North Dakota Law Review

Volume 55 | Number 2 Article 1

1979

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THE TAX MAN COMETH: THE PARADOX OF JUDICIAL CONSERVATISM OR GREAT EXPECTATIONS DISAPPOINTED*

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I. INTRODUCTION

When presidents appoint individuals to the United States Supreme Court a prediction is made about their future behavior. These predictions are not always on the mark primarily because the issues confronted by the appointee are such that no previous experience exists or the appointer is diverted by other considerations. Other considerations can include alleged political payoffs for past help, friendship ties which override political/legal considerations, and estimations of future political benefits.[1] The point is that Supreme Court justices are not found under cabbage leaves. An individual justice is appointed in the hope that he or she will further certain policy objectives.

Former President Nixon in his 1968 presidential campaign put it best, though somewhat crudely, when he called for the appointment of "strict constructionists."[2] Mr. Nixon obviously meant "conservatives" rather than "strict constructionists" since judicial restraint and activism are sometime things for both conservatives and liberals. Whatever his terminology, Mr. Nixon, by January, 1972, was able through his four appointments to restructure the Court from its perceived former liberal activism.

With all these apparent victories a constant complaint among conservative politicians has been the inability to translate power into policy. Illustrative of this was the following query by Barry Goldwater in 1960. "Why should the nation's underlying

* Prepared under the auspices of the NEH-sponsored summer institute at the University of Virginia directed by Professor Henry J. Abraham.

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1. H. ABRAHAM, JUSTICES AND PRESIDENTS; A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT Ch. 3 (1975); R. SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY Ch. 5 (1971).

2. J. SIMON, IN HIS OWN IMAGE; THE SUPREME COURT IN RICHARD NIXON'S AMERICA (1973).

allegiance to Conservative principles have failed to produce corresponding deeds in Washington?"[3] Fifteen years later, Patrick Buchanan, conservative ideologue of the Nixon Administration, was moved as follows to voice a similar complaint: "Yet, with all the conservative primary, convention and election victories of the past decade, with the polls showing a national drift to the right, conservative influence upon public policy in America has been pitifully small. Conservatives have failed utterly to translate political support and ballot victories into national policy."[4] Whatever the factual content of these views, what is important is the disparity that is acknowledged to exist between aspirations and policy. This paper is an attempt to grapple with that disparity in the context of the Supreme Court. Explicitly, the concern is with the behavior of those conservative appointees in the area of tax law. Specifically, what are the constitutional rights of the taxpayer when that individual is being investigated by the Internal Revenue Service (IRS)?

The conservative movement in American politics is based on a fundamental distrust, even hatred, of the administrative state as it has developed over the past forty years. In a genteel way, the issue is whether the conservative appointees reflect that distaste as expressed by the politicos. The argument advanced here is that the conservative justices on the Court have failed to uphold what conservatives see as the rights of the individual confronted by the minions of the state. The result has been that an interesting dichotomy has appeared between electoral political conservatism and what is termed judicial conservatism.

Electoral or popular conservatism, as espoused by leading political figures, has seen the Court as the defender of the individual against the actual abuses and the potential arbitrary discretion of the state. In this view, the Warren Court was an aberration since its focus was upon those who unduly benefitted from the state, i.e., welfare recipients. Judicial conservatism and liberalism as developed and applied by the Supreme Court (and the federal judiciary generally) has seen the Court as fostering or furthering the ability of the state to gather tax revenue as efficiently

3. B. GOLDWATER, THE CONSCIENCE OF A CONSERVATIVE 4 (1960)[hereinafter cited as CONSCIENCE OF A CONSERVATIVE]. This concern was echoed again a decade later. B. GOLDWATER, THE CONSCIENCE OF A MAJORITY 4 (1970) [hereinafter cited as CONSCIENCE OF A MAJORITY].

