IRWIN SCHIFF, Pro Per
444 E. Sahara
Las Vegas, Nevada 89104
702-385-6920
(Fax) 702-385-69**17**

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES	)	
	)	
Plaintiff	)	CR-S-04-0119-KJD-LRL
	)	
V	)	DEFENDANT SCHIFF'S OBJECTIONS
	)	TO MAGISTRATE JUDGE LAWRENCE R.
IRWIN SCHIFF, CYNTHIA NEUN	)	LEAVITT'S "REPORT &
And LAWRENCE N. COHEN, a/k/a/	)	RECOMMENDATION"
LARRY COHEN,	)	
Defendants	)	

COMES NOW, Defendant Irwin Schiff and Objects to Magistrate Judge Lawrence R. Leavitt's "Report and Recommendation" with respect to Defendant's four Motions to Dismiss the prosecution at issue, on the grounds that this Honorable Court has no subject matter jurisdiction pursuant to each of the four grounds covered in those Motions. Magistrate Judge Leavitt's "Recommendations" are based, in every instance, on his taking a position favorable to the government, regardless of: (1) what the law is; (2) what the government had argued in its own behalf; and (3) what Defendant has argued in rebuttal. Since Magistrate Judge Leavitt's "Recommendations," as the following will show, are not only erroneous but represent obvious violations of law (which would constitute violations of 18 U.S.C 241 if adopted), if this Court were to adopt them, it would signal that this criminal prosecution is **not** being conducted on an adversarial basis, but that the defendants' real adversary is the Court itself, with government prosecutors merely playing a diversionary role.

Also, Defendant objects to Magistrate Judge Leavitt's statement that "The court finds it unnecessary to hold oral argument." Why is it unnecessary? The issues covered in his Recommendation and in the government's far more extensive answers, relate to constitutional questions and the fundamental, legal issue of "jurisdiction." Therefore, why shouldn't there be oral argument on such basic and contested *legal* issues? A trial only involves a hearing on contested *factual* issues; why shouldn't there be a hearing on contested *legal* issues, which challenges to jurisdiction represent? If Defendant is wrong on his *legal* claims regarding the federal income tax - which the government claims to be so

concerned about that it has sought (even at the expense of compromising the 1st Amendment) to ban one of his books and limiting Schiff's freedom of speech in connection with his views on the income tax - what better way to discredit Schiff and his "*legal* theories" then at oral argument? Oral argument is the very heart of due process of law, where litigants can confront each other with regard to their stated positions, and where they have to defend those positions in open court, where they cannot avoid answering pointed and relevant questions, as written pleadings allows them to do. One would imagine that the government would relish the opportunity to discredit and demolish Schiff's "legal theories" (even exposing them to ridicule), which oral argument would allow the government to do**.** Therefore, it must be assumed that the only reason why Magistrate Judge Leavitt and the government would oppose oral argument is because they know that the government could not defend its positions in such a forum.

WITH RESPECT TO DEFENDANT'S CLAIM THAT THE COURT HAS NO SUBJECT MATTER JURISDICTION BECAUSE THE INCOME TAX IS NOT "TRACEABLE" TO ANY POWER CONFERRED ON CONGRESS TO "LAY AND COLLECT TAXES"

In opposing Defendant's Motion on this issue, the government relied upon the following cases: *Brushaber v. Union Pacific RR*, 240 US 1 (1915); Tyee *Realty Co. v. Anderson*, 240 U.S. 115 (1915); *Bowers v. Kerbaugh-Empire Co*, 271 U.S. 170 (1926); *In re Becraft*, 885 F.2d 547; *Parker v. C.I.R.*, 724 F.2d 469; *Lovell v. United States*, 755 F. 2d. 517; and *Parker v. C.I.R.*, 724 F.2d 46; of these, three were Supreme Court decisions and four were appellate court decisions:

In support of his position**,** Schiff**,** cited and quoted extensively from the following four Supreme Court decisions: *Pollock v. Farmers Loan and Trust*, 158 U.S. 601 (1895); *Brushaber v. Union Pacific*, supra, *Stanton v. Baltic Mining*, 240 US 103 (1915); and *Eisner v. Macomber* 252 US 189 (1920).

