LIBERTY TREE

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Over the past few issues, I've been exploring different areas in which government usurps powers that have never been granted by the people who created that government. Such powers, not having been granted to their common agent (that is, the government), are retained by the principals (that is, the people), as recognized by the 9th and 10th Amendments to the Constitution. The reason for retaining that great mass of powers is really pretty simple: those powers are such that they cannot be exercised by a common agent to the equal benefit of all its principals. Since that agent owes each and every one of its principals an equal fiduciary duty to protect and promote their interests, then the exercise of any power which favors one individual or group over another violates the agent's fiduciary responsibility to

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HOW THEY DID IT

IRS "Return Preparer Office" now controls the livelihood of half a million people

In June of 2009, IRS Commissioner Doug Shulman told Congress that the IRS was preparing a legal smoke screen under which it could register, control and monitor every tax return preparer in the country — estimated at 1.2 million — and provide "strict enforcement" for any preparer who steps outside the IRS box. Here's the way he actually spun it to the Committee on Ways and Means:

> ...by the end of the year I plan to deliver to the President and the Treasury Secretary a comprehensive set of recommendations on how to better leverage the tax return preparer community to increase taxpayer compliance and ensure high ethical standards of conduct for paid tax return preparers. Today, over 80 percent of taxpayers use either a tax return preparer or third party software to complete their returns. ... Paying taxes is one of the largest financial transactions that individual Americans have each year, and we need to make sure that the professionals who serve them are ethical and ensure that the right amount of tax is paid.

Like the long train of tyrants before them, the IRS is adept at fashioning 'legal' cudgels to beat and rob the people. Since about 50 to 60 percent of Americans use tax return preparers, the IRS reckons that controlling the preparers will control the flow of revenues in an upwards direction, so a larger "right amount" can be had from the "largest financial transaction" of Americans to their overlords.

Since 2002, the IRS has been attempting to solve the 'problem' of unregistered preparers by proposing legislation through the National Taxpayer Advocate and its congressional water-carriers. But these efforts were not bearing fruit, or at least not fast enough, so a better plot was conceived in the bowels of the IRS: they would just

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rewrite *their own regulations* to illegally give themselves the authority they seek.

Because no one who cares is really watching, writing and enforcing your own laws apart from the people's representatives in Congress is as simple as 1-2-3. One: create and maintain an official-sounding smoke screen and cover, including a new bureacracy called the Return Preparer Office (RPO). Two: rewrite the regulations for 26 U.S.C. § 6109. Three: rewrite the regulations for 31 U.S.C. § 330. *Voilà*.

"Transparent and open dialog"

To maintain the illusion that the statists at the IRS benefit the public-at-large rather than a few publicans and their friends,[1] Shulman explained to Congress that he is a "big believer in transparent and open dialog when the government gets involved in a big question like this that is going to affect a lot of people, and so we are going to hold some open meetings ... The first part of the review that I plan to undertake will involve fact finding and receiving input from a large and diverse constituent community."[2]

The so-called fact finding was not *about* to begin, it was already underway, having begun in February of 2008, when the IRS Oversight Board sponsored a "public" meeting on regulating return preparers. Said meeting naturally did *not* feature the public, but rather panelists from the financial and tax industry, with a lone director of a "consumer advocacy group," the AARP Foundation Tax-Aide Program. This insider clique agreed that examination for certification, continuing education, an "ethics requirement," enforcement component, and user fees should all be brought to bear on anyone attempting to make a living by preparing tax returns for others.

Within months of Shulman's 2009 statements, the IRS held three more show-"forums," featuring mostly "industry stakeholders" and government bureaucrat panelists who gave 5-minute statements and then engaged in "discussion." All followed the IRS' predetermined script that return preparers must be licensed. By December 2009, the IRS compiled this nonsense into a 53-page *Return Preparer Review*[3] which laid out its plan to subvert the Constitution.

The plan exposed

The *Return Preparer Review* admits legislative proposals to control return preparers were "introduced and considered" in Congress, but that they did *not* become law. The proposals "would have required"[6] the IRS to set up a registration

program with retribution for refuseniks; a tacit admission that the IRS has no current legal basis for its return preparer licensing program.

Note that the report used the phrase "would have required" rather than "would have authorized," since the former implies the IRS retains some discretion, while the latter would reveal just the opposite — an *absence* of power.