4. P. BUCHANAN, CONSERVATIVE VOTES, LIBERAL VICTORIES: WHY THE RIGHT HAS FAILED 4 (1975). His solution is the capture of the Presidency by a "principled and dedicated Man of the Right" who would then fight through the wars against the vested liberal interests. *Id.* at 164, 166.

and inclusively as possible.[5] The result has been that a tension has developed between the conservative politician and the conservative judge. This tension is often not directly recognized by either since the justices see themselves as applying the logic of the law while the politicos ascribe the malaise to the general political/legal system.[6]

II. TWO STRAWPERSONS

Since the New Deal and the constitutional crisis of 1937, the fundamental issue of the continuation of the administrative or positive state has become a moot issue.[7] Arguments have largely shifted to issues of procedural rights and attempts to restrain obvious abuses of governmental discretion.[8] Conservatives, both political and judicial, have accepted an enlarged role for the state although questions are raised about the necessity for further expansion and the hope is held out for reduction in both its scope and more likely in the size of government.[9]

Definitions of conservative and liberal remain inherently slippery terms because historical change forces redefinition in order to cope with new problems.[10] Conservatism, generally, has been the attempt to cope on an incremental basis with the fact of social change. Generally though, conservatism, as defined in this paper, holds a negative and limited view of the state. Conservatives are suspicious of what is seen as excessive state power and discretion while emphasizing the rights of the individual relative to the state.[11] Much of conservative political activity and thought is focused upon economic rights. In fact, concern for economic individualism is probably stronger than concern about abstract individual rights.[12]

5. Handberg, *Supreme Court Justices Vote About 2 to 1 in Favor of the IRS in Tax Cases,* 43 J. TAX. 376 (1975); Handberg, Jr., The Burger Court and "Old" and "New" Agencies, table 2 (unpublished paper presented to 1975 Annual Meeting of the American Political Science Association)

6. G. HARRISON, ROAD TO THE RIGHT: THE TRADITION AND HOPE OF AMERICAN CONSERVATISM (1954). "Libertarian conservatives have with justice concentrated their attention upon the cancer-like growth of the State, as its malignant cells invade the body of society ever more widely." F. MEYER, THE CONSERVATIVE MAINSTREAM 148 (1969).

7. C. PRITCHETT, THE ROOSEVELT COURT A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947 ch. 4 (1948).

8. Saferstein, *Nonreview ability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367, 393 (1968). The article presents the various reasons advanced by the courts for allowing maximum agency discretion.

9. G. STIGLER, THE CITIZEN AND THE STATE 14 (1975).

10. C. JOYNER, THE REPUBLICAN DILEMMA: CONSERVATISM OR PROGRESSIVISM (1963); C. ROSSITER, CONSERVATISM IN AMERICA (1955); Huntington, *Conservatism as an Ideology,* 51 AM. POL. SCI. R. 454, 473 (1957).

11. R. KIRK, THE CONSERVATIVE MIND, FROM BURKE TO SANTAYANA 2(1953);F. MEYER, *supra* note 6, at 55; Mc Closky, *Conservatism and Personality,* 52 AM. POL. SCI. R. 27 (1958).

12. A typical statement is the following one by William F. Buckley. "It is a part of the conservative intuition that economic freedom is the most precious temporal freedom, for the reason

Tax laws and their enforcement present an intriguing amalgam of both economic and political issues when one attempts to delineate how much power the state should have, especially under our particular Constitution with its Bill of Rights. Modern conservatives do not reject the existence or necessity of the state; they only restrict its reality. Obvious caveats exist. Conservatism is hostile to what is seen as excessive coddling of criminals although this attitude may be a class-related phenomenon. The instances usually referred to are common criminals often engaged in violent crimes or crimes destructive of property rather than white collar criminals. These types of offenses are seen as endemic to certain unsavory groups in the society who are somewhat beyond the pale of decent society.

Liberalism, again for this paper, views the state in positive expansionistic terms. The state is perceived as the engine for social change and ultimately social betterment. In this benign image, individual rights are not subordinated to the state, especially "fundamental rights."[13] Rather, the state, through its activities, is able to make it possible for an individual to develop those rights more fully. The individual and the state are seen as operating in harmony (a partnership for good rather than a struggle of opposites) to further their quest to maximize societal/individual goals, i.e., to promote the common good.[14] An individual may be forced to curtail certain idiosyncratic behavior but the assumption is that the tradeoff is worth the minor cost.

Both these positions are strawpersons, especially given the disillusionments that have occurred in recent years. The liberal faith in the benignness of governmental institutions has been rudely shattered. Conservatism has been buttressed in its faith in the inherent evil of big government; but it is hardpressed to develop an alternative. The concern in both camps is how to best channel government activity into positive controllable directions.[15]

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that it alone gives to each one of us, in our comings and goings in our complex society, sovereignty — and over that part of existence in which by far the most choices have in fact to be made, and in which it is possible to make choices, involving oneself, without damage to other people. And for the further reason that without economic freedom, political and other freedoms are likely to be taken from us." W. BUCKLEY, UP FROM LIBERALISM 179 (1959).

