Rights does not mean what it says. On this account, Irving Brant, constitutional historian and the author of the six-volume biography of James Madison, writes,

> *What the framers should have done, perhaps, was add a second section to the First Amendment, saying: "The preceding section means what it says." But that might require a third section with the same wording, and perhaps a fourth and a fifth, to prove that "no" means "no."*[145]

Jefferson's vision for limiting governmental power vis-à-vis religion was sweeping and absolute. Consider again the language from the Virginia statute, declaring that no person shall be "enforced, restrained, molested, or burdened in his body or goods" with regard to his religious beliefs. This language leaves little room for government to supplant one's religious freedoms in the interest of preserving the "fiscal vitality" of a government program.

There is no longer any semblance of either order or stability to our tax system.

Conclusion

Madison concluded Federalist No. 62 by saying, "No government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable without possessing a certain portion of order and stability."

There is no longer any semblance of either order or stability to our tax system. In the interest of collecting revenue, the Supreme Court has allowed Congress to encroach and vitiate virtually all the individual liberties the Constitution and Bill of Rights guarantee. This treatise clearly documents that otherwise inviolable constitutional rights have been set aside on the claim that an "overriding governmental need," that is, the need for the money, is paramount to the sustenance of personal liberty. This alone is a violation of the plain language of the Constitution.

Article VI of the Constitution sets forth what is known as the document's "supremacy clause." It states,

> *This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws or any State to the Contrary notwithstanding.*

The courts were established to be the guardians of liberty. They were made wholly independent of the executive and legislative branches, expressly so that the will of the legislature and executive departments might never supplant individual liberties. The Founders were well aware of the innumerable instances in English history where kings pressured, threatened and cajoled judges to ensure the convictions of those who spoke out against the authority of the crown. The Founders were determined to structure a government in which such acts would not recur. Indeed, in Federalist No. 78, Hamilton referred to the judicial branch as the "citadel of the public justice and the public security."

In this regard, the judiciary is to compare the language of a statute with that of the Constitution, then determine whether the former comports with the latter. If so, the statute is legitimate and enforceable. If not, the statute is void under the terms of Article VI. In Federalist No. 78, Hamilton described the process in this fashion:

> *The interpretation of the laws is the proper and peculiar province of the courts. A Constitution, is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body [Congress]. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred;*

or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents [representatives].

Because the courts have abdicated their duty to stand as the "citadel of security" against the legislature and the executive, our constitutional liberties have eroded substantially while at the same time, the power and reach of the federal government has been extended to all areas of our private lives. Nowhere is this more true that in area of tax law enforcement. Whereas the Constitution plainly limits the power of government, virtually all such limitations have been declared invalid as they relate to the IRS under the unconstitutional notion of an "overriding governmental need."

There is no clearer example of this than in the *Lee* case. The Supreme Court held that Lee must be forced to participate in the social security program despite its finding that forced participation expressly violated his First Amendment rights. The court rationalized the direct infringement, claiming the government's "overriding interest" in collecting taxes permitted the violation. In no uncertain terms, the Supreme Court said that because "we need the money" it is permissible to violate the Constitutional rights of a citizen in order to collect it.

Note how far this logic is removed from the model set forth by Hamilton in Federalist No. 78. Please recall his admonition regarding the Constitution and the so-called "operating latitude of the legislature." To repeat, Hamilton said, "If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute."

The courts have abandoned a strict reading of the plain language of the Constitution in order to propagate the current tax system.

Throughout their text, the Constitution and Bill of Rights place express restrictions upon government's ability to legislate. Without such restrictions, the federal government is no different than the Tudor and Stewart tyrannies that offended every element of English liberty for centuries. The Constitution's restrictions directly and simply forbid the invasion of individual rights by government eager to pass laws that infringe upon liberty. Yet the Supreme Court in *Lee* effectively held that the limitations are placed upon the individual, not upon government.

Nowhere in the Constitution does it say that one's liberty is dependent upon a "balancing" test. Nor does it say that Congress should "accommodate" individual rights, but only if they do not interfere with its own right to legislate. The hard reality is that there are *no excepting words* where our precious individual liberties are concerned.

