CONSTITUTIONAL RIGHTS OF CRIMINAL TAX DEFENDANTS: A BICENTENNIAL SURVEY AND MODEST PROPOSAL

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I. INTRODUCTION

It is only a bit presumptuous for tax lawyers to join wholeheartedly in the bicentennial celebrations. They really count their origins from February 3, 1913, when the sixteenth amendment was ratified, authorizing federal income taxes. Perhaps tax lawyers think that by singing loudest at the feast, their right to partake will not be called into question.

Such a view, however, would be jaundiced. Protests against the taxes imposed upon the colonists, and upon the means used to compel payment and investigate noncompliance, form important, if not decisive, chapters in American history. The writs of assistance, the odious devices used to seek out the goods on which tax had not been paid, were excoriated by the lawyer James Otis in 1761 in Boston. John Adams wrote of James Otis' speech, "Then and there the child Independence was born."[1]

In 1790, the "whiskey revolts" threatened to rend the new nation. These revolts concerned taxes. Some seemed to believe the revolts were beyond the nation's powers to control. President Washington's decisive action stands today as a testament to the power of federal agents to enforce federal laws.[2]

This paper is not about questions so arcane. It looks back only to try and chart a course from here. The problem of protecting citizen rights in the face of intensive and intrusive civil, criminal, and administrative proceedings is relatively new in the form it arises today. I am not here to count the rights that now exist; that is the task of treatises, handbooks, and conference programs.[3] I will not bemoan the erosion of rights that seemed once within our grasp and now recede as the Supreme Court's majority changes. I will not, at dusk, rage against the dying of light. I know that it is futile to do so and that the morning will surely come.

In Part I of this essay, I will take inventory of America's current situation. In Part II, I chart the course America has taken, leading us to where we now stand. In Part III, I gather some strands of venerable doctrine and suggest a

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An earlier draft of this paper was presented at a meeting of the ABA Section of Taxation in Atlanta, Georgia on January 25, 1987. I benefitted greatly from comments made at that meeting.

[1]*Quoted in* Boyd v. United States, 116 U.S. 616, 625 (1886).

[2]The statutes under which Washington acted, as amended at various times, are today codified at 10 U.S.C. §§ 331-334.

[3]Among the best works is the ABA's publication, N. KAPLAN, PARALLEL GRAND JURY AND ADMINISTRATIVE PROCEEDINGS (1982).

structure of rules to control the investigative power now wielded in criminal tax investigations. Lord Coke taught that from old principles will be derived new notions of liberty.[4] He intended then, as I intend now, to castigate present injustice and to suggest that the injustice violated the contract that binds both sovereign and citizen.

II. THE LONG LIFE AND PRESENT MALADIES OF CONSTITUTIONAL RESTRAINTS ON TAX INVESTIGATORS AND PROSECUTORS

In the current debates over exclusionary rules and exercises of police power, some elementary historical truths are being overlooked. Most important, the exclusionary rule originated in 1914 for federal cases in *Weeks v. United States*.[5] Its allegedly recent coinage has only to do with state prosecutions, to which it was first applied with full vigor in 1961. As late as 1949, Justice Frankfurter reaffirmed that the Court would "stoutly adhere" to *Weeks*.[6] The recent erosions of the exclusionary rule to uphold the alleged objective good faith of the officer,[7] or to deny its applicability to nonconstitutional violations,[8] are new inventions.

The debate over the exclusionary rule, however, cannot obscure the considerable changes that have taken place in the definition of constitutional rights in the criminal arena. Nor, more significantly, will disputes about citizen rights in the one-on-one police-citizen encounter provide many helpful answers to questions in the complex world of administrative, civil, and criminal tax enforcement.

Let us begin by taking the following inventory.

A. *Counsel*

Counsel is guaranteed every tax defendant charged with a crime.[9] Before charging a subject, however, investigative agents are probably under no constitutionally-based duty to inform him or her of a right to counsel.[10] In the trial setting, the right to counsel in complex cases is somewhat illusory. In *United*

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[4]Coke's actual statement was "from the old fields must come the new corne." *Quoted in* M. TIGAR & M. LEVY, LAW AND THE RISE OF CAPITALISM 261 (1977).

[5]232 U.S. 383 (1914).

[6]Wolf v. Colorado, 338 U.S. 25, 28 (1949).

[7]*See, e.g.*, Massachusetts v. Sheppard, 468 U.S. 981 (1984); United States v. Leon, 468 U.S. 897 (1984).

[8]*See generally* United States v. Comstock, 805 F.2d 1194 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 1908 (1987), for a review of the precedents and an outright rejection of the exclusionary rule as applied to nonconstitutional violations. Tax lawyers are familiar with United States v. Janis, 428 U.S. 433 (1976), which declined to apply the exclusionary rule to evidence that was unlawfully obtained by local police and turned over to the IRS. *See* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 3.1, at 89 (Student ed. 1985) [hereinafter LAFAVE & ISRAEL]. This is an excellent desk reference for the matters under discussion.

[9]The right to counsel in adversarial proceedings has consistently been reaffirmed by the Court, most recently in Michigan v. Jackson, 106 S. Ct. 1404 (1986). *See also* Maine v. Moulton, 474 U.S. 159 (1985) (government may not use informer to record post-indictment conversations with accused; stressing right to counsel); *cf.* Kuhlmann v. Wilson, 106 S.Ct. 2616 (1986) (if informant does not interrogate suspect, no right-to-counsel violation).

[10]*See* Beckwith v. United States, 425 U.S. 341 (1976) (no reading of *Miranda* rights required before interview with Government agents, since interview was free of "coercion").

States v. Cronic,[11] the Supreme Court affirmed a mail fraud conviction in a reasonably complex case even though appointed counsel was a real estate lawyer with no criminal experience. Appointed counsel had also been given only a few days to prepare for trial.[12] Those with through-the-looking-glass parity of reasoning could justify the Court's decision on grounds that the case involved real estate. This same sort of analysis would uphold appointing probate lawyers to capital cases.

Lawyers who give financial advice or represent people involved in complex financial transactions have found themselves the targets of grand jury subpoenas of late.[13] This development, as courts and commentators have aptly noted, threatens to undermine the right to counsel.[14] The attack has come on two fronts. First, the 1984 amendments to the RICO statute have pushed back the relevant date for forfeiture to the time when the offense was committed. Therefore, the funds used to retain counsel may, so the government argues, be forfeitable in counsel's hands. Second, the government has been assiduous in seeking to identify the nature and source of funds used to retain counsel, reasoning that such information is generally not privileged.

B. *Self-Incrimination*

On February 1, 1886, as the centennial of the constitution drew near, the Supreme Court decided *Boyd v. United States*.[15] The Court held unconstitutional, as violating the fourth and fifth amendments, a section of the revenue act of 1874.[16] The section provided that a court, on motion of the government attorney, would require a defendant or claimant in customs cases to produce private books and papers.[17] Nonproduction was the equivalent of confessing the allegations in the government's request for forfeiture or penalties.

Justice Bradley's analysis is too familiar to repeat at length. He touched upon the speeches of James Otis, the diary of John Adams, and notable English cases that were fresh in the memory of the constitution's architects.[18] He held that the fourth and fifth amendments run "almost into each other."[19] Those amendments "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

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[11]466 U.S. 648 (1984).

[12]*Id.* at 649.

[13]*See generally* Gertner, *On Trial: A Disciplinary Rule that Limits Attorney Subpoenas*, 1 (No. 3) CRIM. JUST. 2; Rudolf & Maher, *A Subpoena a Day Keeps the Clients Away*, 1 (No. 3) CRIM. JUST. 4; Genego, *Risky Business: The Hazards of Being a Criminal Defense Lawyer*, 1 (No. 2) CRIM. JUST. 2; Rudolf & Maher, *The Attorney Subpoena: You Are Hereby Commanded to Betray Your Client*, 1 (No. 2) CRIM. JUST. 14.

[14]*See, e.g.*, United States v. Thier, 801 F.2d 1463 (5th Cir. 1986) (excluding attorney fees from forfeiture); United States v. Estevez, 645 F. Supp. 869 (E.D. Wis. 1986) (reasonable but not exorbitant attorney fees are exempted from the forfeiture provision).

[15] 16 U.S. 616 (1886).

[16]*Id.* at 634-35.

[17]*Id.* at 621-22.

[18]*Id.* at 625-30.

[19]*Id.* at 630.

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 . . . ."[20] The Court found these rights were violated by compelled production of papers, even those of a business sort.[21] Today, Justice Bradley's opinion appears forceful, eloquent, learned, persuasive . . . and dead. Later decisions have abandoned the *Boyd* formulation.