13. United States v. Carolene Products, 304 U. S. 144, 152 n. 4 (1938); Palko v. Connecticut, 302 U. S. 319 (1937). *See* A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW ch. 31 (1956).

14. The best example of this positive imaage of the State was Lyndon Johnson's 1964 presidential campaign against Barry Goldwater. Johnson saw the presidency and the federal government as the force for good in the society. *See* L. JOHNSON, THE VANTAGE POINT: PERSPECTIVES OF THE PRESIDENCY, 1963-1969 (1971).

15. An example of this shift was the change in Mr. Justice William O. Douglas' position on tax cases specifically, and on the issue of agency descretion generally. *See* Wolfman, Silver & Silver, *The Behavior of Justice Douglas in Federal Tax Cases,* 122 U. PA. L. REV. 235, 301 (1973). *See also* Canon & Miles, *supra* note 5; Handberg, Jr., The Burger Court and "Old" and "New" Agencies, *supra* note

III. THE NIXON APPOINTEES

Richard Nixon's accession to power in 1969 was seen by many conservatives initially as an attempt to reverse the tide of big government symbolized so well by the following phrase: Great Society. An important early gesture in this attempt at reversal was the appointment of Chief Justice Warren Burger. Chief Justice Burger's earlier judicial reputation, while on the District of Columbia's Court of Appeals, had been developed as a protestor and dissenter from the Warren Court's policy positions. The appointment was seen politically as the administration's attempt to repudiate and reverse what had been done earlier.[16]

Subsequent appointments and near confirmations of Judges Haynesworth and Carswell were continuations of that effort. In these two instances, the effort was at appointment of what was termed a "Southern strict constructionist," i.e., conservative as part of the Southern electoral strategy. This ignored the fact that a Southern strict constructionist, Justice Black, was already on the bench. His fault was his liberalism, not his strict construction of the Constitution.

The importance of all this is that the Nixon Administration by its appointment behavior demonstrated its belief that conservative justices would render conservative decisions. In fact, the belief is a correct one. Several scholars, using quantitative and qualitative techniques, have identified the four Nixon appointees as conservatives.[17] The effect has been a gradual reduction in the Court's involvement in fostering social and legal change and in a resistance to pleas for further expansion of the rights of the accused. Restricted by adherence to the doctrine of *stare decisis,* there has not been a general rollback of Warren Court precedents. Rather, the process has been one of limiting or distinguishing prior precedents.[18] Ironically, the conservative-dominated Court has opened several important issue areas with which the Warren Court had either not dealt or had made only tentative policy choices.

5, at app. A. This disquietude was further reflected in the 1976 presidential election process where the three major candidates, Carter, Ford and Reagan, were united in their distrust of big government.

16. H. ABRAHAM, *supra* note 1, at 4; S. WASBY, CONTINUITY AND CHANGE: FROM THE WARREN COURT TO THE BURGER COURT ch. 2 (1976).

17. G. SCHUBERT, THE JUDICIAL MIND REVISITED: PSYCHOMETRIC ANALYSIS OF SUPREME COURT IDEOLOGY table 5.4 (1974); Handberg, Jr., *The 1974 Term of the United States Supreme Court,* 29 W. POL. Q. 298 (1976).

18. The process of revision may be accelerating with the appointment of Mr. Justice Stevens. On the last day of the 1975 Term, a series of decisions came down severely limiting fourth amendment claims. *See, e. g.,* Stone v. Powell, 428 U. S. 465 (1976) (limiting the ability of prisoners to appeal to federal court before exhausting state remedies).

Examples are the various abortion decisions, sex discrimination cases, continuance of busing policies, racial and alien equalitarianism, and price fixing by the legal profession.[19]

IV. THE PARADOX

When the substantive focus is on the narrow question of the individual's rights relative to the government in its guise as tax collector, a paradox appears.[20] The paradox has been the reluctance generally of the Court, and notably the conservatives, to extend to the taxpayer the protections afforded, however reluctantly, the common thief. In this situation, a gap appears between the *political* conservative and the *judicial* conservative. Rather than a linear relationship occurring between the two, the judicial conservative seems to have moved over beside the liberal in support of the tax collector. Meanwhile, the political conservatives have complained of what are termed the excesses and abuses of the tax system. These complaints have apparently fallen on deaf legal ears.[21] One common complaint made is that the Court, which often looks at the actual operation of statutes in other cases, has not been willing to subject the IRS procedures to the same close scrutiny. The presumption is that the state does not lie and evidence to the contrary is not seriously entertained.[22]