After admitting that it begged for, but did not receive, legislation to control preparers via registration, background checks, fees, etc., the IRS report about-faces and boasts it already has such authority: "The IRS believes that increased oversight of paid tax return preparers *does not require additional legislation*."

The report discloses the new plan to grab power by (illegally) 'amending' two statutes. The first is IRC § 6109: "IRS' intention is to require paid tax return preparers to register ... through the issuance of regulations under section 6109 of the Internal Revenue Code."[3]

IRC § 6109 provides that preparers must show ID numbers (PTINS) prescribed by the Secretary on returns they prepare, but Congress never intended such number to be used to register or license preparers, only as an alternative to the SSN.[4] Under § 6109(c), the IRS is only authorized to require information "necessary to assign an identifying number." Since 2002, a PTIN could be obtained with an individual's name, address, SSN, and date of birth.[5]

But in 2010, after deciding for itself that it can license return preparers, the IRS rewrote its regulations to make it *mandatory* for paid return preparers to apply for a PTIN for a fee of $64.25. The application form (W-12) expanded from 3 to 15 lines, and the data demanded now includes filing status, tax compliance, status, felony convictions, professional credentials, and more.

It cannot be reiterated too often that such collection of information has *not* been authorized by Congress. This new "requirement" is *created* by a regulation written by unelected bureaucrats. Since Art. I, Sec. 1 of the Constitution states all legislative powers are vested in Congress, the new rule is actually null and void.

Misusing English and Congress

IRS lawyers could see that IRC § 6109 by itself cannot provide adequate legal "cover" for making registration and application for a PTIN mandatory, and that it provided no cover whatsoever for competency examinations, continuing education, and background checks. For that, the IRS intended to rewrite a different law:

> Further, the IRS considers the preparation of a tax return for compensation as a form of representation before the agency. Thus, the IRS intends to amend the regulations under 31 U.S.C. 330 to clarify that any person preparing a tax return for compensation is practicing before the agency and, therefore, must demonstrate good character, good reputation, and the necessary qualifications and competency to advise and assist other persons in the preparation of their federal tax returns. [3]

It will shortly be seen that by "clarify," the IRS actually meant "mangle and destroy forever" the legal concepts of practice and representation.

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1. See *Liberty Tree*, October 2011.
2. This and quote on first page from House Hearing, Serial No. 111-23.
3. IRS Publication 4832 (for quotes, see pp. 25 and 33).
4. See *Liberty Tree*, November 2011.
5. See form W-7P.
6. See also 5 U.S.C. § 500.
7. See the previous version of 31 CFR § 10.2(a)(4) at www.gpo.gov/fdsys/pkg/CFR-2010-title31-vol1/xml/CFR-2010-title31-vol1-subtitleA.xml
8. See the current version of 31 CFR § 10.2(a)(4) at www.irs.gov/pub/irs-pdf/pcir230.pdf
9. Federal Register, Vol. 76, No. 107, p. 32288.
10. www.irs.gov/taxpros/article/0,,id=243337,00.html
11. www.irs.gov/newsroom/article/0,,id=249453,00.html
12. http://abcnews.go.com/Business/prison-inmates-register-irs-tax-preparers/story?id=15256681#.TwPIoIGArQB

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Under 31 U.S.C. § 330(a)(1), the IRS can regulate "the practice of representatives of persons" before the IRS, and representatives meant, as passed by Congress: "agents, attorneys, or other persons representing claimants before [Treasury] Department"— *i.e.,* in audit or appeal cases and hearings. The IRS may require that someone admitted to such "practice" demonstrate good character and reputation as well as the qualifications and competency to legally advise and assist persons they represent.[6] This regulation authority did not extend, and has never extended, to people who only prepared returns.

The *practice* of law, according to *Black's Law Dictionary*, 5th Ed., is the "rendition of services requiring the knowledge and the application of legal principles and technique to serve the interests of another with his consent." To *represent* a person means to "stand in his place, to speak or act with authority on behalf of such person; to supply his place; to act as his substitute or agent."

Preparing a return is not the practice of law, nor does it involve representing another person; returns must be signed under penalty of perjury by the person or company official liable for the tax shown therein. The person liable is also responsible for the information shown, and for all back taxes, penalties and interest in the event the IRS can show a deficiency in the amount of tax paid.