Fourth amendment objections are overcome by a grand jury subpoena,[22] a proper summons,[23] or a warrant issued upon probable cause.[24] The fifth amendment is still held to protect some private papers of a testimonial sort, such as diaries, notebooks and other writings.[25] At least one Justice has suggested that even this protection should be regarded as undercut by previous Supreme Court cases.[26]

The prohibition against compelled self-incrimination, however, still lives in some contexts and has even assumed renewed vitality. The Supreme Court has squarely held that the holder of a public position, a political party office, or a license issued under public authority may not be forced to waive the privilege against self-incrimination upon pain of losing that public benefit or position.[27] As *Lefkowitz v. Cunningham* makes clear, this protection has benefitted targets of tax fraud investigations.[28]

At the same time, the possible dangers of parallel civil, administrative, and criminal proceedings are abated somewhat by cases that preserve a litigant's right to maintain the silence that the fifth amendment protects while continuing to litigate the underlying claim. *Wehling v. CBS, Inc.*[29] is the leading case. The

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[20]*Id.*

[21]*Id.* at 631-32.

[22]*See, e.g.*, United States v. Calandra, 414 U.S. 338 (1974). *See also infra* note 25 (discussion of fifth amendment cases)

[23]*See, e.g.*, [Latest Developments] Fed. Tax Explanation (P-H) ¶ 39,643; United States v. Powell, 379 U.S. 48 (1964). The lore of bad faith, overbroad and otherwise improper summonses is not within the scope of this paper. These decisions do, however, provide one basis for building the kind of due process-based jurisprudence discussed in Part III.

[24]*See, e.g.*, Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

[25]The latest discussion is United States v. Doe, 465 U.S. 605 (1984), which summarizes the development of fifth amendment law and holds that a sole proprietor's business records are not subject to fifth amendment protection, since they were not prepared under compulsion and the subpoena would not force the movant to restate the contents. The act of production, however, might involve incrimination. The government might, therefore, have to grant use immunity for the act. In United States v. Davis, 636 F.2d 1028 (5th Cir. 1981), a pre-*Doe* decision, the Fifth Circuit held that private papers are entitled to a great deal of fifth amendment protection. The rationale of *Davis* is not completely undermined by *Doe*, although Justice O'Connor's concurring opinion urges the Court to hold that the fifth amendment provides no protection for private papers of any kind. *Doe*, 465 U.S. at 618. *See also* United States v. Edgerton, 734 F.2d 913 (2d Cir. 1984); Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fisher v. United States*, 95 HARV. L. REV. 638 (1982).

[26]*See Doe*, 465 U.S. at 618 (contents of subpoenaed records not priviledged under fifth amendment). Justice O'Connor's concurring opinion argues that the fifth amendment provides no protection for the contents of any kind of private papers. *Id.* at 618.

[27]The most recent case is Lefkowitz v. Cunningham, 431 U.S. 801 (1977).

[28]*Id. See* United States v. Cunningham, 672 F.2d 1064 (2d Cir. 1982) (providing an introduction to Cunningham's related income tax difficulties).

[29]608 F.2d 1084 (5th Cir. 1979), *aff'd on reh'g*, 611 F.2d 1028 (5th Cir. 1980).

plaintiff sued CBS for libel based upon a publication that implicated him in criminal conduct.[30] The court held that he could stay his deposition until he was free from danger of criminal prosecution.[31] This benefit terminates, however, if the defendant elects to push the case to trial without the plaintiff's deposition. Of course, if the plaintiff invokes the privilege at trial, an adverse inference may be drawn from his silence. So the fifth amendment provides only a partial and temporary shield. The *Wehling* result might not be obtained when the plaintiff's testimony is central to the lawsuit, so that staying discovery will demonstrably burden the defendant's case. In short, *Wehling* is a balancing case. The Tax Court has been willing to accommodate the principle of staying discovery from the petitioner when a criminal investigation pends.[32]

In a complex tax fraud case, the fifth amendment protection of *Cunningham* and *Wehling* is curtailed by the cases limiting *Boyd*. The Service and the Department of Justice may not need the taxpayer's testimony. They can get the documents. The one bright spot in such cases is the "act of production" doctrine, reaffirmed in *Doe v. United States*.[33] If compelling production requires the holder of the records to incriminate himself, for example by vouching for the authenticity of the documents' contents, the government may be required to grant use immunity.[34] The "act of production" doctrine is now being debated in the context of government efforts to compel targets of tax investigations to consent to waiving the protection of foreign bank secrecy laws. The circuits are divided on the issue.[35]

C. *Fourth Amendment*

Boyd rested upon the fourth as well as the fifth amendment. To the extent that there were two *Boyds*, they have been pelted with many stones, including *Stone v. Powell* for post-conviction review of taxpayer convictions.[36]

Because there is no special fourth amendment status for personal papers, the fourth amendment has no special relevance for taxpayers. The rule that a search for "mere evidence," as opposed to fruits and instrumentalities of crime, was interred during the Warren Court years,[37] and thus vanished a major underpinning of the *Boyd* concept of the fourth amendment.

More significantly for practical purposes, evidence of the taxpayer's transactions is so often in the custody of others than the taxpayer, that he or she will lack standing to challenge even illegal incursions. The Court has not finished

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[30]608 F.2d at 1085.

[31]*Id.* at 1088-89.

[32]*See, e.g.*, Broad v. Commissioner, 65 T.C. 948 (1976).

[33]*Doe*, 465 U.S. at 612-14.

[34]*See id.* at 614-17 (production of subpoenaed documents cannot be compelled absent a statutory grant of use immunity).

[35]*See* In re Grand Jury Proceedings (Ranauro), 814 F.2d 791 (1st Cir. 1987) (requiring grand jury target to authorize release of foreign bank records violates fifth amendment rights), and cases there cited.

[36]428 U.S. 465 (1976).

[37]Warden v. Hayden, 387 U.S. 294 (1967).

its standing work, but it has undermined most claims that might be made about the protected status of taxpayer papers voluntarily placed in the hands of others, including lawyers, accountants, and banks.[38]

The Supreme Court has, however, refused most invitations to dilute the warrant requirement. This judicial insistence upon one of the fourth amendment's core values may have practical significance in the business setting. The Court has been willing to accord fourth amendment warrant clause protection to business premises as well as homes and other, more traditional, places of privacy and repose.[39]

Coolidge v. New Hampshire[40] is significant among warrant clause decisions because the Court there insisted that the government entrust the task of issuing a warrant to a neutral and detached magistrate.[41] This much of *Boyd*'s magisterial language still echoes in the Court's hallways; the English cases upon which Justice Bradley relied excoriated the "executive warrant."[42]

Challenges to the government illegality, however, must generally await an indictment. The grand jury process has been held inappropriate for resolution of Fourth Amendment claims,[43] and the preindictment motion to suppress may languish on the docket if the government strongly contends that litigation risks compromise of ongoing investigations.

In addition, a good faith reliance upon what the officer thinks is a valid warrant forecloses application of the exclusionary rules.[44] Whether this objective good faith test will be expanded in later cases, to match the contours drawn by some of the courts of appeals, remains to be seen.[45] Permitting an officer to rely upon subjective good faith, elaborated at the suppression hearing, would render the exclusionary rule a practical dead letter. Every trial lawyer knows that subjective impressions, recounted in self-serving fashion after the fact, are difficult to test

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[38]United States v. Miller, 425 U.S. 435 (1976), rests its holding on the assertion that a bank depositor assumes the risk that the bank will turn the materials over to a government agency. This reasoning was again applied in United States v. Payner, 447 U.S. 727 (1980), to hold that the customer assumed the risk of a Service-sponsored burglary. *See generally* LAFAVE & ISRAEL, *supra* note 8, §§ 9.1 - 9.2.

[39]*E.g.*, Payton v. New York, 445 U.S. 573, 585-86 (1980); Mincey v. Arizona, 437 U.S. 385, 391-92 (1978); Michigan v. Tyler, 436 U.S. 499, 504-05 (1978). *Tyler* deals with a fire inspection search. This is not a suggestion that purely administrative searches must fulfill traditional fourth amendment requirements. *See generally* LAFAVE & ISRAEL, *supra* note 8, § 3.9. *Compare* United States v. United States District Court, 407 U.S. 297, 320 (1972) (upholding the warrant requirement against a claim of domestic national security) *with* LAFAVE & ISRAEL, *supra* note 8, § 4.3(d). By contrast, the vehicle exception has been expanded. *See, e.g.*, California v. Carney, 471 U.S. 386, 393 (1985). The most pro-fourth amendment business premises case is Marshall v. Barlows, Inc., 436 U.S. 307, 324 (1978), which held warrantless OSHA searches unlawful.