One should note that the justices are not being asked to return to the kneejerk anti-statism of the late 19th century or the early and middle 1930s.[23] Instead, the pressure or expressed hope is that the justices will establish a clear concern with the protection of the individual in that person's dealings with the state. What would result would be a healthy skepticism about the claims of the State, especially in an area as sensitive to potential abuse as the taxing

19. *E. g.*, Goldfarb v. Virginia State Bar, 421 U. S. 773 (1975); Frontiero v. Richardson, 411 U. S. 677 (1973); Roe v. Wade, 410 U. S. 113 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U. S. 1 (1971).

20. Handberg, *Supreme Court Justice Vote About 2 to 1 in Favor of the IRS in Tax Cases,* 43 J. TAX, 376 (1975).

21. "The penetrative vision of the tax collectors now is slightly less ubiquitous than Orwell's telescreen." C. MANION, THE CONSERVATIVE AMERICAN 176 (1964).

22. This complaint has been made most strongly in the use of Section 6851 of the Internal Revenue Code which allows the Government at its discretion to calculate a tax deficiency, sieze the taxpayer's property to pay the deficiency, and complete this process before review is allowable. The effort is to "punish" suspected criminals without formal court proceedings. Note, *Jeopardy Terminations Under Section 6851: The Taxpayer's Rights and Remedies,* 60 IOWA L. REV. 644 (1975). An even longer standing complaint has been the lack of judicial scrutiny into the reality of tax investigations. Weiss, *Do Taxpayers Have Constitutional Rights,* 46 TAXES 494, 496 (1968); Note, *Criminal Tax Fraud Investigations: Limitation on the Scope of the Section 7602 Summons,* 25 U. FLA. L. REV. 114, 123 (1972).

23. Carter v. Carter Coal Co., 298 U. S. 238 (1936); Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429 (1895). *See* F. RODELL, NINE MEN ch. 6 (1955).

power. The state has the authority to tax — that is beyond dispute unless the sixteenth amendment is repealed. A move for repeal has been supported by the more extreme conservatives but is not seen as a real practical possibility.[24]

V. THE COURT IN ACTION[25]

Over the past few years, the Burger Court, and notably the Nixon appointees, has significantly strengthened the reach of the IRS when it investigates alleged tax violators. This strengthening process has involved the establishment of precedents which either deny the suspect the right to challenge certain methods of evidence collection or restrict the applicability of the constitutional rights granted the accused.[26] In all cases, the Court's presumption, well founded in administrative law, has been to favor the discretion and good faith of the agency, a presumption not shared by the outside conservative audience where the IRS is perceived in much more ambivalent or malevolent terms.[27]

Privilege against self-incrimination has been an oft-assured defense in tax fraud litigation. The basic argument has been that the legal requirement to produce certain books, papers, and other data relevant to a determination of a person's tax liability constitutes self-incrimination.[28] The process begins when the IRS issues an administrative summons to the taxpayer or other individuals and organizations which possess relevant records. The

24. Repeal of the sixteenth amendment has been a goal for more extreme conservative groups, C. MAMION, *supra* note 21, at 178-79; Lipset, *The Sources of the 'Radical Right,' in* THE NEW AMERICAN RIGHT 189 (D. Bell ed. 1955).

25. This section provides a synopsis of the Court's activities — its purpose is informational relative to the political issue being discussed. The reader is referred to the numerous indexed articles available on the technical issues of precedent, statutory construction and tax advice to clients.

26. Most of the evidence is collected by the IRS through the summons power granted in Section 7602 of the Internal Revenue Code.

27. "The 'nature of things,' I submit, is quite different. Government does *not* have an unlimited claim on the earnings of individuals." CONSCIENCE OF A CONSERVATIVE at 59.

