RUTGERS LAW RECORD
The Digital Journal of Rutgers School of Law
lawrecord.com

Volume 44 **2016-2017**

FIRST CIRCUIT GIVES THE IRS A SEAT IN THE BOARDROOM

PROF. ROY WHITEHEAD, LLB,* PROFESSOR PAM SPIKES, PHD, CPA,† &
WALTER E. BLOCK, PH.D.‡

I. Introduction

The First Circuit Court of Appeals in *United States v. Textron, Inc.*,[1] issued a critically important tax decision giving the Internal Revenue Service ("IRS") access to Textron's tax accrual planning work papers.[2] The case is a major victory for the IRS and in effect gives this government agency a seat in the room when tax accrual work papers are prepared.[3] In *Textron*,[4] the Court held en banc[5] that the taxpayer could not, in response to an IRS summons, withhold from production to the IRS its tax accrual work papers under the long-recognized work

* Roy Whitehead, JD, LLM, is Retired Professor of Business Law at the University of Central Arkansas. His law degree is from the University of Arkansas, Fayetteville. He can be reached at royw@conwaycorp.net.
† Dr. Pam Spikes, CPA, is Professor of Accounting at the University of Central Arkansas. Her Ph.D. in Accounting is from the University of Mississippi. She can be reached at pams@uca.edu.
‡ Dr. Walter Block, is Harold E. Wirth Eminent Scholar Endowed Chair and Professor of Economics at Loyola University New Orleans. His Ph.D. is from Columbia University. He can be reached at wblock@loyno.edu.
[1] United States v. Textron, Inc., 577 F.3d 21 (1st Cir. 2009).
[2] *Id.* at 31-32.
[3] *Id.*
[4] 577 F.3d. 21.
[5] I.e., by the full Court of Appeals.

product doctrine.[6] The decision, which reversed the district court, was reached by a narrow margin of a five judge panel, with three judges representing the majority over two judges who wrote the dissenting opinion.[7]

This decision was troubling to a number of large corporations and corporate counsel because it chills the taxpayer's thorough analysis of the accounting and legal implications of financial decision making by placing those corporate thought processes directly into the hands of the IRS.[8] Textron filed a Writ of Certiorari with the U.S. Supreme Court.[9] Textron's writ was supported by an unusually large number of friend of the court briefs filed on its behalf by corporations and organizations such as the U.S. Chamber of Commerce, the Washington Legal Foundation, the International Civil Defense Lawyers, the U.S. Steel Corporation, the Product Liability Advisory Council, and Graybar Electric Company.[10] Many commentators expected the high court to take the case to resolve the issues we will discuss in this article.[11] To the surprise of many accountants and lawyers, the high court recently decided not to hear the case, *Textron v. United States*.[12] The failure of the high court to do so will clearly encourage the IRS to continually and aggressively seek access to the information provided by the taxpayer to its accountants, auditors, and lawyers. The case is clearly a game changer in civil tax

---

[6] See Jeff A. Anderson et al., *Special Project: Work Product Doctrine*, 68 CORNELL L. REV. 762 (1982-83); Sherman L. Cohn, *The Work Product Doctrine: Protection, Not Privilege*, 71 GEORGETOWN L.J. 917 (1982-83); Ronald J. Allen, et. al., *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 THE JOURNAL OF LEGAL STUDIES 359 (1990); Grace M. Giesel, *Alternative Litigation Finance and the Work-Product Doctrine*, 47 WAKE FOREST L. REV. 1083 (2012).

[7] *Textron*, 577 F.3d. at 32.

[8] *Textron Inc. v. U.S,* U.S. CHAMBER LITIGATION CENTER, http://www.chamberlitigation.com/textron-inc-v-us (last visited Feb. 20, 2017).

[9] *Id.*

[10] Brief of Amicus Curiae Chamber of Commerce of the U.S. of American in Support of Petitioner, *United States v. Textron, Inc.,* 577 F.3d 21 (1st Cir. 2009); Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioner, *United States v. Textron, Inc.,* 577 F.3d 21 (1st Cir. 2009); Brief of Reed Smith LLP, Graybar Electric Company, Inc. and U.S. Steel Corporation as Amicus Curiae in Support of Petitioner, *United States v. Textron, Inc.,* 577 F.3d 21 (1st Cir. 2009); Brief of Amicus Curiae Product Liability Advisory Council in Support of Petitioner, *United States v. Textron, Inc.,* 577 F.3d 21 (1st Cir. 2009).