[40]403 U.S. 443 (1971).

[41]*Id.* at 449.

[42]Boyd v. United States, 116 U.S. at 626-33.

[43]*See, e.g.*, United States v. Calandra, 414 U.S. 338, 346 (1974).

[44]*E.g.*, United States v. Leon, 468 U.S. 897 (1984); Massachusetts v. Sheppard, 468 U.S. 981 (1984).

[45]*See generally* United States v. Comstock, 805 F.2d 1194, 1207 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1908 (1987).

with cross-examination, and are unlikely to be contradicted by contemporaneous memoranda.

In at least one notable instance, litigation in the shadow of the fourth amendment has fared better than that based solely upon the constitution. In *Gelbard v. United States*,[46] the petitioners claimed that they had standing to object to the prosecutor's questions before the grand jury because the questions were based upon unlawful electronic surveillance. The Court held in a 5-4 decision that wiretap legislation gave the petitioners the right to notice of surveillance and an opportunity to contest the legality of the government's conduct in the grand jury setting.[47] In *United States v. Calandra*,[48] the Court refused to extend this rule to claims of fourth amendment violation, making clear the statutory basis of *Gelbard*.

In reviewing this history, I am not singling out the Burger Court as the villain in a fourth amendment melodrama. The Warren Court never fully embraced the citizen's right to be secure from police intrusion. Chief Justice Warren devised the "*Terry* stop," a citizen-police encounter based upon less than probable cause. The "*Terry* stop" has borne bountiful fruit.[49]

The Warren Court gave us *White* and *Lopez*,[50] the cases that dispense with the requirement of a warrant or probable cause when the government intrudes upon a multi-party conversation with the consent of only one participant. The "consent" may be given by a false friend or feigned accomplice. The target, against whom the tape recorded evidence will be used, is deemed to have consented to the intrusion through his ill advised choice of friends. There may be some due process limitations upon such tactics,[51] and some of us harbor hopes that the first amendment freedom of association might restrain zealous investigators in political or religious association contexts.[52] But *White* and *Lopez* con-

[46]408 U.S. 41 (1972), discussed in LAFAVE & ISRAEL, *supra* note 8, § 4.6. The only area in which standing rules have consistently been protected is in this area of electronic surveillance. This is a result of Katz v. United States, 389 U.S. 347 (1967) (the "telephone booth" case).

[47]*Gelbard*, *supra* note 46, at 51-2.

[48]414 U.S. 338, 353-54 (1974).

[49]Terry v. Ohio, 392 U.S. 1 (1968). A *Terry* stop will escalate into a fourth amendment violation if a person is held in custody unreasonably as in Davis v. Mississippi, 394 U.S. 721, 726 (1969), or is removed from his home as in Hayes v. Florida, 470 U.S. 811, 814 (1985). For years, the Solicitor General has been seeking and consenting to Supreme Court review in airport cases and other instances where the *Terry* stop can be argued to have escalated into probable cause for a more intrusive encounter. The cases are collected in LAFAVE & ISRAEL, *supra* note 8, § 3.8. The typical scenario has the police detaining someone and harassing him until he does or says something that establishes probable cause, or until somebody with superhuman powers arrives and smells narcotics.

[50]United States v. White, 401 U.S. 745, 752 (1971); Lopez v. United States, 373 U.S. 427, 439-40 (1963).

[51]United States v. Cervantes-Pacheco, 800 F.2d 452 (5th Cir. 1987), *rev'g* 793 F.2d 689 (5th Cir. 1986) (testimony of informant held to be inherently untrustworthy). *See also* United States v. Twigg, 588 F.2d 373 (3d Cir. 1978) (fundamental fairness does not allow overreaching by government via third parties).

[52]*See generally* Tigar, *Crime Talk, Rights Talk, and Double-Talk: Thoughts on Reading Encyclopedia of Crime and Justice*, 65 TEX. L. REV. 101, 143-44 (1986).

tinue to be cited as the basis for ever-more sophisticated law enforcement efforts, including the Service, FBI, and DEA "sting" operations.[53]

D. *Confrontation, Cross-Examination, Compulsory Process*

This triad of related rights[54] has been vivified within the past fifteen years. *Davis v. Alaska*[55] reaffirmed that the right to cross-examine includes the right to know about potential impeachment material that would otherwise be safe from public view. *Chambers v. Mississippi*[56] held that a defendant has the right to present reliable evidence despite metastatic state rules of exclusion, such as quaint formulations of the hearsay taboo. *Giglio v. United States*,[57] capping a line of cases relating to impeachment, upheld the defendant's right to discover information bearing upon a paid informer's motivation to lie.

In the Courts of Appeals, however, there are some disturbing signs of apostasy from the tenet that full and fair cross-examination has wonder-working power.[58] Some courts have taken a less than charitable view of the Jencks Act,[59] the weapon of first resort in the battle to expose the fickleness of a government witness' memory.

E. *Due Process*

I will spend most of this paper trying to recapture a sensible meaning of due process, and to use this elusive phrase as the watchword of a theory of protection for taxpayers' rights in criminal investigations. I confess, however, that the Court has not been kind to the due process clause. More precisely, it has taken a view of due process that largely ignores the real power relationships of the modern administrative state.

Procedural due process, like many other constitutional concepts, was shaped in the struggles that led to the English Revolution, and in later battles over procedural fairness to dissidents.[60] It has been traditionally regarded as a function of the adversarial system for resolution of disputes. The extension of due process has largely been one of expanding the types of disputes thought appropriate for adversarial disposition, as opposed to inquisitorial or informal disposition.

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[53]*See, e.g.*, United States v. Caceres, 440 U.S. 741, 750 (1979).

[54]*See, e.g.*, Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978).

[55]415 U.S. 308 (1974) (protecting confidentiality of a juvenile offender's record).

[56]410 U.S. 284, 302 (1973). *See also* Washington v. Texas, 388 U.S. 14 (1967) (invalidating accomplice testimonial disqualification rule). *See generally* LAFAVE & ISRAEL, *supra* note 8, § 23.3. Suffice it to say, the confrontation clause does not completely constitutionalize the common law hearsay rule. The public trial cases have not been considered in this paper, although the Supreme Court has gone to great lengths to uphold that right. *See generally* LAFAVE & ISRAEL, *supra* note 8, § 23.1.

[57]405 U.S. 150, 154 (1972).

[58]*See, e.g.*, United States v. Osgood, 794 F.2d 1087, 1093 (5th Cir.), *cert. denied*, 107 S. Ct. 596 (1986).

[59]18 U.S.C. § 3500 (1982).

[60]*See generally* M. TIGAR, LAW AND THE RISE OF CAPITALISM 257-74 (1977). *See also* Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044 (1984).

Thus, *In re Gault*[61] recognized juvenile rights by rejecting allegedly "protective," "pro-child" informal procedures in which evidentiary and proof requirements for interference with liberty had been relaxed. In *Goldberg v. Kelly*,[62] a decision later-eroded in the administrative sphere, the Court noted the importance of the matters being decided in a particular administrative setting and set basic due process limits upon the administrator's powers to decide. Procedural due process has also been the basis for some decisions setting a "reliability floor" upon evidence that a jury may hear in a criminal case. In eyewitness identification cases, the Court has established lineup reliability standards to prevent police and prosecutors from manipulating and manufacturing crucial evidence for trial.[63] The Court, however, has refused to create a generalized due process review for outrageous governmental investigative conduct. Instead, the Court has restricted the use of "supervisory power" in the shadow of the due process clause as a means of achieving the same result.

Surely, a reading audience of tax professionals recalls, some with pleasure and others with pain, *United States v. Payner*,[64] a tax case partially based upon Service conduct involving all of the deadly sins except sloth, several commandments and even some outright unconstitutional behavior. In *Payner*, the Service sought out a Bahamian bank officer.[65] During the banker's visit to Miami, one agent rifled his briefcase while another titillated his palate and tickled his libido.[66] The briefcase contained documents that incriminated Payner.[67] Payner, however, had no standing to challenge the violation of the banker's fourth amendment rights.[68] The Court declined to fashion either a supervisory power or due process remedy, even in such a case of wholesale wrongdoing.[69]

III. HOW DID WE GET HERE?

When a draft of this paper was presented at the ABA Section of Taxation meeting in Atlanta, Assistant Attorney General Roger Olson noted that "there is more potential for government intrusiveness in the tax area than in any other

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[61]387 U.S. 1, 57 (1967).