28. One difficulty that has clouded the issue has been the fact that government has to require certain records be kept in order to efficiently and successfully administer programs. "In Boyd v. United States, 116 U. S. 616 (1886), the Supreme Court held that the Government could not compel an individual to surrender his private papers. Later, however, the Supreme Court, in Shapiro v. United States, 335 U. S. 1 (1948), held that records required by the Emergency Price Control legislation were not private papers within the meaning of *Boyd,* but were 'required records' unprotected by the fifth amendment. The leading case of Falsone v. United States, 205 F.2d 734 (5th Cir.), *cert. denied,* 346 U. S. 846 (1953), involved a proceeding against a certified public accountant who refused to comply with a special agent's summons to produce his client's tax records. Noting that the Code authorizes the IRS to inspect a taxpayer's records, the court held that the tax records were not protected by the fifth amendment, whether in the hands of an accountant or a taxpayer." Comment, *Constitutional Rights of the Taxpayer in a Tax Fraud Investigation,* 42 TUL. L REV. 862, 862-63 (1968). The issue has not been directly posed to the Court of what would be required to justify government access to *purely personal* tax records with no instance of outside assistance to the taxpayer such as an accountant or lawyer.

taxpayer can challenge enforcement of a summons aimed at the individual taxpayer personally but not that directed at third parties.

In *Donaldson v United States,*[29] the Court was called upon to quash certain summonses directed at the individual's former employer. The fourth amendment challenge of unreasonable search and seizure was dismissed on the basis of *First National Bank v United States.*[30] The case was straight forward in its application of precedent and drew a seven justice majority opinion by Mr. Justice Blackmun plus two concurring opinions. *Donaldson* represents a clear instance of reaffirming the personal nature of the rights established under the first eight amendments. One cannot, except in limited instances, establish standing to assert a privilege broader than one's person and its immediate environs.

Two years later, in *Couch v United States,*[31] the Court, in an opinion by Mr. Justice Powell, rejected a taxpayer's claim that certain records given to her accountant for the purposes of tax preparation were protected by the fifth amendment. The records had been given to the accountant, an independent contractor, since 1955. Though surrendering possession, the petitioner had legally retained title to the records. When the accountant received an IRS summons, Couch had the records turned over to her attorney. The issue was defined as "whether her proprietary interest further enables her to assert successfully a privilege against compulsory self-incrimination to bar enforcement of the summons and production of the records, despite the fact that the records no longer remained in her possession."[32] Mr. Justice Powell went on to describe the "intimate and personal" nature of the privilege which "proscribes state intrusion to extract self-condemnation."[33] The "[F]ifth [A]mendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him."[34] Therefore, by giving the records over to the accountant for such a long time period, the Court held that the element of personal compulsion against the taxpayer was lacking. The summons and related legal actions were directed at the accountant and not the taxpayer. By surrendering possession but not legal title for such a long period of time, Couch compromised the personal and

29. 400 U. S. 517 (1971).
30. 267 U. S. 576 (1925) (per curiam). The summons in *First Nat'l Bank* had been directed to a third party bank and the fourth amendment challenge was seen as nongermane.
31. 409 U. S. 322 (1973).
32. Couch v. United States, 409 U. S. 322, 327 (1973).
33. *Id.* at 327.
34. *Id.* at 328.

confidential nature of the records. The taxpayer had lost her expectation of privacy.[35] In addition, the Court could find no confidential accountant-client privilege existing under federal law and no state-created privilege that had been recognized in federal cases.[36] An individual could still use an accountant, but record disposition would have to be clearly stipulated and controlled if a taxpayer wished to later make a fifth amendment claim.

The two dissenters, Mr. Justices Douglas and Marshall, diverged in their respective dissents. Douglas relied on the concept of privacy as protecting such records from government intrusion.[37] Marshall's dissent was an attempt to identify more clearly when the records would be protected and when the constitutional protections would be lifted.[38] He argued that the Court had created a "bright-line rule that no constitutional right of petitioner is violated by enforcing a summons of papers not in her possession."[39] In arguing against this simplistic rule, Marshall was willing to consider "disclosure to an accountant is rather close to disclosure to an attorney."[40] The latter argument like a section of Justice Douglas's dissent[41] is based on an empirical argument: the overwhelming complexity and obscurity of the tax laws makes professional assistance almost mandatory for taxpayers with unusual or complicated income patterns. The Court in *Couch* is seen as making that service potentially hazardous to the client in some unforeseen future.