On the other hand, return preparers are subject by law to numerous penalties for infractions such as failure to sign returns or supply ID numbers, taking unreasonable positions, and assisting in understatements of liability. If a preparer engages in conduct prohibited by law — see, *e.g.*, IRC §§ 6694 and 6695 — the IRS may also seek to enjoin them under IRC § 7407. Under IRC § 7206, making fraudulent or false statements in return preparation is a felony punishable by up to $100,000 in fines and three years in prison. Finally, if a preparer through negligence or fraud damages a taxpayer, he or she can sue for those damages in court. In other words, there are plenty of laws and remedies available to restrain tax return preparers.

Erasing one word

While Congress has provided punishments for noncompliant return preparers, the IRS likely does not prefer penalizing or charging preparers, since with a few exceptions, the burden of proof rests with the IRS in court. It is much more convenient (and aggrandizing) to establish a new bureaucracy (the RPO) and a constant time and cost burden on non-attorney, non-CPA preparers (never mind that their work already benefits the IRS).

The Treasury lawyers thus found it expedient to (a) break the phrase "practice of representatives" apart, (b) cast the term 'representatives' aside, and (c) expand the term 'practice' to include tax return preparers. This was accomplished through the simple expedient of removing the word "and" from a key definition. Before the change, 31 CFR § 10.2(a)(4) defined the word practice to comprehend "all matters connected with a presentation to the [IRS] relating to a taxpayer's ... liabilities under laws or regulations administered by the [IRS]. Such presentations include, but are not limited to, preparing and filing documents ..."[7] As noted above, return preparers prepare returns for others to sign and file, they do not prepare *and* file documents (they may mail or electronically transfer such return to the IRS, but they are still not the person actually filing the return).

By slashing "and," 31 CFR § 10.2 (a)(4) now reads: "Such presentations include, but are not limited to, preparing documents; filing documents ..."[8] In this way, the lawyers redefined "practice" before the IRS to include the mere preparation of documents. George Madison, general counsel for Treasury, reiterated in the Federal Register that this will "clarify" that "*either* preparing ... *or* filing a document may constitute practice before the IRS."[9] (emphasis added).

Having made "preparing" synonymous with "practice," the IRS promulgated onerous new regulations to load up the newly designated "practitioners," a.k.a. "registered" tax return preparers, with requirements to take competency exams, be fingerprinted, pass background checks, enroll in continuing education, and pay annual fees. Even worse, however, the new rules don't simultaneously turn preparers into actual *representatives*: "registered tax return preparers are not permitted to represent taxpayers, regardless of the circumstances requiring representation, before appeals officers, revenue officers, counsel or similar officers of employees of the IRS or the Treasury department."[9]

Cui bono?

Since this smackdown of the unwashed (non-attorney, non-CPA, non-enrolled agent) independent return preparers was always about tax preparation industry insiders using the special rules to smash their competitors, the big boy tax preparers such as H & R Block and Jackson Hewitt don't have to *actually* proceed as if the word "prepare" means "practice." The IRS has declared in Notice 2011-6 that "supervised preparers" — those employed by firms at least 80 percent owned by attorneys, CPAs, and enrolled agents, and who prepare returns someone else signs — only need a PTIN, and are exempt from the other new regulations.[10] The big boys' bottom line is protected; the burdens fall squarely on those dirty little independents.

Perhaps the suppression of independent mom-and-pop return preparers has been even better than hoped. Speaking at the American Institute of CPAs on November 8th of this year, Commissioner Doug Shulman stated: "Since Sept. 28 of last year, almost 740,000 individuals have registered and obtained a [PTIN]." This is a much lower figure than the 1.2 million registrants projected by the IRS. Shulman continues, " ... over 60 percent of PTIN holders are not attorneys, CPAs or enrolled agents."[11] If true, then the unconstitutional and illegal licensing scheme has positioned nearly one-half million new folks directly under the IRS jackboot.

As for Shulman's promise that regulating preparers would "ensure high ethical standards of conduct for paid tax return preparers"? A TIGTA audit recently revealed 331 inmates serving prison terms were able to receive active PTINs under the IRS provisional rules (Sept. 2010-July 2011) because none of them disclosed their felony convictions on the applications.[12] So good news! The IRS *is* finally attracting people with higher ethical standards than its own staff.

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all the disfavored principals. Thus, while there are only a few powers that can be exercised with equal benefit to all, there is a virtually limitless pool of powers that can be exercised to favor some people over others.