[62]397 U.S. 254, 267 (1970). *Cf.* Mathews v. Eldridge, 424 U.S. 319 (1976) (assessment of proper process for termination of benefits cases must give substantial weight to the good-faith judgments of individuals charged by Congress with the administration of social welfare programs). *See generally* Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1314 (1986) [hereinafter Rabin].

[63]Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (reliability is the linchpin in determining admissibility). The same theme is found in the hearsay admissibility cases. *See* Dutton v. Evans, 400 U.S. 74, 89 (1970). *See also* United States v. Valdez 722 F.2d 1196, 1203 (5th Cir. 1984) (suggestive procedure in creating hypnotically-refreshed testimony).

[64]United States v. Payner, 447 U.S. 727, 729-31 (1980). *See* Proesel v. Commissioner, 73 T.C. 600, 601-03 (1979) (providing the Tax Court parallel to *Payner*).

[65]*Payner*, 447 U.S. at 729.

[66]*Id.* at 730.

[67]*Id.*

[68]*Id.* at 731-33.

[69]*Id.* at 735.

area of government regulation and endeavor."[70] Olson did not mean that tax cases involve the individualized police-citizen confrontations that are the principal subject of constitutional criminal procedure. Nor was he referring to the trial of a civil or criminal tax case. Olson was talking about investigative activity.

Despite the potential for intrusiveness, neither advocates nor judges have developed a set of coherent constitutionally-based principles for controlling official behavior in tax investigations. In the last half-century, the Supreme Court has recognized two distinct models for protecting individual rights against intrusive or punitive governmental conduct: the criminal procedure model and the administrative due process model. Neither model has yet yielded rules to control the sort of conduct that Assistant Attorney General Olson was describing.

A. *The Criminal Procedure Model*

In the previous section of this essay I tried to describe some basic categories of "rights" in the criminal procedure context. This section seeks to show why these rights are unlikely to develop into a set of protections for the taxpayer under investigation. At the outset, we can put aside "trial rights," such as confrontation and cross-examination. In the investigative stage, the government's obligation to accord certain rights is usually triggered by custody, formal charge, or invasion of protected areas. None of these areas are readily adaptable to the intrusive tax investigation. In tax investigations, the subject of the investigation is not "in custody"; therefore, *Miranda*-type rights do not attach.[71] Until the subject becomes an "accused," the right to counsel and its corollaries are not recognized.[72] Therefore, the "formal charge model" is usually unavailing.

Invasion of protected areas could be a fecund source of rights, but the Supreme Court has already decided to define the scope of protection narrowly. The scope of protection was defined in the following two significant ways: the restriction of fifth amendment protections for papers, and the decoupling of property concepts from fourth amendment jurisprudence to limit the amendment's protections against unreasonable searches.

The fifth amendment was designed not only to end torture, but also to constitutionalize a concept of human integrity in the face of official inquiry. Justice Bradley, in *Boyd*, had little trouble reasoning that one's "papers" were an extension of one's "self."[73] Therefore, the forcible taking of papers involved self-incrimination just as surely as forcible extraction of testimony.

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[70]Assistant Attorney General Olson, Remarks at the ABA Section of Taxation Conference on Constitutional Rights of Criminal Tax Defendants (Jan. 25, 1987) (tape 14A, side one) (available at the office of *The Tax Lawyer*).

[71]Beckwith v. United States, 425 U.S. 341 (1976).

[72]Michigan v. Jackson, 106 S. Ct. 1404, 1411 (1986) (if police initiate interrogation after defendant's assertion of right to counsel at an arraignment or similar proceeding, any waiver of that right is invalid); Edwards v. Arizona, 451 U.S. 477, 482 (1981) (erroneous for state courts to focus upon voluntariness of confession in determining waiver of right to counsel; rather, correct standard is whether defendant understood his right to counsel and intelligently and knowingly relinquished it).

[73]*See supra* notes 15-21 and accompanying text (discussion of *Boyd* case).

As the zone of privacy protected by the fifth amendment has narrowed to include fewer and fewer papers, a related theory has diminished fourth amendment protection. By recording one's business or personal transactions on paper, one now courts increased risk that the government will be able to obtain these fossilized remains of thoughts, words, and deeds over a fifth amendment objection. By dealing in the world through one's own agents and friends, and through financial and business enterprises, one creates paper trails that are beyond even fourth amendment protection. As the cases teach, one does not have "standing" to object to government gathering of papers put in other hands.[74]

These restrictions have been achieved by decoupling these constitutionally-based rights from our understanding of rights to property, such as those protected by the theft offenses. Although this is not the place to review the history in detail, a few words are in order. The common law development of theft, and soon its statutory overlay, recognized early that property in a commercial society was often handled by and transmitted through agents. In the earlier common law formulations, taking from the agent was regarded as a trespass against the principal. Literally, it was a taking from the principal's "possession."[75]

Today, the agent who faithlessly gives over the principal's property can be prosecuted on a variety of theories.[76] The taker who overbears the agent's will, or who takes by stealth, or who seeks to undermine the agent's duty of loyalty to the principal, is understood in most jurisdictions to have committed some form of theft .[77] That is, we define property rights as subsisting in tangible or intangible goods even when the owner has given physical custody to another.[78]

By contrast, placing one's papers in the hands of another effectively empowers the recipient to consent to a search. Additionally, it risks making the giver powerless to object that a seizure was made in violation of the fourth amendment. This dramatically illustrates that Justice Bradley's stern defense of the right of "property," under the fourth and fifth amendments, is no longer viable.[79]

In summary, the complexity of modern commercial life is reflected in rules about private persons stealing goods and papers left with agents, but not in constitutionally-based rules about public officers taking them. For this reason, whether based upon the fourth or fifth amendment, the search and seizure doctrine has not been a reliable source of limitations upon taxpayer investigations.

Finally, criminal due process limitations have proven elusive. When the gov-

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[74]Fisher v. United States, 425 U.S. 391, 397 (1976); California Banker's Ass'n v. Schultz, 416 U.S. 21, 54 (1974).

[75]Tigar, *The Right of Property and the Law of Theft*, 62 TEX. L. REV. 1443, 1450 (1984). *See also* LAFAVE & ISRAEL, *supra* note 8, § 8.1 (constructive possession).

[76]LAFAVE & ISRAEL, *supra* note 8, § 8.2.

[77]*See, e.g.*, TEX PENAL CODE ANN. § 32.43 (Vernon 1987); Ex parte Mattox, 683 S.W.2d 93, 97 (Tex. Ct. App. 1984), *reh'g denied*, 685 S.W.2d 53 (1985).

[78]*See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1010-1011 (1984) (recognizing insecticide producer's state law based property interest in health, safety, and environmental data, using a trade secret rationale). *Ruckelshaus* shows a great solicitude for intangible property interests embodied in documents subject to compulsory disclosure under federal pesticide legislation and regulations. *See generally* Tigar, *supra* note 75, at 1470-71.

[79]*See supra* notes 15-21 and accompanying text (discussion of *Boyd* case).

ernment is too much involved in setting up a criminal episode,[80] or resorts to evidence-gathering tactics that shock the leather-bound consciences of judges,[81] or creates evidence that is inherently unreliable,[82] courts have fashioned remedies. Such interventions are regarded as exceptional and an unsuitable basis, however, for erecting a generalized theory of rights for targets of tax investigations.

B. *The Administrative Due Process Model*

If the criminal procedure model will not avail, what of the extensive literature on fairness under the due process clause? More than twenty years ago, Professor Steven Duke catalogued the disadvantages of taxpayers faced with criminal investigation and prosecution.[83] Professor Duke's discussion of tax investigations is part of a larger picture that has been developing since the nineteenth century. When the Constitution was written, the police forces of the towns and states were typically small and unprofessional. There was no federal police force. The professionalization of the police is a nineteenth century phenomenon. The rise of a significant body of federal criminal law, and of federal regulation in all its forms, began in the wake of the Civil War and continues to the present day. The FBI is an outgrowth of a rather dark period in American law enforcement, which included the roundups of antiwar and socialist dissidents.[84]

Today, the Service, FBI, DEA, and other federal police agencies comprise an enormous bureaucracy that operates under sets of internally-prescribed guidelines, manuals, and rules. Some of these are in response to statutes that either established or fund a particular police force. Most of them are simply the agency's way of telling its employees how to do their business. The prosecutorial apparatus, including the Justice Department and United States Attorney offices, to which these police report, has its own sets of regulations.