A related series of cases revolves around the issue of bank records, the extent of record-keeping requirements, and the ability of the IRS to access those records.[42] In a test case, *California Bankers Association v Shultz,*[43] Mr. Justice Rehnquist for the Court upheld the basic constitutionality of the Bank Secrecy Act of 1970. Certain of the claims were rejected as premature and failing to assert sufficient cause. Other issues were disposed of by citing *Couch* to the effect that the individual could not assert privilege on testimony or

35. *Id.* at 336.
36. *Id.* at 335.
37. *Id.* at 338-44 (Douglas, J., dissenting).
38. *Id.* at 344-351 (Marshall, J. dissenting).
39. *Id.* at 344.
40. *Id.* at 351.
41. *Id.* at 342 (Douglas, J., dissenting).
42. The Government's concern was to control organized and white collar crime by establishing clear records of all sizeable financial transactions. This would allow the tracing of financial transactions from point to point in a stream of transactions. An example would be the tracing of the funds delivered to the original Watergate breakin team. Flippen, *The Internal Revenue Service Summons: An Unreasonable Expense Burden on Banks and an Invasion of Depositors' Privacy], 12* AM. BUS. L. J. 249 (1975); LeValley & Lancy, *The IRS Summons and the Duty of Confidentiality: A Hobson's Choice for Bankers,* 89 BANKING L. J. 979, 995-96 (1972); Mortimer, *The IRS Summons and the Duty of Confidentiality: A Hobson's Choice for Bankers — Revisited,* 92 BANKING L. J. 832 (1975).
43. 416 U. S. 21 (1974).

evidence by a third party. The Court was clearly concerned with maintaining the ability of the Government to cope with organized crime. The three dissenters, Mr. Justices Douglas, Brennan, and Marshall, saw the Act as allowing the Government almost unlimited access to an individual's personal records with only superficial controls at best.[44]

The following term, in *United States v Bisceglia,*[45] the Court was confronted with a "John Doe" summons to a bank. Certain moneys in deteriorated condition had been deposited to the bank and were sent to the Federal Reserve for disposal. The IRS suspected that the moneys related to transactions probably not reported for tax purposes. After a preliminary investigation, the "John Doe" summons was issud for all relevant bank records. The Court, in an opinion by the Chief Justice, upheld the summons against the objection that it was vague and unduly broad. Mr. Chief Justice Burger argued that the protection against abuse lie in the fact that such summons can only be enforced by the courts.[46] In addition, such fictitious name summons are not unusual and are in fact common in indictments. The interest of the IRS in investigating such large cash transactions overrides most objections of this nature.[47] Mr. Justice Powell, concurring, denied that the Court had authorized an unlimited power of summons — the search must be narrow and specific.[48] Mr. Justice Stewart, dissenting with Justice Douglas, held that there was no protection since the federal courts had no measurable standard to apply in judging a summons.[49] The power was construed too broadly and allowed "a shot in the dark to see if one (an investigation) might be warranted."[50]

In a later case, *United States v Miller,*[51] the Court explicitly upheld the power of the Government to subpoena or issue summons to banks for a depositor's bank records. The individual was held unable to assert a fourth amendment claim — as "no legitimate 'expectation of privacy' "[52] existed.

> Since no [f]ourth [a]mendment interests of the depositor are implicated here, this case is governed by the general

44. California Bankers Ass'n v. Schulz, 416 U. S. 21, 79 (1974) (Douglas, Brennan, Marsnall, J., dissenting).
45. 420 U. S. 141 (1975).
46. United States v. Bisceglia, 420 U. S. 141, 146 (1975).
47. *Id.* at 149.
48. *Id.* at 152 (Blackmun Powell, J., concurring).
49. *Id.* at 153 (Stewart, Douglas, J., dissenting).
50. *Id.* at 156.
51. 425 U. S. 435 (1976).
52. United States v. Miller, 425 U. S. 435, 442 (1976).

> rule that the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant, even if a criminal prosecution is contemplated at the time the subpoena is issued.[53]

The dissenters, Mr. Justices Brennan and Marshall, saw the depositor as having "a reasonable expectation of privacy in his bank statements and records."[54] A right was seen as vitiated by the bank's voluntary relinquishment of the records — an action not reported to or approved by the depositor.

On the same day as *Miller,* the Court in *Fisher v United States,*[55] further restricted the ability of the taxpayer to claim fifth amendment privilege as regards his personal tax records. The records had been worked on by his accountant but held by the taxpayer. In this instance, the taxpayers had turned the documents over to their attorney. The attorney was then ordered to turn the records over to the IRS. The Court agreed that the attorney was obligated to surrender the materials. Arguing that the privilege is personal *ala' Couch,* Mr. Justice White stated "that by reason of the transfer of the documents to the attorneys, those papers may be subpoenaed without compulsion on the taxpayer."[56] The "compelled production of documents from an attorney does not implicate whatever Fifth Amendment privilege the taxpayer might have enjoyed from being compelled to produce them himself."[57] Even this caveat was further qualified in that the Court defined the papers demanded as not the taxpayer's "private papers."[58]