[11] *See* Hillary Russ, *Lawyers Urge High Court to Hear Work Product Case,* LAW 360 (Jan. 27, 2010), https://www.law360.com/articles/145852?scroll=1.

[12] Textron Inc. v. United States, 130 S. Ct. 3320 (2010).

litigation, because it invites the government into the corporation's financial planning conferences.

In this paper we explore the critical question of what did the Textron case hold and what can the taxpayer do to protect his work papers? Clearly, the First Circuit majority was not impressed by Textron's argument that tax accrual work papers are protected from disclosure by the work product doctrine.[13] This case has severely limited the taxpayer's protection from discovery under the work product doctrine by the finding that it does not apply when there is a statutory requirement that the papers be prepared under securities law and that the taxpayer's primary motive is an unqualified audit opinion.[14] The Court was not receptive to an argument that accrual work papers can have a dual purpose that includes both the ordinary course of business and the possibility of future litigation.[15] The Court was greatly influenced by the practical problems faced by the IRS in discovering the underreporting of corporate taxes which the Court complained was endemic.[16] The Court said it was fair and in the public interest for the IRS to have access to these papers to insure the proper collection of taxes.[17] The Court was also influenced by the fact that the IRS was investigating nine leveraged lease transactions entered into by Textron that were the same or substantially similar to the Sale-In/Lease-Out ("SILO").[18]

II. Background

This article discusses the question of whether the work product doctrine shields from an Internal Revenue Service (IRS) summons the tax accrual work papers prepared by lawyers,

[13] *See Textron Inc.*, 577 F.3d at 28-32.
[14] *See id.*
[15] *See id.* at 28-29.
[16] *Id.* at 30-32.
[17] *Id.*
[18] Transactions listed in Notice 2005-13 ("listed transactions") *Id.* at 22-24.

accountants and others in Textron's tax department.[19] The work papers were prepared to support Textron's calculation of tax reserves for its audited corporate financial statements.[20] Textron is a major aerospace and defense conglomerate, with well over 100 subsidiaries, whose consolidated tax return is audited by the IRS on a regular basis.[21] Textron is required by federal securities law to have public financial statements certified by an independent auditor.[22] To comply with the securities law financial reporting requirements, Textron must calculate the reserves to be entered on the company's books to account for contingent tax liabilities.[23] Contingent liabilities necessarily include estimates of potential tax liability if the IRS decides to challenge debatable positions taken by the taxpayer. An independent auditor, in this case Ernst & Young, then examines the work papers to determine the reasonableness and adequacy of Textron's reserve account for contingent tax liabilities.[24] Tax accrual work papers are obviously a valuable resource for the Internal Revenue Service because they pinpoint the soft spots in the corporation's tax return and provide an item-by-item analysis of the corporation's potential exposure to additional tax liability.[25]

The present case began with the 2003 IRS audit of Textron's liability for the years 1998-2001.[26] The IRS issued a summons to examine all of Textron's books, papers, records, or other data, which may be relevant or material to the inquiry involving the SILO transactions.[27] The summons also asked for related work papers created by Ernst & Young when reviewing the adequacy of Textron's reserves.[28]

---

[19] *See Textron Inc.,* 577 F.3d 21.
[20] *Id.* at 22-23.
[21] *Id.* at 22.
[22] *Id.*
[23] *Id.* at 22.
[24] *Id.* at 22.
[25] *Id.* at 23.
[26] *Id.*
[27] *Id.* at 24.
[28] *Id.*

Textron challenged the summons as lacking a legitimate purpose and claimed that the attorney-client, tax practitioner privilege, and a qualified privilege for litigation materials based on the work product doctrine, protected the material from disclosure. Textron claimed that the real effect of the summons would be to allow the IRS access to materials that might result in litigation. Unconvinced, the IRS brought an enforcement action in Federal District Court in Rhode Island.

The District Court decided the papers were protected by the work product privilege.[29] It concluded that the work papers were prepared "because of" the prospect of litigation.[30] On appeal, a divided panel of the First Circuit upheld the District Court's decision.[31] The First Circuit then granted the government's petition for a re-hearing en banc, vacated the panel decision, and obtained additional briefs from the parties and interested friends of the court.[32] Let us now turn to the en banc decision.