When it comes to the rights of the average citizen, the courts have abandoned a strict reading of the plain language of the Constitution in favor of judicial creativity designed specifically to achieve the predetermined goal of propagating the current tax system. Strict adherence to the letter of the document was insisted upon by Hamilton. He spoke plainly on the subject, saying,

If we set out with justice, moderation, liberality, and a scrupulous regard to the Constitution, the government will acquire a spirit and tone productive of permanent blessings to the community. If, on the contrary, the public counsels are guided by humor, passion, and prejudice; or from resentment to individuals, or a dread of partial inconveniences, the Constitution is slighted, or explained away, upon every frivolous pretext, the future spirit of government will be feeble, distracted and arbitrary. The rights of the subjects will be the sport of every party vicissitude. There will be no settled rule of conduct, but everything will fluctuate with the alternate prevalency of contending factions.[146]

Hamilton's message is simple. Continuity of the moral fabric of society is dependent upon legal absolutes, especially where citizens' rights are concerned. If the government is free to "explain away" the protections of the Constitution, in the end, there will be no Constitution. If the rights of the citizens are made the "sport" of every governmental opinion change, in the end, citizens will have no rights.

Arguing the "overriding" need for revenue as its justification, the courts have caused our priceless Constitutional system of law and limited government to deteriorate. What system of taxation is so important that we should sacrifice our precious liberty to save it?

What system of taxation is so important that we should sacrifice our precious liberty to save it?

The foregoing examination should plainly illustrate that the income tax, as a direct tax, is a frontal assault upon the most fundamental of our constitutional liberties. It should be abundantly clear why the Founders rejected direct taxation such as an income tax in favor of indirect taxes as the chief means of raising revenue. The enforcement of a system of direct taxation necessarily requires the systematic invasion of individual liberties and destruction of constitutional restrictions on the power of government. Otherwise, a direct tax is simply unenforceable. It is for that reason that an income tax of any kind is wholly antithetical to liberty. The above history should clearly show that liberty and an income tax cannot co-exist in the same society. One must necessarily drive out the other. The question for policy makers is simple: which is the American people more willing to learn to live without?