Most lawyers in the tax field know about the manuals that govern the conduct of Service agents and prosecutors handling tax cases. These lawyers use the manuals as the basis for interceding in tax investigations on behalf of clients.[85] In addition, there is an elaborate network of statutory, regulatory, and judge-made rules defining the proper powers of the Service and its agents in the tax

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[80]*See, e.g.*, United States v. Cervantes-Pacheco, 793 F.2d 689 (5th Cir.), *reh'g granted*, 800 F.2d 452 (1986) (en banc); United States v. Twigg, 588 F.2d 373 (3d Cir. 1978).

[81]Rochin v. California, 342 U.S. 165 (1952) (stomach pumping shocks judicial conscience and violates due process). *See generally* Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044 (1984).

[82]*See, e.g.*, United States v. Merkt, 794 F.2d 950 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1603 (1987) (defendant has standing to object to admissibility of testimony coerced from witness); United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984) (hypnotically-refreshed testimony found inherently unreliable on particular facts).

[83]Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1 (1966).

[84]M. LOWENTHAL, THE FEDERAL BUREAU OF INVESTIGATION 147-55 (1950).

[85]*See* INTERNAL REVENUE MANUAL (CCH) § 9600 (July 1987) (pertaining to administration of technical assistance and processing of cases after investigation).

assessment, collection, and enforcement process.[86] This body of law provides some uncertain and fitful protection of a taxpayer's interest in reputation and right to fair procedures.

When senior FBI agents are questioned about "sting" operations that went amiss, harming concededly blameless citizens, they will cite a series of formal, agency-developed guidelines for such operations. The guidelines include review at appropriate moments by Justice Department lawyers. The rulemaking of internal governance is, therefore, not confined to the tax area.[87]

As I have suggested, the growth of this administrative establishment parallels the growth of administrative agencies generally in waves of regulatory zeal. It is fitting that we address the present topic in the bicentennial year of the constitution because in 1887, at the midpoint of these 200 years, Congress created the first federal independent regulatory agency, the Interstate Commerce Commission.

Professor Robert Rabin's brilliant and exhaustive article, *Federal Regulation in Historical Perspective*,[88] has traced the development of agency proliferation and agency power from 1887 to the present. Rabin has noted the development of judicial attitudes towards exercises of agency power. Even though the story is familiar, some of it bears a brief retelling.

The first wave of New Deal legislation met with an unhappy fate in the Supreme Court. The National Industrial Recovery Act, with its plan for thousands of "codes" to regulate all American industries, was found to be delegation run rampant. A more modest set of legislative proposals, and a shift in attitude by at least one Justice, led the Court to uphold a series of delegations of power to regulate most areas of national life. The sword of "improper delegation" was sheathed.

The lawyers whose clients were subject to agency regulation shifted focus. As Rabin explains,

> By the late 1930s, after a half century of uncharted growth, the federal administrative system was viewed in a new light-the ongoing critique of regulatory

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[86]*See, e.g.*, Goulding v. Feinglass, 811 F.2d 1099 (7th Cir. 1987) (affirming dismissal of suit challenging allegedly false and defamatory statements made about lawyer under Service investigation, and denial of lawyer's motion to amend complaint to add first amendment theory relying on Paul v. Davis, 424 U.S. 693 (1976)); United States v. Author Services, Inc., 804 F.2d 1520 (9th Cir. 1986) (affirming district court order enforcing IRS summons on condition that IRS refrain from disclosing information to other government agencies without court order); United States v. Barrett, 804 F.2d 1376 (5th Cir. 1986), *reh'g granted*, 812 F.2d 936 (5th Cir. 1987) (en banc) (taxpayer-doctor entitled to judicial determination whether enforcement of IRS summons should be conditioned to protect doctor against disclosure that he was under criminal investigation); United States v. Texas Heart Inst., 755 F.2d 469 (5th Cir. 1985) (doctor loses in his attempt to protect his right to confidentiality in the context of a third-party summons). *Cf.* Laing v. United States, 423 U.S. 161 (1976) (based on statutory rational court holds taxpayer entitled to notice when Service uses jeopardy termination procedures) (Brennan, J. concurring on due process grounds).

[87]*See, e.g.*, REPORT OF HOUSE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS, 98TH CONG., 2D SESS., FBI UNDERCOVER OPERATIONS (Comm. Print 1984) (discussion of scope and danger of FBI undercover operations).

[88]38 STAN. L. REV. 1189 (1986).

> politics turned from concerns about the appropriate realm of administrative action to a focus on agency decisionmaking processes.
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> The immediate consequence was a barrage of criticism, emanating in part from the American Bar Association, over the inadequacies of agency procedures and the limitations of judicial review . . . .
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> The reaction against agency processes reached its peak in the late 1930s. In a widely publicized report published in 1938, Roscoe Pound, chairman of the special committee of the ABA on administrative law, excoriated the regulatory system for "administrative absolutism" and catalogued the suspect "tendencies" for administrative agencies, among them (1) to decide without a hearing, (2) to decide on the basis of matters not before the tribunal, (3) to decide on the basis of preformed opinions, (4) to disregard jurisdictional limits, (5) to do what will get by, (6) to mix up rulemaking, investigation and prosecution, as well as the functions of advocate, judge and enforcement authority.[89]

The Pound report coincided with the views of academics and those engaged in administration. The two categories overlapped to a great degree.[90] During the War years, however, these recommendations lay dormant . Not until 1946 did Congress pass the Administrative Procedure Act (APA), with its detailed prescription for adjudication and its tentative and partial codification of rulemaking procedures.[91]

This paper is not the proper place for a detailed discussion of the APA. If the reader asks why the APA is at all relevant, the question is easily answered. The APA was the first systematic effort to vivify certain basic due process guarantees in the administrative context. The APA was a response to criticisms such as those made by Elihu Root a quarter century earlier. As Root argued,

> [t]he powers that are committed to these regulating agencies, and which they must have to do their work, carry with them great and dangerous opportunities of oppression and wrong. If we are to continue a Government of limited power these agencies of regulation must themselves be regulated. The limits of their power over the citizen must be fixed and determined. The rights of the citizen against them must be made plain.[92]

It could not be said that every provision of the APA was required by the due process clause. But its fundamental provisions were surely required, if not as the clause was understood in 1946, then as it came to be interpreted in the succeeding three decades of Supreme Court decisions. Indeed, one could argue that the APA and its state counterparts had a symbiotic or synergistic relationship to due process adjudication. If a right was generally recognized as important to proper decisionmaking, then its claim for inclusion under the rubric of procedural due process was surely stronger.

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[89]*Id.* at 1263-64.

[90]*Id.* at 1265 n.243. *See also* Williams, *Fifty Years of the Law of Federal Administrative Agencies—and Beyond,* 29 FED. B.J. 267 (1970) [hereafter Williams]. Professor, now Judge, Williams was first chairman of the Administrative Conference.

[91]5 U.S.C. §§ 551-559 (1982).

[92]Root, *Public Service by the Bar, Address of the President, quoted in* Williams, *supra* note 90, at 267-68.

Among the significant APA provisions were those requiring decisions based upon an open record and upon fact-finding confined to matters placed in evidence before the decider, the right to counsel (later given meaning by the Administrative Conference), the right of confrontation and cross-examination (though not to application of the common law rules of evidence), and the right to notice of the proceeding's agenda.

Although, the APA significantly contributed to the statutory and constitutional literature on controlling administrative discretion, its coverage was limited. Some governmental functions were not covered by its terms, including those dealing with significant national defense and national security interests.[93] As the judicial literature of the McCarthy period amply shows, these were the very areas where procedural fairness was most needed and most wickedly abused.[94]

More important, the APA did not purport to deal with agency investigative functions. As of 1946, and in most respects to the present day, there was no coherent body of administrative law informed by the due process clause and directed to the serious intrusions and harms that may result from inquiry into citizen's private beliefs, activities, and transactions.[95]

Congressional failure to regulate investigation in the APA occurred at a time when investigation was becoming vastly more important in our national life. The Second World War had created a great need for revenue. The Congress responded by greatly increasing the number of citizens whose income was subject to taxation. In addition, the Internal Revenue Code of 1940 cast criminal offenses in broad terms, with the quintessentially vague evasion offense, now codified in section 7201, as the capstone. The FBI was enforcing the Smith Act. Congressional committees cranked up investigations in several different fields. While the federal *bureaucracy* of investigation was on the loose, the due process implications of its activities were only dimly understood.[96]

Lawyers with experience in complex criminal tax law know that investigations affect the target's interests long before a decision is made to charge or to decline the case. When third-party contacts are made, the individual's reputation suffers. The anxiety of having one's affairs examined with exacting scrutiny exists whether or not one is conscious of guilt. Private business arrangements may be disrupted by publicity. Legitimate associational activity is chilled by the fear of exposing one's life to inquiry. The same concerns attended investigations of other sorts. When the House Committee on Un-American Activities came to town, its ad-

[93]*See, e.g.*, 5 U.S.C. § 554 (a)(4).