In his Reply Brief, Schiff addressed <u>*each and every*</u> *court decision* relied upon by the government as shown in its Response, and explained why he believed *each* of them were either: (1) irrelevant (such as *Tyee Reality*); (2) erroneously decided (as were all of the lower court decisions including *In re Becraft*); or (3) actually supported Defendant's position and not the government's, such as *Bowers v. Kerbaugh-Empire Co and Brushaber v. Union Pacific RR.* However, Magistrate Judge Leavitt resolved this issue in favor of the government (in approximately five lines) without addressing <u>*any*</u> of the Supreme Court decisions Schiff relied upon. Since neither the government in its Response nor Magistrate Judge Leavitt in his "Report" commented on, nor contested <u>*in any way*</u>, the basis upon which Schiff relied upon those four

Supreme Court decisions, one wonders why Schiff even bothered to raise them in support of his position? However, Schiff will explain why they failed to do so, further on in this Reply.

In support of his "Report," Magistrate Judge Leavitt cites as his primary authority the 9th Circuit decision of *In re Becraft* while also stating "(see also *Bowers v. Kerbaugh-Empire Co,* 271 U.S. 170, 173-74 (1926)(reiterating the Constitutional basis for Congress' power to impose taxes on income)." First of all, Schiff never claimed that Congress did not have the power to "impose taxes on income," so Magistrate Judge Leavitt's comment is both irrelevant and misleading. However, the Constitution requires that if Congress wants to tax "income," it must do so in one of two ways. If it imposes the tax **directly** on specific sources of income, it must do so pursuant to the rule of "apportionment." If it imposes the tax on income, in which those sources **are not** *individually* and directly taxed, it can do so on the basis of an *excise tax,* subject only to the rule of "uniformity," and without being hampered by the limitations placed on its taxing powers by the rule of "apportionment." Those constitutional limitations on its taxing power were not altered or abolished by the 16th Amendment, as all of the Supreme Court decisions cited above confirm. However, Magistrate Judge Leavitt's "Report and Recommendation": (1) ignores these distinctions and; (2) ignores all of the Supreme Court decisions bearing on them.

Therefore, in making the statement that *Bowers v. Kerbaugh-Empire Co*, "reiterated Congress' "power to impose taxes on income,'" Magistrate Judge Leavitt erects a straw man, since Schiff never claimed that Congress did not have such a power. What Magistrate Judge Leavitt refuses to consider is that in two of its decisions (*Pollock* and *Brushaber*) the Supreme Court defined and established *two different kinds* of "income," and explained how each kind had to be constitutionally taxed. In order to render a Report favorable to the government, Magistrate Judge Leavitt had to pretend that there is only *one kind of income* that needed to be considered – it being "income" received in the "ordinary sense." Magistrate Judge Leavitt also bases his Recommendation on the 9th Circuit decision of *In re Becraft.* In that decision, the 9th Circuit erroneously held that the 16th Amendment gave Congress a new power, the power to impose a *direct* tax on sources of income without the tax being subject to the rule of "apportionment." Such a claim, as the following will show, is *clearly* contrary to all of the Supreme Court decisions cited above.

In the 1895 *Pollock v. Farmers Loan and Trust Co* decision, the Supreme Court held that a tax on income from real and personal property was a direct tax, and could only be imposed on the basis of apportionment. It therefore declared the Income Tax Act of 1894 unconstitutional for want of apportionment. Despite the passage of the 16th Amendment, the *Brushaber* Court, held that, "The (16th) Amendment contains nothing repudiating or challenging the ruling in the Pollock case" therefore, the *Pollock* decision is still "the law of the land," which this Court is bound by its oath of office to uphold, but which Magistrate Judge Leavitt recommends that this Court disregard. In any case, as a result of the 16th Amendment, the Supreme Court felt compelled to create another kind of "income" in which: (1) the various "sources" that produced the "income" would not be *considered*, and thus not *directly* taxed; and (2) the tax on this other form of income (*separated* from those sources) would be imposed in the form of an *excise* tax. Thus, such a holding would: (1) not require amending the Constitution; (2) would still be in conformity with the Amendment; and (3) would not conflict with the Court's prior *Pollock* decision, which required that all direct taxes on income (from real and personal property) be imposed pursuant to the rule of apportionment.