Endnotes

1. *McCulloch v. Maryland,* 17 U.S. 316 (1819).
2. James Madison, *The Federalist,* No. 62.
3. Internal Revenue Service, "Annual Report of the Commissioner on Tax Law Complexity," June 5, 2000, 6.
4. Internal Revenue Service, "Statement of Charles O. Rossotti, Commissioner of IRS," Before the Subcommittee on Oversight, House Committee on Ways and Means, June 29, 2000, 4–5.
5. The IRS is only now beginning to acknowledge that the code's penalty system is itself overly complex and burdensome. See Department of the Treasury, Office of Tax Policy, "Report to Congress on Penalty and Interest Provisions of the Internal Revenue Code," October, 1999.
6. Shirley Peterson, Testimony to House Government Operations Committee, June 3, 1992, 2.
7. Internal Revenue Service, "National Taxpayer Advocate's FY 2000 Annual Report to Congress," IRS Publication 2104, December, 2000, 6.
8. General Accounting Office, "Small Business: Taxpayers Face Many Requirements," Statement of Margaret T. Wrightson, Associate Director, Tax Policy and Administration Issues, General Government Division, GAO/T-GGD-99–76, April 12, 1999, 4.
9. General Accounting Office, "Tax Administration: IRS' 1999 Tax Filing Season," GAO/GGD-00–37, December, 1999, 23.
10. Charles O. Rossotti, "Comments on Customer Service Employee Feedback Report," Internal Revenue Service, May 25, 2000; emphasis added.
11. General Accounting Office, "Tax System Burden: Tax Compliance Burden Faced by Business Taxpayers," GAO/T-GGD-95–42, December 9, 1994, 3.
12. General Accounting Office, "Tax Administration: Recurring Tax Issues Tracked by IRS' Office of Appeals," GAO/GGD-93–101, May, 1993.
13. General Accounting Office, "Tax Administration: IRS Faces Several Challenges as It Attempts to Better Service Small Businesses," GAO/GGD-00–166, August, 2000, 6–7.
14. *Money,* March, 1992, 90.
15. U.S. 385 (1926).
16. Senator Henry Bellmon, Testimony before Senate Finance Committee, Record of H.R. 13270, October 2, 1969, Vol. 5, pp. 4675–76; emphasis added.
17. Internal Revenue Service, "Annual Report of the Commissioner on Tax Law Complexity," 6.
18. The Executive Office of the President of the United States, *A Vision of Change for America,* February 17, 1993, 65–6.
19. U.S. Constitution, Article I, Section 8, clause 1.
20. Karl Marx, *The Communist Manifesto,* 1848; emphasis added.
21. Ibid.
22. Clarence B. Carson, "The General Welfare," appearing in *The Foundations of American Constitutional Government,* Foundation for Economic Education, 1996, 189.
23. James Madison, *The Federalist* No. 41.
24. Richard B. Morris, *The Basic Ideas of Alexander Hamilton,* Pocket Books, 1957, 220.
25. Ibid, 221; emphasis added.
26. *Writings of Thomas Jefferson,* Library Edition, 1904, 147; emphasis added.
27. Carson, "The General Welfare," 195.
28. U.S. 1 (1933).
29. Ibid, 61.
30. Ibid, 76.
31. Richard E. Ellis, "The Political Economy of Thomas Jefferson," appearing in *Thomas Jefferson, The Man, His World, His Influence,* Lally Meymouth, editor, G.P. Putnam's Sons, 1973, 94.
32. John Locke, "An Essay Concerning the True Original Extent and End of Civil Government," Great Books of the Western World, Britannica, Vol. 35, 29.