[94]*See, e.g.*, Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961).

[95]In part, this lacuna is the result of the American approach to administrative procedure, which has been episodic and on the whole ad hoc. Unlike the Europeans, particularly the French, who had been elaborating a systematic theory of administration since the days of Napoleon, American law developed along unevenly, inconsistently and as the result of case-by-case rather than legislative action. *See generally* J. AUBY & R. DUCOS-ADER, DROIT ADMINISTRATIF (4th ed. 1980); H. BARTHELEMY, TRAITE ELEMENTAIRE DE DROIT ADMINISTRATIF (11th ed. 1926).

[96]The literature of this period is extensive. I have reviewed some of it in Tigar, *The McCarthy Era: History as Snapshot* (Book Review), 15 HARV. C.R.-C.L. L. REV. 507 (1980).

vance men attempted to serve subpoenas to hostile witnesses at their workplaces. The committee had, and reveled in, its power of "exposure."[97]

Imperfect judicial understanding of the potential harm of investigation was reflected by application of several rules. First, an individual who was being investigated was not the subject of final action, and therefore, the rules of ripeness and standing might bar a lawsuit. Second, information-gathering did not adjudicate legal rights and therefore the individual could not have a cognizable claim under the APA or the due process clause.[98]

There were some exceptions to the rule of nonreview, but they rested upon special facts. When the Attorney General published his "list" of "communist organizations," the Supreme Court held in *Joint Anti-Fascist Refugee Comm. v. McGrath*,[99] that some of the organizations had standing to challenge their inclusion. This decision was based in part on procedural due process grounds. These organizations would have *jus tertii* standing on behalf of their members, as well as in their own right.[100] The list was some sort of "final decision." There were consequences because membership in a listed organization went a long way towards disqualifying one from government employment.[101] The ripeness rule of *Joint Anti-Fascist Refugee Comm.* was an exception to the narrower rule of earlier cases, such as *United Public Workers v. Mitchell*.[102]

Outside the investigative sphere, in the domain of adjudication, the Supreme Court was a fecund progenitor of new rules. It is worthwhile to review some of these rules because they are relevant to the task of seeking a constitutional basis for curbing overzealous investigators.

First, procedural irregularity invalidated agency action. The agency had to follow its own rules. Even if a particular procedural protection was not mandated by the due process clause, that clause compelled the agency to apply the rule to all cases before it. Failure to accord procedural rights was fatal to many agency decisions, even in the loyalty-security and military draft areas.[103]

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[97]The history is canvassed in a significant Supreme Court decision, Watkins v. United States, 354 U.S. 178 (1957). *See also* Sweezy v. New Hampshire, 354 U.S. 234 (1957). Both opinions arraigned and excoriated the power to expose for the sake of exposure. *Watkins* did not, however, sustain the hopes that it raised. *See* 15 HARV. C.R.-C.L. L. REV. at 519 (examination of *Watkins* and its aftermath).

[98]For a discussion of the threshold requirements for judicial review of executive action *see* Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. REV. 1135 (1970) [hereinafter Tigar, *Judicial Power*]. This article also discusses standing and ripeness. *Id.* at 1138-39 nn.10-11.

[99]341 U.S. 123 (1951).

[100]*See* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962) (delineating the scope of standing and formulating broadened principles of standing not expressly accepted by the Court); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974); Tigar, *Judicial Power*, *supra* note 98 at 1138-39 nn.10-11 (discussion of definition and treatment of standing requirement in case law).

[101]This is an appropriate point to note the important contribution to the literature of judicial review of administrative action, and the rigorous insistence upon procedural regularity in L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).

[102]330 U.S. 75 (1947).

[103]*See, e.g.*, Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957). *See also* Tigar, SELECTIVE SERV. L. REP. PRACTICE MANUAL, ¶ 2410 at 1150 (1969) (procedural

Second, when agency action threatened basic rights, the Court would look more carefully to see if the action was authorized by statute or regulation. For example, in *Greene v. McElroy*,[104] the Department of Defense claimed the right to deny a security clearance (and with it all prospect of employment) to the engineer-petitioner without giving him the opportunity to confront the dubious evidence against him. The Court might have decided the case on due process grounds, but held instead that these basic rights are so important that it could presume that Congress intended that they be accorded everyone in petitioner's position.[105] This is another case of litigation in the shadow of constitutional principle.

In *Kent v. Dulles*,[106] Congress had not specifically authorized the Secretary of State to deny passports based upon political affiliation. Denial on such a basis was fraught with constitutional peril, and therefore the Court would presume the Secretary was powerless to deny. In *Gutknecht v. United States*,[107] the most important case in this line, the petitioner was a draft registrant who handed in his draft card in a public protest. In accordance with Selective Service regulations, he was declared a "delinquent" and put at the top of the list for induction without a hearing.[108] The draft board's conduct raised serious due process questions and some first amendment concerns. The Court recognized the constitutional issues, but invalidated the agency action because it found no specific Congressional authorization for it.[109]

It would be simplistic to dismiss these cases as unrelated to constitutional issues for two reasons. First, the major premise of these decisions is the probable existence of a constitutional right. Second, and at a deeper level, these cases concern the most basic task of democratic government: control of the agencies that wield impressive governmental power by insisting that they abide by their charters.[110] Due process also operated in its own name, as where an agency action had been taken based upon testimony that was probably perjurious.[111]

Procedural fairness aside, the postwar era Court had been schooled in the New Deal tradition, and was ready to extend deference to procedurally proper agency

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error invalidates draft board induction order). The Court also set out rules concerning fair hearing, notice, and right to counsel in the administrative adjudicative setting. For a brief review of post-1970 developments, *see* O'Neill, *Public Employment, Antiwar Protest and Judicial Review*, 17 UCLA L. REV. 1028, 1038-42 (1970).

[104]360 U.S. 474 (1959).

[105]*Id.* at 507-08.

[106]357 U.S. 116 (1958).

[107]396 U.S. 295 (1970).

[108]*Id.* at 297.

[109]*Id.* at 306-07.

[110]The notion that even discretionary functions were subject to due process standards, and that the agency could not escape review of substantive rules, received powerful impetus from Sherbert v. Verner, 374 U.S. 398 (1963). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). From these beginnings, one can fashion rules of law that cut through the "ripeness" and "standing" rhetoric of arguments against review. The agency may, when it investigates, be conducting a discretionary function; however, provable detriment in a practical sense will nonetheless trigger review.

[111]Communist Party v. Subversive Activities Control Bd., 351 U.S. 115 (1956).

decisions. Professor Rabin has described well the ideology of the liberal state that fostered such judicial deference. Fundamental works in the Critical Legal Studies movement have focussed upon the structural impossibility of achieving the liberal dream and the duplicity inherent in some of its manifestations.[112] Some of this work has brilliantly exposed the emptiness of liberal pieties about agency expertise and objectivity.

Deference to agencies has limited both the content and the timing of judicial review. An agency action would be examined by judges only when it was "final," and if properly arrived at, would be presumed factually right and legally sound. Such rules make some sense when one is reviewing final agency decisions on matters committed by law to agency expertise.[113] The rules on ripeness are also sensible analogs to the final judgment rule in court cases; that is, if there is a contested proceeding, review ought generally to await its conclusion.[114] Whatever the logical basis for such rules in the adjudicative context where they were developed, they have little rational connection to investigative procedures that are open ended and they have measurable consequences while in progress.

Professor Edward Rubin has ably argued for an expansive view of administrative due process in a lengthy article, *Due Process and the Administrative State*.[115] Rubin traces the Supreme Court's shifting definitions of administrative fairness. His argument, in summary form, is as follows:

> Today, most adjudications are carried out by administrative agencies rather than courts. And these agencies perform many functions that courts did not and probably could not fulfill, most notably the distribution of benefits. A literal reading of the terms "liberty" and "property" in this modern context excludes many administrative adjudications from the scope of due process protection. Again, this makes sense only if some independent significance attaches to the fact that these adjudications involve issues that are not readily described in terms of traditional common law interests. If one focusses instead on the concept of procedural fairness, the fact is that due process originally applied to all government adjudications; the only adjudications were court decisions about "life, liberty, or property" as those terms were understood at the time. Consequently, a strong argument can be made to preserve that inclusive effect. Instead of reading "life, liberty, or property" as referring to a particular group of interests, it could be read as referring to the entire, now-expanded range of government adjudications.[116]

Professor Rubin begins his article by tracing the background of due process in the Magna Carta. His historical argument is a little difficult to follow because there was probably no single concept of due process in medieval England, nor did such a concept emerge in the successive struggles down to and beyond the

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[112]*See, e.g.*, K. KLARE, *Critical Theory and Labor Relations Law*, in THE POLITICS OF LAW 65 (D. Kairys ed. 1982), and works cited therein.