III. Discussion

There were four decisive questions that arose during the First Circuit's en banc review of the Textron case. First, does the work product doctrine only apply to materials that are expressly prepared for litigation? What if the documents are prepared as a necessary part of the ordinary course of business? Second, may tax accrual work papers qualify for work product protection? Third, does the fear of making tax accrual materials available to the IRS discourage sound preparation of the work papers? And, fourth, is it somehow unfair for the government to have access to the taxpayer's tax accrual spreadsheets?

[29] *Id.* at 25.
[30] *Id.* at 26.
[31] *Id.* at 32.
[32] United States v. Textron, Inc., 560 F.3d 515 (1st Cir. 2009).

The work product privilege arose from the Supreme Court's decision in *Hickman v. Taylor*[33] and focuses on the materials lawyers typically prepare for the purpose of actually litigating cases. The *Hickman* case concerned on-going litigation in which one side filed a discovery request seeking from opposing counsel memorandum concerning witness interviews that had been conducted after receiving notice of possible litigation.[34] The Court pointed out that *Hickman v. Taylor* addressed "the extent to which a party may inquire into oral and written statements of witnesses, or other information, secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen."[35] *Hickman* described the work product doctrine as protecting documents that are prepared in anticipation of litigation or for trial.[36] Here, said the Second Circuit panel, the critical difference between *Hickman* and *Textron* is that the immediate motive of Textron in preparing the tax accrual work papers was to fix the amount of tax reserves on their books and to obtain an unqualified financial opinion from the auditor.[37] Just because the taxpayer wants to be adequately reserved for possible tax liability does not necessarily mean that the taxpayer is preparing for litigation.[38] Finally, of great importance to the reviewing court was that the district trial judge did not say the accrual work papers were prepared for use in possible litigation.[39]

The Appellate Court found that it is not enough to trigger the work product doctrine protection that the subject matter of the document related to a subject that might conceivably be litigated. Rather, as the U.S. Supreme Court has explained, "the literal language of the [work products doctrine] protects materials prepared for *any* litigation or trial as long as they

---

[33] Hickman v. Taylor, 329 U.S. 495, 510-11 (1947).
[34] *Id.*
[35] *Id.* at 497.
[36] *Id.* at 511.
[37] *Textron Inc.*, 577 F.3d at 27.
[38] *Id.*
[39] *Id.*

are prepared by or for a party to the subsequent litigation."[40] The Court decided that from the outset, the focus of work product doctrine has been on materials prepared for use in litigation, either underway or anticipated.[41] It is only work done in anticipation of, or for a trial, that is protected under the doctrine.[42] Nor, said the Court, is it enough to trigger the work product doctrine that the contested materials were prepared by lawyers or represent legal thinking.[43] This is because many corporate papers are routinely prepared and reviewed by lawyers. According to *Hickman v. Taylor*, reports if made in ordinary course of business are not privileged.[44] Finally, the Court said that a set of tax reserve figures, calculated for purpose of accurately stating a company's financial condition has in ordinary parlance only that purpose: to support a finance statement and the independent audit of it.[45] The Court concluded that the *Textron* work papers were required by statutory and audit requirements and were not necessarily protected by the work product doctrine.[46] But that was not the end of the inquiry.

The Court next discussed the purpose of tax accrual work papers and whether or not they should be given work product protection. These judges pointed out that the tax audit work papers must be prepared by exchange-listed companies to comply with securities law and accounting principles for certified financial statements.[47] Citing the famous case of *United States v. Arthur Young and Co.*[48], the Court reasoned that the purpose of the tax accrual work papers is clearly not necessarily bundled with any sort of preparation for litigation.[49] The Court

---

[40] *F.T.C. v. Grolier, Inc*, 462 U.S. 19, 25 (1983).
[41] *Id.*
[42] *Id.* at 27.
[43] *See id.* at 29.
[44] *Hickman,* 329 U.S. at 509 n.9.
[45] *Textron Inc.*, 577 F.3d at 30.
[46] *Id.* at 26.
[47] *Id.* at 31.
[48] *United States v. Arthur Young & Co.*, 465 U.S. 805, 812 (1984) (holding that auditors have both a public responsibility to insure that financial statements are properly certified, and a corresponding private responsibility to their client to insure that the financial statements are properly certified).
[49] *Textron*, 577 F.3d at 31.

said that the *Young* case made this point in refusing to create an accountant's work privilege for tax audit papers.[50] In describing the auditor's function, the *Young* court stated:

> The auditor is ethically and professionally obligated to ascertain for himself as far as possible whether the corporation's contingent tax liabilities have been accurately stated.... Responsible corporate management would not risk a qualified evaluation of a corporate taxpayer's financial posture to forge cover for questionable positions reflected in prior tax return.[51]

The Court concluded that under the *Young* test, the purpose of work papers were to make book accounting entries, prepare financial statements and obtain an unqualified audit from Ernst & Young.[52] Consequently, the primary motivation was to ascertain sound business practice rather than to make preparation for future litigation.[53]

Third, the Court was not convinced that the revelation of the tax accrual work papers in this case would raise the concern the work product doctrine is intended to remedy.[54] These jurists said that the evidence in this case squarely supports the IRS's position.[55] The work doctrine privilege is aimed at protecting the litigation process, specifically work done by counsel to assist in litigating the case.[56] It is not a privilege intended to help the lawyer prepare corporate documents or other materials created in the ordinary course of business.[57] So, said the Court, the rationale for the rule stops at this point because allowing IRS access to the tax accrual work papers simply did not discourage sound preparation for the Ernst & Young audit.[58] This is so in this case because there was a legal obligation to soundly prepare such papers to comply with the securities law and accounting principles in order to have the

---

[50] *Id.*
[51] *Young,* 465 U.S. at 818-19.
[52] *Textron*, 577 F.3d at 31.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Textron*, 577 F.3d at 31.
[58] *Id.*

financial statements certified by the auditor.[59] The Court indicated that responsible corporate management was required to prepare the work papers in order to obtain an unqualified evaluation of its financial condition from the auditors.[60]

Fourth, the Court discussed whether the Internal Revenue Service's concern about widespread corporate abuse of tax laws and tax shelter abuse was well-founded.[61] The Court averred that Textron apparently thinks it is unfair for the government to have access to its spreadsheets.[62] But, the court said, "tax collection is not a game."[63] Underpaying taxes is a threat to the public interest based on fair tax collections.[64] Consequently, if a blueprint to Textron's possible improper deductions can be found in that firm's files, it is properly available to the government unless otherwise privileged.[65] Having already decided that the work product doctrine does not apply, the Court indicated that the purpose of discovery is to assist in the proponent (deponent?), in this case the IRS, in discovering the truth.[66] Because the appropriate collection of revenues is essential to the operation of government, it is imperative and fair that the tax accrual work papers be furnished to the IRS.[67]

Finally, the Court was satisfied that the government's concern about widespread corporate abuse of tax laws is well-founded.[68] The Court opined that the underreporting of corporate taxes was likely endemic and serious.[69] Textron's return was massive in length consisting of over 4,000 pages.[70] The IRS asked for the work papers only after finding a

---

[59] *Id*; *see Young,* 465 U.S. 805 (1984)
[60] *Textron*, 577 F.3d at 31-32
[61] *Id.* at 31
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* at 25.
[66] *Textron*, 577 F.3d at 29.
[67] *Id.* at 31.
[68] *Id.*
[69] *Id.*
[70] *Id.*

specific type of SILO transaction that had been commonly abused by taxpayers.[71] It is because the proper collection of revenues is essential to government that administrative discovery is fair in this case.[72] Shockingly, the court notes in a discussion of the tax accrual work papers that in some instances the spreadsheet entries estimated the probability of IRS success in collecting the taxes on the SILO transactions at 100%.[73] It is black letter law that a taxpayer is generally not allowed to report a position for which it does not have some reasonable basis.[74] How likely is it that a corporation like Textron would have a reasonable basis for taking a position when its own work papers indicate that it has a no chance of winning on the merits? It sounds like the majority is convinced it is fair for the IRS to get the work sheets.