33. Carrol D. Kilgore, *Judicial Tyranny,* Thomas Nelson, Inc., Publishers, 1977, 268.
34. Thomas Paine, "Rights of Man," *The Life and Major Writings of Thomas Paine,* Philip S. Foner, Ed., The Citadel Press, 1974, 359.
35. Kevin Sharp, "Public Perceptions and Misperceptions of the 1986 Tax Reform Act," Internal Revenue Service, *Trend Analysis and Related Statistics,* Publication 1500, 1990 Update, 83.
36. Ibid. p. 89; emphasis added.
37. Michael Wildavsky, "How Fair Are Our Taxes?" *Reader's Digest,* February 1996, 60.
38. With the Economic Growth and Tax Relief Reconciliation Act of 2001, signed by the president on June 7, 2001, a new 10 percent bracket was added to the law and a one percentage point drop in other brackets was imposed, except for the 15 percent bracket. Thus, the top bracket is reduced one percentage point to 28.6 percent. Further reductions are to be phased in over time.
39. *A Vision of Change for America,* 7–8.
40. Congressional Record, United States Senate, August 28, 1913, 3834.
41. Revenue Procedure 93–49.
42. Internal Revenue Code section 1(a) and Revenue Procedure 99–42. The marriage penalty may be more or less exaggerated depending upon the nature of deductions, etc., claimed by a given married couple. The Economic Growth and Tax Relief Reconciliation Act of 2001 purports to correct the so-called marriage penalty. It does so by further manipulating standard deductions and increasing the size of the 15 percent tax bracket in an attempt to ameliorate the effects of the graduated rates. However, the changes do not go into effect until 2005. Even then, the changes applicable to the standard deduction are phased in over five years while those related to the 15 percent bracket are phased in over four years. Act sec. 301, code sec. 63; act sec. 302, code sec. 1.
43. General Accounting Office, "Tax Administration: Income Tax Treatment of Married and Single Individuals," GAO/GGD-96–175, September 1996, 3.
44. National Commission on Restructuring the Internal Revenue Service, *A Vision for a New IRS,* Report to Congress, June 25, 1997, 41.
45. "Annual Report of the Commissioner on Tax Law Complexity," 19.
46. Ibid, 25.
47. Internal Revenue Service, "National Taxpayer Advocate's FY 1999 Annual Report to Congress," p. IV-43; and the "FY 2000 Annual Report," 75.
48. See generally, code sections 55–59.
49. The code sections corresponding to these provisions are sections 2(b); 151; 25A; 21; 32; and 24, respectively.
50. Code section 1(g).
51. Under the newly enacted Economic Growth and Tax Relief Reconciliation Act of 2001, these phase-outs are phased out over a period of five years beginning with 2005. Act sec. 201, code sec. 151. Stated another way, Congress phased in the phase out.
52. An easy way to distinguish direct and indirect taxes is this: a direct tax is a tax on property; an indirect tax is a tax on an activity. Real estate taxes are direct; excise taxes on consumer products are indirect. Indirect taxes carry the added attribute of being voluntary in the sense that the consumer can avoid the tax by declining to purchase the products to which the tax attaches.
53. Richard B. Morris, *The Basic Ideas of Alexander Hamilton,* 1957, 259–60.
54. Ibid, 257.
55. U.S 601 (1895). This case provides an excellent discussion of the nature of direct vs. indirect taxation.
56. Congressional Record, United States Senate, August 28, 1913, 3840.
57. James Iredell, "A System of Government which I am Convinced Can Stand the Nicest Examination," Answers to Mason's Objections, February 20-March 19, 1788, *The Debate on the Constitution,* The Legal Classics Library, Part One, 365.
58. Public Law No. 103–66, 107 Stat. 312 (1993).
59. See code section 2001(c)(1) as amended.
60. U.S. 26 (1994). The case addressing the specific Clinton estate tax increase is *Nationsbank of Texas v. United States,* 84 AFTR2d Par. 99–5001 (U.S. Court of Claims 1999).
61. U.S. at 32–33.
62. *Magna Charta,* "Explanatory Notes on the foregoing Collection of Charters of Liberties," The Legal Classics Library, Gryphon Editions, 221.
63. U.S. 111 (1933).
64. U.S. 247, 260 (1935); emphasis added.
65. Ibid, 259.
66. F.2d 693 (5 Cir. 1977).
67. Code section 6213(b).
68. Code section 7491(b) puts the burden of proof squarely upon the IRS to justify income reconstructions that are founded upon "statistical information based upon unrelated taxpayers." However, this provision also applies only "in court cases." Code section 7491(c) provides that in any court proceeding, the IRS "shall have the burden of production" with respect to the appropriateness of any penalty or addition to the tax. This is not a burden of proof. It merely provides that when a penalty is at issue in a court case, the IRS must proceed first to show that the penalty applies.
69. T.C. No. 28, June 6, 2001, Slip Opinion, 14.
70. Ibid, 15; emphasis added.
71. Lysander Spooner, *An Essay on the Trial by Jury,* John P. Jewett and Co., 1852, 222.
72. Impeachments trials are conducted before the Senate as provided for under Article I, section 3.
73. Tax Reform Act of 1969, Public Law 91–172, section 951, amending section code section 7441.
74. T.C. 392, 396 (1971).
75. U.S. 589, 596 (1931).
76. U.S. 145, 175 (1960).
77. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).
78. U.S. 589, 596–7; emphasis added.
79. Ibid, 595.
80. *Enoch v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962) and *Bob Jones University v. Simon,* 416 U.S. 725 (1974).
81. Internal Revenue Service, *Taxpayer Advocate's Annual Report to Congress,* FY 1996, 4–5.
82. Internal Revenue Service, *Taxpayer Advocate's Annual Report to Congress,* FY 1999, I-2.
83. Internal Revenue Service, *Taxpayer Advocate's Annual Report to Congress,* FY 2000, 2.
84. Code section 6320 provides identical provisions with respect to tax liens. However, a citizen is entitled to just one "due process" hearing, either under section 6320 or 6330.
85. Howell's State Trials 1029, 95 Eng. 807 (1765).
86. *Boyd v. United States,* 116 U.S. 616, 629 (1886).