Briefly summarizing this particular line of precedents, the Court since 1971 has basically forbidden fifth amendment privilege claims. If an accountant, or by implication an attorney-accountant, works on the documents — almost a necessity for those in professional or proprietorial status — the documents are no longer private and protected. In fact, the Court *in dicta* seems to even reject the claim that might be posed by an individual who received no outside tax counseling. The record keeping requirements of the Internal Revenue Code apparently destroy any claim to privacy or constitutional privilege that might exist.[59] The Court has

53. *Id.* at 444.
54. *Id.* at 448 (Brennan, Marshall, J., dissenting).
55. 425 U. S. 391 (1976).
56. Fisher v. United States, 425 U. S. 391, 399 (1976).
57. *Id.* at 402.
58. *Id.* at 414.
59. Note, *Constitutional Rights and Administrative Investigations,* 58 GEO. L. J. 345, 351 (1969); Note, *Constitutional Limits on the Admissibility in the Federal Courts of Evidence Obtained From Required Records,* 68 HARV. L. REV. 340, 341 (1954).

maximized the power of the state to the point that the fifth amendment seems only to protect the individual from the rack and the screw. Commitment of one's personal affairs to paper or some other recording medium leaves it open to government scrutiny.[60]

A related though separate issue has been whether the IRS is required to give the formal warning mandated by *Miranda.* Actually, the IRS had revised its rules in 1967, in a press release, at least to inform the taxpayer that an investigation was under way. But this was not to be construed as voluntary imposition of the *Miranda* warning on the Service's investigations.[61] Precedent in the lower federal judiciary had emphasized the noncustodial aspects of the IRS interrogations. In *Beckwith v United States,*[62] the Court, through Mr. Chief Justice Burger, upheld the custodial/noncustodial distinction.[63] The warning given by the IRS was deemed sufficient since the coercive elements of the interrogation were not deemed overwhelming enough to trigger the necessity of a *Miranda* warning. If an individual were placed in custody then the normal criminal justice process would be invoked.

VI. POLITICAL-JUDICIAL TENSION

Overwhelmingly the Court, despite or because of its conservative justices has futher expanded the power of the tax collector. What is striking is the uniform support given these

60. Mr. Justice Brennan, concurring in the *Fisher* judgment, saw the Court driving toward the position that no papers however private are protected.

> 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. . . . its production. Under a contrary view, the constitutional protection would turn on fortuity, and persons would, at their peril, record their thoughts and the events of their lives. The ability to think private thoughts, facilitated as it is by pen and paper, and the ability to preserve intimate memories would be curtailed through fear that those thoughts or the events of those memories would become the subjects of criminal sanctions however invalidly imposed. Indeed, it was the very reality of those fears that helped provide the historical impetus for the privilege.

425 U. S. at 420 (Brennan, J., concurring).

61. The literature on the applicability of the *Miranda* rule in tax cases is voluminous. Andres, *The Right to Counsel in Criminal Tax Investigations Under Escobedo and Miranda: The "Critical Stage,"* 53 IOWA L. REV. 1074 (1968); Duke, *Prosecution for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid,* 76 YALE L. J. 1 (1966); Segal, *The Miranda Warnings: To What Extent Must the IRS Comply in Tax Fraud Investigations?,* 39 J. TAX. 76 (1973); Weiss, *supra* note 22, at 498; Note, *Extending Miranda to Administrative Investigation,* 56 VA. L. REV. 690 (1970).

62. 425 U. S. 341 (1976).

63. In Mathis v. United States, 391 U. S. 1 (1968), the Court explicitly rejected the Government's position that the tax investigation is immune from *Miranda.* The limiting factual circumstance was that the putative taxpayer was in prison at the time of the interrogation. So, if you are a convicted felon, your rights are more extensive than if you are not incarcerated at the time of the investigation.

expansions by the Nixon appointees.[64] Politically, the Goldwater-Reagan policital movements were repudiations of that type deference to expanding government power. President Nixon, though not as conservative as Senator Goldwater or Governor Reagan, earlier stated a similar strong personal distaste for big expansive government. Part of this distaste for big government apparently vanished in the fire of office on the way to Watergate but at least rhetorically the distinction was clear. The inquiry then becomes one of why the conservatives actively fostered this expansion of governmental taxing power.