[113]*See* Rabin, *supra* note 62, at 1295-1315 (review of Supreme Court's shifting patterns of deference to agency expertise).

[114]*See generally* C. WRIGHT, FEDERAL COURTS §§ 101-102 (4th ed. 1984).

[115]Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044 (1984).

[116]*Id.* at 1094-95.

English Revolution. Rather, due process seems to have had the same elusive quality it possesses today.

Historical uncertainty aside, building a due process framework around "adjudication" provides no constitutional basis for limiting much governmental action that has serious consequences for individuals. Such a formulation accepts a major and mistaken premise of the Court's "investigation" jurisprudence.

It is circular and silly to conclude that when the agency is just investigating and gathering adverse information, its "administrative proceeding adjudicates no legal rights"[117] and therefore the target is not entitled to any rights of notice or opportunity to rebut. This is "circular" because "adjudicate" is a term of art in the APA and the administrative literature. Furthermore, the investigator is not, by definition, adjudicating. It is "silly" because the investigator is creating consequences of a sufficiently serious order. Some regulation of the investigator's activity, therefore, seems reasonable.[118]

The Supreme Court's refusal to extend its due process and agency control rationales into the investigative stage is fairly easy to document. In *Hannah v. Larche*,[119] the Civil Rights Commission proposed to hold public hearings in Louisiana, at which various individuals would be identified as violators of federal civil rights laws by nameless informants. The Supreme Court upheld this procedure, based upon the now-familiar refrain that the Commission was not adjudicating any legal rights.[120]

Protecting the identities of informers in civil rights cases is doubtless laudable. Investigating the murderous, corrupt, and racist regimes of Louisiana's parishes was a necessary activity. So it is not surprising that Chief Justice Warren authored the Court's opinion for seven Justices, with only Justices Black and Douglas dissenting.[121]

United States v. Caceres,[122] following *Hannah*, also represents the Court's fixation with agency "adjudication." Service regulations abated the rigor of the *White* and *Lopez* decisions,[123] by requiring a senior agency officer to approve

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[117]SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 742 (1984).

[118]We are accustomed to flag-waving about the advantages of the "adversary system," especially when celebrating the anniversaries of events in the life of the Republic. A brief look at Continental, civil law, and systems of investigation reveals that we may be wrong in doing so. The "adversary system" is fine when the adversary proceeding begins with a formal charge of crime. Prior to that time, investigators are subjected to a few limits adapted to police-citizen street confrontations and to restrictions upon their behavior towards suspects in custody and not to many more limits. By contrast, a typical French inquiry is conducted by judicial police under the control of a magistrate who is a professionally-trained civil servant. While there have been and are lively debates in France over police power, the principle of control over investigations is well-understood.

[119]363 U.S. 420 (1960). For a critical discussion of *Hannah see* Newman, *Due Process, Investigations and Civil Rights*, 8 UCLA L. REV. 735 (1961) and Newman, *Some Facts On Fact-Finding By An Investigatory Commission*, 13 ADMIN. L. REV. 120 (1961).

[120]363 U.S. at 451-52.

[121]*Hannah* has often been cited and followed, *see, e.g.*, SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735 (1984); United States v. Payner, 447 U.S. 727 (1980); United States v. Caceres, 440 U.S. 741 (1979).

[122]440 U.S. 741 (1979).

[123]United States v. White, 401 U.S. 745 (1971); Lopez v. United States, 373 U.S. 427 (1963), both discussed in United States v. Caceres, 440 U.S. 741 (1979).

"consensual" electronic surveillance. A Service agent recorded a taxpayer allegedly offering him a bribe.[124] The agent had not obtained approval for this monitoring in the fashion required by the regulations.[125] His departure from the regulations might have been regarded as relatively minor,[126] but this is not the point of the Court's decision. A seven-Justice majority, with Justices Marshall and Brennan dissenting, upheld the admissibility of the tapes and testimony of the agents who monitored the conversations by means of the listening device the Service agent wore.[127]

The Court first had to confront its prior decision in *Bridges v. Wixon,*[128] a deportation case that invalidated a deportation order because the agency relied upon statements not complying with its rules requiring that declarants be under oath. The *Caceres* Court said *Bridges* involved a procedure that was required by statute, rather than by a regulation.[129] When agency procedure is required by statute or by the Constitution, "a court's duty to enforce [it] . . . is most evident."[130] *Bridges* also involved a completed agency action and the error took place in the evidence-taking phase. The Constitution was not implicated because of *White* and *Lopez*. Since *Caceres* had not detrimentally relied upon the regulations, the due process clause could also not compel compliance. Finally, the Court noted the obvious, that "this is not an APA case," and held inapplicable the decisions that compelled agencies to follow their own internal rules when adjudicating.[131]

Reasoning similar to *Hannah* and *Caceres* can be found in many cases, and illustrates the problem we confront in this bicentennial of constitutional history. Powerful agencies of intrusion have come into being. These agencies are armed with sophisticated weapons of snoopery and are operating under sophisticated and largely self-drafted charters. In the vast majority of instances, their conduct is being controlled only when it eventuates in a prosecution, and even then, under a diluted version of the exclusionary rule applied grudgingly to a few types of violations rooted in traditional constitutional doctrine.

The most troubling case in this vein is *Laird v. Tatum,*[132] in which the military instituted extensive surveillance of domestic political protest. The court of appeals held that plaintiff's complaint stated a claim and that the case could go forward. The Supreme Court reversed, holding 5-4 that the Army's activities

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[124]*Caceres*, 440 U.S. at 743.

[125]*Id.* at 756-57.

[126]This author does not view the departure as minor. When a regulation designedly makes an intrusive procedure difficult, by requiring review by someone not directly involved in the inquiry, strict obedience is intended. As the Court has repeatedly held in other contexts, this strict obedience is basic to the idea of constitutional government.

[127]*Caceres*, 440 U.S. at 757.

[128]326 U.S. 135 (1945).

[129]*Caceres*, 440 U.S. at 749-50.

[130]*Id.* at 741.

[131]*Id.* at 754-55 (doubting the wisdom of applying the exclusionary rule to administrative violations).

[132]408 U.S. 1 (1972).

did not raise a prospect of real harm to the plaintiff's protected rights.[133] Therefore, the case was nonjusticiable.[134] In essence, the majority held that the chilling effect of military surveillance was not an interest protected by the Constitution.[135] The Army was just looking around.

These cases illustrate the paucity of useful insight in current administrative due process theory. By focussing upon "adjudication," one risks missing the potential use of due process concepts when relatively informal governmental action impinges upon citizens' activity. One misses what is very right about a case like *Fuentes v. Shevin*[136] and very wrong about a case like *Paul v. Davis*.[137]

In *Fuentes*, the Court held that a debtor was denied due process because she did not receive prior notice of, and an opportunity to contest, a seizure of chattels purchased under a financing agreement on which she had allegedly failed to make timely payments.[138] Even though later cases have watered down the *Fuentes* rule, the principle that one who may be harmed by government action is entitled to timely notice and a meaningful hearing remains intact.

In *Paul*, a local police department distributed a list of "active shoplifters" to merchants. The Supreme Court held, 5-3, that Davis had suffered no deprivation of a liberty or property right by having his photograph and name used in this fashion.[139] Fortunately, later cases have undercut the *Paul* rationale. Under a number of theories, courts have curtailed official action that, without any provision for reliable fact-finding, harms reputation. In the tax context, for example, courts have conditioned enforcement of Service summonses upon the agents not telling witnesses and third-party respondents that the taxpayer is under criminal investigation.[140]

Paul reaches its result by denying that the object of governmental attention has suffered any cognizable harm. Cases like *Hannah* arrive at the same place by pretending that due process rights do not attach until the proceedings reach a certain level of formality. The effect is the same.[141]

C. *The Models Reconsidered*

The criminal procedure model yields very little guidance for the investigative process. If constitutional principles are to avail the taxpayer under investigation,

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[133]*Id.* at 13-14.