87. Eng. at 818.
88. *Boyd v. United States,* 116 U.S. at 625.
89. Supra, note 86.
90. U.S 347, 353 (1967).
91. *Donaldson v. United States,* 400 U.S. 517, 523 (1971).
92. *United States v. Michaud,* 897 F.2d 264 (7 Cir. 1990).
93. See *United States v. Lawless,* 709 F.2d 485 (7 Cir. 1983) and *United States v. Frederick,* 83 AFTR2d para. 99–686, (7 Cir. 1999).
94. U.S. 48, 56 (1964).
95. Ibid, at 57.
96. U.S. 435, 443 (1976).
97. Internal Revenue Service, "Notice of Proposed Amendment to Privacy Act System of Records," *Federal Register* 59, No. 243, December 20, 1994.
98. Code section 21(e)(9)(A).
99. Compare code sections 6721(e)(2)(C) and 7201. The civil penalty for not filing the form is *more* serious than the criminal fine for failing to file an income tax return altogether. Compare section 7203.
100. John A. Szilagyi, "Where Have All the Dependents Gone?," Internal Revenue Service, Publication 1500, *Trend Analysis and Related Statistics,* August, 1990, 65.
101. Ibid, 64.
102. Ibid, 68; emphasis added.
103. Public Law 103–465, December 8, 1994.
104. General Accounting Office, "Social Security: Government and Commercial Use of the Social Security Number is Widespread," GAO/HEHS-99–28, February 1999, 3.
105. See *Miller v. Commissioner,* 114 T.C. No. 32 (June 23, 2000) (no recognized religious objection to using SSNs for minor children); *Adams v. Commissioner,* 110 T.C. 137 (1998), aff'd 170 F.3d 174 (3 Cir. 1999); *Furlow v. United States,* 84 AFTR2d Par. 99–5062 (Dist. MD 1999).
106. U.S. 616 at 622; emphasis added.
107. Ibid, at 630; emphasis added.
108. *Boyd,* 116 U.S. 616, 629.
109. U.S. 406, 415–16 (1966).
110. U.S. 616, 630.
111. U.S. 52, 55 (1964).
112. *Hoffman v. United States,* 341 U.S. 479 (1951); *McCarthy v. Arndstein,* 266 U.S. 34 (1924); *Ullman v. United States,* 350 U.S. 422 (1956).
113. *United States v. Sullivan,* 274 U.S. 259 (1927); *Garner v. United States,* 424 U.S. 648 (1976).
114. *United States v. Silkman,* 542 F.2d 1218 (8 Cir. 1976); *United States v. Daly,* 481 F.2d 28 (8 Cir. 1972).
115. For a more complete analysis of this very dilemma, see *United States v. Neff,* 615 F.2d 1235 (9 Cir. 1980).
116. See *United States v. Sullivan,* supra; *Garner v. United States,* supra.
117. F.2d 518, 523 (9 Cir. 1980).
118. F.2d 1160 (4 Cir. 1974); 598 F.2d 843 (5 Cir. 1979), respectively.
119. The "tax gap" is defined as the difference between what is owed in taxes and what is actually paid.
120. General Accounting Office, "Analyzing the Nature of the Tax Gap," GAO/T-GGD-97–35, January 9, 1997, 5.
121. For a detailed analysis of this audit program, see Daniel J. Pilla, *IRS, Taxes and the Beast,* Winning Publications, Inc., 1996. As a result of this work, the audit program came under scrutiny and attack by Congress during the 1997 hearings into IRS abuse. In response, Congress added section 7602(d) to the code. The law somewhat limits the use of these audits but does not prevent them or any of the invasive techniques discussed.
122. Internal Revenue Service Training Aid 3302–127, "Examining for Economic Reality," Facilitator's Guide to Workshops 1 through 6, p. i.
123. Ibid, emphasis added.
124. Internal Revenue Service Training Aid 3302–102, "JOB AID 1, Components of Economic Reality."
125. Internal Revenue Service Training Aid 3302–104, "JOB AID 3, Personal Living Expense (PLE) Checklist."
126. Internal Revenue Service Training Aid 3302–110, "JOB AID 9, Indirect Methods," 1.
127. General Accounting Office, "Taxpayer Confidentiality: Federal, State and Local Agencies Receiving Taxpayer Information," GAO-GGD-99–164, August, 1999, 9–11.
128. U.S. 391, 420 (1976).
129. Ibid, at 409–10.
130. Ibid, at 415; footnotes omitted.
131. Ibid, at 414.
132. U.S. 605 (1984).
133. Ibid, at 611–12.
134. Ibid, at 618.
135. F.3 933 (9 Cir. 1996).
136. Ibid, Slip Opinion, 3.
137. F.3d 251 (6 Cir. 1996).
138. Ibid, Slip Opinion, 4.
139. U.S. 252 (1982).
140. Code section 1402(g).
141. U.S. at 257.
142. Ibid.
143. Ibid, at 258.
144. Ibid, at 259.
145. Irving Brant, *The Bill of Rights: Its Origin and Meaning,* Mentor Publishing, 1965, 225.
146. Morris, *The Basic Ideas of Alexander Hamilton,* 17.