IV. Fairness

The ruling for the government gives the IRS further support for its policy to seek tax accrual work papers when taxpayers have entered into listed transactions and may cause the IRS to reconsider its "policy of restraint" in seeking tax accrual work papers in other situations.[75] Also, we expect that the several states will take note of this decision and commence to aggressively seek accrual information.[76]

This decision is obviously of concern to corporate accountants and lawyers and because it effectively deprives them of a way to protect their clients from having the IRS privy to preparation of tax work papers.[77] But here, we think, that the appellate court was convinced that the work product doctrine had become an obstacle to the fair collection of taxes. The facts are not friendly to Textron. They want to hide from the IRS's prying eyes SILO

---

[71] *Id.*
[72] *Textron*, 577 F.3d at 31.
[73] *Id.* at 25.
[74] *Id.* at 31.
[75] *Id.*
[76] *See Id.*
[77] *Textron*, 577 F.3d at 31-32.

transactions that their own advisors believed were not supportable if challenged by the IRS. The Court did not think that was fair to the government and other taxpayers.[78] Finally, it is important to understand that this case does not stand for the proposition that work papers prepared for actual litigation are not protected.[79] The Court clearly said that work papers prepared in anticipation of litigation are still protected.[80] The court flatly rejected Textron's position that the work papers had a dual purpose of ordinary business and anticipated litigation.[81] The Court was unconvinced that the primary motive for presentation of the work papers was anticipation of litigation.[82]

V. Dealing with the Decision

What is the taxpayer to do now? First, in some respects, the Textron decision can produce perverse results.[83] This is because when a taxpayer knows that the IRS might have a seat at the table some taxpayers will be tempted not to disclose information to auditors and lawyers that could result in an IRS intervention.[84] This withholding could actually result in a weaker tax enforcement system. But we expect that most corporations and taxpayers like Textron will try to clearly label work papers as materials prepared in anticipation of litigation, try to carefully segregate aggressive tax issues from less sensitive matters to limit the scope of any litigation, and involve external lawyers and accountants in an attempt to protect accrual work papers. Lastly, Congress ought to consider legislation that would allow taxpayers to obtain waivers to release certain kinds of information to third party auditors and lawyers

[78] *Id.*
[79] *Id.* at 29.
[80] *Id.* at 31.
[81] *Id.* at 31-32.
[82] *Id.*
[83] *Textron*, 577 F.3d at 37-38 (Judge Torruella, dissenting).
[84] *Id.*, at 35-36 (Judge Torruella, dissenting).

without waiving the work product doctrine in regard to the IRS. The use of such waivers might result in a stronger tax enforcement system.

Finally, in a related development, the IRS recently issued Announcement 2010-17,[85] which indicates that the IRS plans to require the filing of a new schedule for reporting uncertain tax positions pursuant to FIN 48 (or other accounting standards such as IFRS) for tax returns relating to calendar year 2010 and for fiscal years that begin in 2010.[86] This disclosure would be required by a business taxpayer with total assets in excess of $10 million.[87] The recent denial of the Writ of Certiorari certainly strengthens the IRS's position in obtaining accrual information.[88]

VI. Further Considerations

A. The Fourth Amendment

The Fourth Amendment[89] to the U.S. Constitution states:

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

If the IRS claim in *Textron* is not a violation of the fourth amendment, it is difficult to see what would be. Under present law, this corporation, and of course all others, is required to pay taxes, but that is it. It is not entailed to proffer to government authorities anything more than that. When and if it pays what the law requires, that ends its legal responsibility. For the IRS

---

85 I.R.B. 2010-13: Announcement 2010-17, I.R.S. (Mar. 29, 2010), https://www.irs.gov/irb/2010-13_IRB/ar10.html.
86 *See id.*
87 *Id.*
88 *See Textron*, 560 U.S. 924 (cert. denied).
89 U.S. CONST. amend. IV.

to thrust itself, forcibly, into the deliberations of a private company, before not only was it not found guilty of criminal behavior, it was not even accused of same, constitutes a failure to uphold the rule of law.[90]

B. *Nemo Judex in Causa Sua*

We also take note of the fact that the *Textron* case was tried in a government court. Here, two out of three of the parties was an agency of the state: the IRS and the Court. According to that old aphorism: he who is a judge in his own case cannot be trusted to be unbiased.

The principles of natural justice mandate that no one should be a judge in his own case. In this particular instance, one branch of government, the Court, presumes to judge another branch of government, the IRS. Not only does this constitute an appearance of bias, it is the paradigm case of such a violation of natural justice. Another aphorism is that not only must the Emperor's wife be pure; she must be seen to be pure. In like manner, justice must not only be actually done, it must also be widely seen to be done. It is difficult to see how this can be attained under present circumstances.