Three somewhat distinct explanations commend themselves. The obvious prime explanation is *stare decisis.*[65] Having been appointed as "strict constructionists," the justices may be seen as sensitive to the power of precedent. This is not a blind worshipping of the past, but it necessarily limits Court flexibility on many issues. A truly precedent-conscious justice would also give due weight to lower court precedents. In the line of cases delineated above, notably those dealing with documents and privilege claims, the policy choice was clearly a fairly direct development of prior precedent, at least for the dominant bloc. This means that the Court tends to move in a linear fashion until significant conceptual problems develop or an extensive personnel turnover occurs. Interestingly, this development leads the justices to further expand the prerogatives of the IRS. In effect, the conservative justices are prisoners of their own rules of the road. Technique overcomes substance.

This strong precedent orientation is directly related to the second explanation. The Court is always confronted with reconciling the law with changing social/political reality. There is always a gap which is accentuated in more conservative courts because of their *status quo* orientations. The world, as it is, is accepted by the justices because it is the world they know. Suspicious of rapid social change and political or social experimentation, their inclination is to hunker down and defend the present. "Reactionaries," "radicals," and "liberals" all propose change — very divergent types of change obviously, but change. Litigants in tax cases are proponents of change; therefore,

64. The Nixon appointees did not dissent in any of the cases although Mr. Justice Powell, most notably, did concur limiting what he saw as the broad potential of a particular ruling. *E. g.*, California Bankers Ass'n v. Schultz, 416 U.S. 21, 78 (1974).

65. Precedent is not the dead hand of the past on the present but an attempt to provide continuity to the judicial process. It allows stability and change in an uneasy and shifting mixture of past wisdom and the needs of the present. Everyone knows it when they see it. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113-15 (1921); W. DOUGLAS, STARE DECISIS (1949).

the presumption is against them. This presumption against change is obviously part of the working rules of the Court as enunciated most eloquently by Justice Brandeis in his *Ashwander* concurrence.[66] The change that comes is that mandated by the political branches. Mr. Chief Justice Burger has publically stated that position as the Court has tightened the rules on standing to sue in environmental and consumer cases.[67] Since 1937, the government and its actions are the *status quo;* ergo, their actions are constitutional.

A final explanation must be tendered which is in fact generalizable to all conservatives both political and judicial. Their concern with the individual is a limited one. The focus is upon the good people — the "silent majority" of political rhetoric.[68] Criminals or those suspected of crime are individuals who by their actions are beyond the contours of civilization. In order to repress their deprivations, all weapons must be brought into the struggle. In this context, the conservatives move to support the maximum utilization of state power, the assumption being that these weapons will never be used against them.[69] Individuals who enter the criminal process are given a minimum of constitutional rights — the emphasis is on *de minimus.* Due process is designed to prevent automatic punishment and obvious abuses, but the presumption is against the accused individual. In their view, discretion must flow in the direction of maximizing the power and options of prosecutor and the policeperson. The hands of the peace forces' must not be unduly fettered while the guilty or suspected go free. The tax cases considered above all the *potentiality* of criminal prosecution though such an outcome was not automatic. One might hypothesize that this element tipped the scales in the direction of maximizing the power and options of the peace forces.

Whatever the cause, conservative appointments have not led to a sophisticated discrimination between the state as policeman and the state as tax collector. In the mishmash of the positive state, even the conservative justices have absorbed the lesson of 1937 as "anything goes."[70] Ideology is not dead — its forms are just not clear in the rarefied atmosphere of the Court. Conservatives dominate the bar and bench, but the political world is a liberal one. That liberal domination makes a truly conservative court

66. Ashwander v. TVA, 297 U. S. 288, 346-48 (1936) (Brandeis, J., concurring).

67. *E. g.,* Zahn v. International Paper Co., 414 U. S. 291 (1973); Sierra Club v. Morton, 405 U. S. 727 (1972).

68. CONSCIENCE OF A MAJORITY ch. 2.

69. The classic cases of this assumption in operation were those accused in the Watergate conspiracy. Their concern for expanded criminal rights has markedly broadened under their presently adverse conditions.

70. C. PRITCHETT, *supra* note 7, at ch. 10.

impossible — only marginal conservatism is feasible. Otherwise, the Court would be destroyed or crippled beyond repair.[71] Conservative politicians will go on proposing that their choices are the "right" appointments to the Court, but with no guarantee of doctrinal or political success.

71. The Taney Court, after the 1857 *Dred Scott* decision, represented the most dramatic example of the Court being almost destroyed, *See* R. MCCLOSKEY, THE AMERICAN SUPREME COURT (1960).