About the Author

Daniel J. Pilla is a Tax Litigation Consultant and author of ten IRS self-help defense books. He is the founder and executive director of the Tax Freedom Institute, Inc., a national association of attorneys, accountants and enrolled agents. The institute's purpose is to provide continuing education to tax professionals working in the areas of taxpayers' rights defense, problems resolution and IRS abuse prevention and cure. Pilla was a consultant to the National Commission on Restructuring the IRS, presented testimony to Congress on a number of tax policy and administrative issues and presently works with numerous public policy research organizations. His 1993 book, *How to Fire the IRS,* sparked the national debate on the elimination of the IRS and the current income tax system. Pilla's 1995 policy analysis, entitled "Why You Can't Trust the IRS," published by the Cato Institute, combined with his 1996 book, *IRS, Taxes and the Beast,* provided the intellectual foundation for the 1997 congressional hearings into IRS abuse. The Associated Press once said that, "Pilla probably knows more about the IRS than the commissioner."

About the Roadmap to Tax Reform™ Series

The Road Map to Tax Reform™ is a series of studies published by the Institute for Policy Innovation (IPI) and produced in cooperation with participating organizations. The purpose of this project is not to promote a particular tax reform plan or proposal, but to provide research, analysis and argument in service of fundamental tax reform toward a neutral federal tax system, and to work with all proponents of such reform. The series consists of topical investigations by leading experts, with the goal of creating a corpus of research that makes a truly comprehensive case for a neutral, transparent, and simple tax code.

About the IPI Center for Tax Analysis

The IPI Center for Tax Analysis is the tax policy arm of the Institute for Policy Innovation, a nonpartisan public policy organization. The IPI Center for Tax Analysis recognizes that changing tax policy affects incentives to work, save, and invest. These changes in economic behavior are frequently ignored in static government forecasts, resulting in policy decisions that negatively affect economic growth, capital formation, employment, and local, state, and federal revenues. The IPI Center for Tax Analysis publishes *Economic Scorecard*, a quarterly newsletter, as well as additional commentary on tax policy.

About the Institute for Policy Innovation

The Institute for Policy Innovation (IPI) is a nonprofit, nonpartisan educational organization founded in 1987. IPI's purposes are to conduct research, aid development, and widely promote innovative and nonpartisan solutions to today's public policy problems. IPI is a public foundation and is supported wholly by contributions from individuals, businesses, and other nonprofit foundations. IPI neither solicits nor accepts contributions from any government agency.

IPI's focus is on developing new approaches to governing that harness the strengths of individual choice, limited government, and free markets. IPI emphasizes getting its studies into the hands of the press and policy makers so that the ideas they contain can be applied to the challenges facing us today.

Nothing written here should be construed as necessarily reflecting the views of the Institute for Policy Innovation, or its directors, or as an attempt to aid or hinder the passage of any bill before Congress.