No truer words were ever said on this matter than these:

> The maxim that *no man is to be judge in his own case* should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest . . . . This will be a lesson to all . . . tribunals to take care, not only that in their decrees they are not influenced by their personal interests, but to avoid the appearance of labouring under such an influence.[91]

---

[90] *See* FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE (1976).
[91] *Nemo Judex In Parte Sua*, DUHAIME'S LAW DICTIONARY, http://www.duhaime.org/LegalDictionary/N/NemoJudexInParteSua.aspx (last visited Mar. 7, 2017).

In Canada, the Supreme Court had occasion to reflect on the maxim in Brosseau v Alberta Securities Commission, Justice l'Heureux-Dubé:

> The maxim *nemo judex in causa sua debet esse* underlies the doctrine of reasonable apprehension of bias. It translates into the principle that no one ought to be a judge in his own cause. In this case, it is contended that the Chairman, in acting as both investigator and adjudicator in the same case, created a reasonable apprehension of bias. As a general principle, this is not permitted in law because the taint of bias would destroy the integrity of proceedings conducted in such a manner.[92]

What we are saying is that whenever there is a law case between a branch of government such as the IRS,[93] *that Federal and State courts in the U.S.,* all *of them, ought to recuse themselves on the basis of bias, possible or actual.*[94] *Who, then, should judge such legal altercations? This is unclear. Perhaps a Canadian court, or the U.N. or, maybe, even, horrors, a* private court, *such as the American Arbitration Association, or the Jewish Bet Din, or the Catholic Ecclesiastical court. We only say that it should not be a court which is part of the U.S. government, or that of any of the fifty states, if the maxim "No one should be a judge in his own case" is to be upheld.*

C. IRS-gate

The IRS attempt to trespass into the private affairs of Textron comes with particular ill grace given IRS-gate. The former head of this organization Lois Lerner was found with her hand in the cookie jar related to her targeting of the Tea Party and other right wing groups.[95]

---

[92] *Id.*

[93] Indeed, *any* branch of government.

[94] On recusal, *see* M. Margaret McKeown, *To Judge or Not to Judge: Transparency and Recusal in the Federal System*, 30 THE REV. LITIG. 653 (2011); Deborah Goldberg et al., *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503 (2007) ; James J. Sample & David Pozen, *Making Judicial Recusal More Rigorous*, 46 JUDGES' JOURNAL 17 (2007); Terri Day, *Buying Justice: Caperton v. A.T. Massey: Campaign Dollars, Mandatory Rescusal and Due Process*, 28 MISSISSIPPI COLLEGE L. REV. 359 (2009); Rebekah L. Osborn, *Current development 2005-2006: Beliefs on the Bench: Recusal for Religious Reasons and the Model Code of Judicial Conduct*, 19 GEO. J. LEGAL ETHICS 895 (2006); Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657 (2005).

[95] See Leandra Lederman, *IRS Reform: Politics as Usual?,* 7 COLUM. J. TAX L. 36, 42-43 (2016); GROVER NORQUIST, END THE IRS BEFORE IT ENDS US: HOW TO RESTORE A LOW TAX, HIGH GROWTH, WEALTHY

Thus, the IRS shot itself in the foot when it engaged in such nefarious partisan activities. If there is any justice in the word, this organization deserves to be transferred to the dust-bin of history.

VII. Conclusion

We see no warrant for inviting the IRS into the boardrooms of the nation's corporations on fishing expeditions. If a firm breaks the (tax) law, if extant tax law is to be upheld,[96] the proper procedure is to sue them afterwards, not coercively intrude on them before.[97] Given the dire recent history of the IRS,[98] not only should they not be allowed to meddle in the deliberations of the business community, there is a strong case for disbanding this organization entirely, and, if revenue neutrality is to be achieved,[99] substituting for this intrusive bureaucracy a sales or value added tax.[100]

AMERICA (2015); Philip T. Hackney*, Should the IRS Never 'Target' Taxpayers? An Examination of the IRS Tea Party Affair*, 49Val. U. L. Rev. 453, (2015).

[96] It would take us too far afield to engage in a critique of this proposition.

[97] *See Textron Inc.*, 577 F.3d at 31.

[98] Lois Lerner and IRS-Gate attacking the Tea Party in an unwarranted, biased manner. Stephen DInan & Seth McLaughlin, *Emails show IRS' Lois Lerner specifically targeted tea party*, WASHINGTON TIMES (Sept. 12, 2013), http://www.washingtontimes.com/news/2013/sep/12/emails-ois-lerner-specifically-targeted-tea-party/

[99] This itself is a dubious proposition.

[100] *See supra* note 90.