[134]*Id.* at 15.

[135]Justice Rehnquist was in the majority. His participation raises two questions. First, he ought to have recused himself because he had, while in the Justice Department, not only considered but actively supported the propriety of this military activity. Second, the case says something about the statist judicial philosophy of the present Chief Justice. For a perceptive discussion *see* Blumenthal, *How Rehnquist Came Down in Hobbes v. Locke*, Washington Post Nat'l Weekly Edition, Oct. 6, 1986, at 23, col 1.

[136]407 U.S. 67 (1972).

[137]424 U.S. 693 (1976).

[138]*Fuentes*, 407 U.S. at 96.

[139]*Paul*, 424 U.S. at 712.

[140]*See supra* note 86 (case law regarding enforcement of Service summonses).

[141]Jennifer Jaff has focussed upon the dual questions of the rights protected by due process and the procedure that must be followed to deprive someone of a right in Jaff, *Hiding Behind the Constitution: The Supreme Court and Procedural Due Process in Cleveland Board of Education v. Loudermill*, 18 AKRON L. REV. 631 (1985).

they must be found in the administrative law-based notion of procedural fairness. Yet the Supreme Court has recoiled from fashioning a coherent theory that would ensure fairness whenever the government undertakes a procedure that threatens some interest of which the law should take notice. The Court's evasion has been accomplished by a narrow focus upon adjudicative procedures as opposed to more informal intrusions and, as in *Paul v. Davis*, by juggling the concept of rights protected under the rubric of "liberty" and "property."

Is there a way forward?

IV. THE PATH AHEAD

We can all recall instances of law enforcement run amok in the past two decades and we can see the responses. The CIA's speculations have been investigated by a blue-ribbon commission.[142] The United States-based activities of foreign intelligence agents have been the subject of a largely-secret Senate probe.[143] The Service hi-jinks with booze, burglary, and debauchery as investigative techniques have been condemned, and the Service professes to be chastened.[144] The FBI's "sting" operations that went awry and threatened innocent people with financial and reputational ruin have been the subject of a congressional study. The FBI promises that its new regulations will prevent further wrongdoing.[145] The two DeLorean acquittals, particularly the first one, shed light on agent and prosecutor overreaching.[146] I would like to think that Congressman Murphy's acquittal in the ABSCAM cases of the bribery and racketeering counts, the only such acquittal in those cases, sobered a few zealots.[147] The Nixon administration's political crackdown on dissidents, mostly under the name COINTELPRO, was partly unhorsed in the courts, partly washed away when its progenitor suffered disgrace and resignation, and partly exposed to public view by Senator Church's committee.[148]

There have been some modest legislative proposals to correct some abuses, such as requiring a warrant to begin a sting operation, effectively legislating the protection that *White* and *Lopez* declined to provide. But neither public exposure, nor tongue-wagging, nor jawboning, nor solemn promises to behave better in the future, have seemed to do anything lasting or permanent. Legislators have so far lacked the gumption to turn from preaching to meddling, and the present majority of the Supreme Court seems headed in another direction.

The structure of government has become ever larger, and has ever increasing ability to inflict harm under the ostensibly neutral rubric of "investigation."

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[142]REPORT TO THE PRESIDENT COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES, (June 1975).

[143]*See, e.g.*, Washington Post, Oct. 18, 1980, at A1, col. 4.

[144]*See Oversight Hearings into the Operations of the IRS (Operation Tradewinds, Project Haven, and Narcotics Traffickers Tax Program)*, 94th Cong., 1st Sess. (1975).

[145]*See supra* note 87 (House Report on scope and danger of FBI undercover operations).

[146]Starr, Kasindorf & Robinson, *De Lorean: Not Guilty*, NEWSWEEK, Aug. 27, 1984, at 22.

[147]For the history on appeal *see* United States v. Myers, 692 F.2d 823 (2d Cir. 1982), *cert. denied*, 461 U.S. 961 (1983) (reversing one of the remaining convictions).

[148]S. REP. No. 755, (Part III), 94th Cong., 2d Sess. 187 (1976).

The rules that limit such exercises of power must come from old and basic notions of due process, informed by basic principles of administrative procedure. The task is somewhat daunting because the tide of judicial decision seems to be running against meaningful change.

Lawyers once before faced a similar problem. The courts had become accustomed to defer greatly to the procedural peccadillos and substantive sloppiness of the Selective Service System.[149] As the System's deficiencies came increasingly to light during the Vietnam War, the courts turned around and began to invalidate its actions on a regular basis. The Supreme Court's attitude visibly changed. Lower courts rejected the government's position in the majority of cases. The turnaround took only a few years, which makes it all the more impressive. This result was obtained because of public outcry, legislative concern, and able lawyering. This example must be added to the impact upon due process thinking wrought by the APA and the cases decided under it.

Today, a similar initiative is required. Instances of administrative malfeasance in the investigative process should be exposed, tested, and litigated. Concerned bar groups must unite their voices in a denunciation as clear as the Pound Report that contributed so much to passage of the APA.

As Dean Newman pointed out many years ago in criticizing *Hannah v. Larche*,[150] the statutory basis, regulatory control, and judicial supervision of agency investigations has yielded a modest, but by no means trivial, list of rights possessed and enforceable by targets of investigations. These rights include notice, some chance for confrontation of adverse information, controls on damage to reputation, and the opportunity for judicial review to enforce compliance.

Three separate issues emerge from the cases, and must occupy this effort. First, the content of investigative behavior must be regulated, including not only what investigators may and may not do, but also the rights of the putative target or subject.

Second, the timing of judicial review must be regulated to ensure that the target's remedy occurs at a meaningful time and in a meaningful manner. Although the cases sound with deference to ongoing criminal investigations, and the language of ripeness is loudest in that context,[151] preindictment review is hardly unthinkable in a world that has adjusted to litigation in the grand jury context and to preinduction review in the midst of the Vietnam War. After all, some of the worst agency misbehavior consists of the interminable investigation that never does anything except sully reputations, chill permissible conduct and help send lawyers' children to fine schools. If review awaits the formal criminal charge, such cases would escape judicial notice.[152]

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[149]*See generally*, Tigar, *Whose Rights? What Danger?*, 94 YALE L.J. 970, 983-84 (1985). In fiscal 1965, 71% of all indicted draft defendants were convicted. In fiscal 1975, 16.6% were convicted. In the former year, 78% of those convicted were imprisoned, while in the latter year the figure was 8.7%. *See also* BASKIR & STRAUSS, RECONCILIATION AFTER VIETNAM 132 (1st ed. 1977).

[150]*See supra* note 119 (critiques of *Hannah* decision).

[151]*See, e.g.*, Branzburg v. Hayes 408 U.S. 665, 688 (1972) (deference to grand jury).

[152]*See, e.g.*, Todd v. United States, 802 F.2d 1152 (9th Cir. 1986) (no *Bivens* action against IRS agents for statutory or regulatory violations).

Finally, we need to make clear that the usual consequence of serious agency malfeasance will, at the criminal stage, be the exclusion of the tainted evidence. It seems to me that this remedy is the least controversial of all in the tax field. The Internal Revenue Code provides a systematic structure of enforcement and penalty provisions. In most cases, the criminal case coming undone leaves substantial civil remedies at the Department's and Service's disposal, including fraud penalties. And if someone tells me that the tax shelter planner, who is not the taxpayer, would not be caught in such a net, I would direct that person to the myriad of RICO suits now being brought by taxpayers against shelter promoters, and when the taxpayer is squeezed, his counsel will find a way to make sure that the juice flows from the promoter.[153]

None of these proposals is novel. I do suggest that the means of achieving them requires a different way of thinking about these problems than we have used in recent decades. The goal is not simply to put some particular rules into commission, but to allay the indeterminacy of due process jurisprudence in the investigative realm. In this bicentennial year, the tax bar and its constituency, in alliance with other groups that seek to bring government intrusion under control, must first identify what is wrong, unfair, and harmful about what is being done now. Second, these groups must identify the statutory, regulatory, and judicial review principles that now control such behavior and that must be fashioned to better control it.

This is the lesson of the agitation that led to the APA, and to the due process jurisprudence based upon it. It is a lesson not of grand theory, but of understanding, explaining, and translating into legal rules the common and concrete experiences of people.

[153]18 U.S.C. § 1964 (1972). RICO refers to the Racketeer-Influenced and Corrupt Organizations statute, a civil remedy provision. The weekly issues of the BNA Civil RICO Report provide a treatment of issues arising under this provision.