Of course, this limitless pool of power is attractive to government, like a flame is to a moth. One reason is that every favor bestowed not only guarantees a constituency, but also creates an opportunity for reciprocal favors (i.e., *bribes*). To a politician, it doesn't get any better than this. He pays for the favors he grants out of money taken from the citizenry, but the return favors (in whatever form they may take) accrue to the politician's personal account. Thus, his largesse costs him nothing, but in the long run, benefits him directly. Making it even more attractive is that when those who were disadvantaged by that first favor demand their due, they can likewise be bought off at public expense, while their bribes still funnel back to the politician himself. And on and on it goes, until such time as the people realize that this vote-buying scheme is just another control mechanism.

And control is a second reason why the limitless pool of power is attractive. It affords endless opportunities to exercise petty control over the lives and property of one's neighbors near and far. Perhaps you have a neighbor or two who you think could use some controlling. Well if so, you just might be a *statist*! As the government moves farther down the road of totalitarianism, dipping more and more into the pool of reserved powers, the amount of control over individuals' lives increases. Chasing after this increased control are the would-be tyrants, who can't be happy unless they're telling other people how to live their lives. They gravitate towards government jobs because that is where the opportunities for controlling others are greatest. This power over the lives and property of their countrymen is a corrupting influence, both on the controller and the ones being controlled.

You can get an idea of the corrupting influence on the ones being controlled by simply looking around you (or maybe even in the mirror), and seeing so many people reluctant to give real liberty a try.[1] I mean, can you imagine if people could just do whatever they wanted? It would be chaos – a zoo!

But of course there would be a limit on what anyone could do – that limit being the equal rights of everybody else to do the same. Sure, some people might use their freedom to drink to excess or to take drugs or to do any number of other things that you might deem imprudent, sinful, or even flat-out wrong. They might even discriminate against other races, or refuse to help the less-fortunate, or live in sub-standard houses. But that is the price you must be willing to pay in order to have your own freedom. (Freedom isn't free!) The fact is that those same people are probably already doing all those things. The only real difference is that currently they are being forced to pay extra (in fines, imprisonment, or other punishments) for their decisions, merely because some group of their fellow citizens used the coercive power of government to enforce their own ideas of what is acceptable behavior. However, if we are to live in liberty, we must take Voltaire's famous quote to heart, and even extend it beyond the right to free speech: *I do not agree with what you do, but I'll defend to the death your right to do it*.

Unfortunately, many people have come to believe that it would simply not work for everyone to determine their own best interests and act accordingly. They are convinced that too many people are incapable of looking after themselves to that extent, and therefore government is necessary to separate them from the consequences of poor decisions, by limiting their ability to decide for themselves.

Thomas Jefferson succinctly answered that misguided idea in his first inaugural address on March 4, 1801:

> Sometimes it is said that man can not be trusted with the government of himself. Can he, then, be trusted with the government of others? Or have we found angels in the forms of kings to govern him? Let history answer this question.

This simply stated proposition is really the heart of self-government. All men are equally susceptible to lapses in judgment, and subject to the same human frailties and disabilities. Therefore, those who manage to get themselves elected to public office are no more fit to govern even themselves than those who elected them, and considerably less fit to govern those others. One reason they're less fit is that they lack the information necessary to make an informed decision, since they have no direct knowledge of the personal circumstances or the desires or the real or perceived interests of those they would govern. They must either attempt to obtain that information from the governed, or simply make presumptions. But even if they had perfect knowledge of all the relevant factors, it would still be impossible to equally satisfy the interests of *everyone*. In fact, the odds are they would not be able to fully satisfy *anyone* (except possibly themselves).

This brings us back to the short list of delegated powers, and the reasons the list is so short – those powers can be exercised to the equal benefit of all, and they are more effectively accomplished by a common agent rather than by each of us personally. After all, it would be folly to delegate to another person authority to act for you in matters that are better accomplished personally, and our founding fathers were no fools.[2] Once we strayed from these concepts, we started down the road to absolute tyranny. To restore our liberty, we must return to that original plan, and stick to it. Only then will we have again, as Jefferson explained in that same inaugural address:

> ... a wise and frugal Government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. This is the sum of good government ...

1. They become "institutionalized," as is sometimes said of prison, where they become reliant on government largesse and no longer can (or are willing to) function independently.
2. But I would defend to the death your right to think they were!