However, in citing *Bowers v. Kerbaugh* in support of his "Recommendation," Magistrate Judge Leavitt failed to notice that in that decision the Bowers Court held:

> It was not the purpose or effect of that (16th) Amendment to bring any new subject within the taxing power. Congress *already had power* to tax all incomes. But taxes on incomes from some sources have been held to be "direct taxes" within the meaning of the constitutional requirement as to apportionment…. "Income" has been taken *to mean the same thing* as used in the Corporation Excise Tax Act of 1909, in the Sixteenth Amendment and in the *various revenue acts subsequently passed.*

So, while the Supreme Court in *Bowers* might have "reiterated" Congress' constitutional power to tax income as claimed by Magistrate Judge Leavitt, he *totally disregards* the *basis* upon which it did so. His "Report" *fails to explain* what the *Bowers* Court meant when it said: *"Income'* has been taken *to mean the same thing* as used in the Corporation Excise Tax Act of 1909, in the Sixteenth Amendment and in the various revenue acts *subsequently* passed." Therefore, while Magistrate Judge Leavitt cites *Bowers* in support for his "Recommendation," he fails to consider *what* the *Bowers* Court actually *held in that decision*. And what the *Bowers* Court actually held *goes to support* **Schiff's claim**: (1) not the government's**,** and (2) not the recommendations in his "Report."

The other decision which Magistrate Judge Leavitt attempts to claim supports his "Recommendation" is the claim by the 9th Circuit in *In re Becraft* that:

> For over 75 years, the Supreme Court and the lower courts have both implicitly and explicitly recognized that the Sixteenth Amendment authorization *of a non-apportioned direct income tax* on United States citizens residing in the United States and thus the validity of the federal income tax laws as applied to such citizens."

In *Brushaber*, the Supreme Court decision that **established** the *constitutional basis* for the current income tax, explained Congress' authority to "lay and collect taxes," as follows:

> In the matter of taxation, the Constitution recognizes these two great classes of *direct* and *indirect* taxes and lays down two rules by which their imposition must be governed namely: The rule of *apportionment* as to direct taxes and the rule of *uniformity* as to duties, imposts and excises.

Since the original Constitution did not authorize Congress to impose "a non-apportioned direct tax," in order for the 9th Circuit's decision in *In re Beacraft* to be correct, the *Brushaber* Court would have had to rule that the 16th Amendment: (1) "amended" the Constitution; (2) gave Congress a new taxing power; and (3) held an income tax to be a direct tax. However, the *Brushaber* Court ruled that *none* of these things happened. Since the *Brushaber* Court stated that: "The whole purpose of the (16th) Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the sources whence the income was derived," it obviously didn't rule that the 16th Amendment "amended" the Constitution, since the Court specifically ruled that was not its "purpose." If the 16th Amendment did not amend the Constitution, Congress could not have been given a new taxing power that would have allowed it to impose a direct tax without apportionment, as held in *re Becraft*. The fact that the 16th Amendment did not amend the Constitution is affirmed by the following Supreme Court decisions, as were cited and quoted by Schiff in his briefs to this court:

> The provisions of the 16th Amendment *conferred no new power of taxation* but simply prohibited (a tax on income) from being taken out of the category of indirect taxation to which it inherently belonged and being placed in the category of direct taxation subject to apportionment *by a consideration of the sources* from which the income was derived. *Stanton v. Baltic Mining,* 240 US 103, 112 (1915)

> The Sixteenth Amendment must be construed in connection with the *taxing clauses in the original Constitution* and the effect attributed to them *before the Amendment was adopted.* (Eisner *v. Macomber* 252 US 189, 205 (1920)

> A proper regard for its genesis…require that the *(16th) Amendment shall not be extended by loose construction…so as to repeal or modify…those provisions of the Constitution that require an apportionment…for direct taxes upon property, real and personal.* This limitation still

has an appropriate and important function, and is not to be overridden by Congress or *disregarded by the courts.* (Eisner page 206)

Therefore, the above Supreme Court decisions make clear that: (1) the 16th Amendment "*conferred no new power of taxation"* on Congress; (2) Congress' power to tax "income" still "must be construed in connection with the taxing clauses in the original Constitution" without taking into consideration the 16th Amendment; and (3) **"** those provisions of the Constitution that require an apportionment…for direct taxes upon property, real and personal…is not to be…disregarded by the courts," [1] as Magistrate Leavitt's "Report" urges this Court to do.

The *Brushaber* Court used the 16th Amendment to get around the "apportionment" provisions of the Constitution by holding the income tax imposed pursuant to that Amendment was to be imposed as an "excise tax" on income "separated from its sources," which: (1) did not require "amending" the Constitution; and (2) also got around the *Pollock* decision, without disturbing that decision.

All of the above proves that the 9th Circuit's holding in *In re Beacraft* (as relied upon in Magistrate Judge Leavitt's "Recommendation") was erroneous.

In addition, the 9th Circuit's holding is also based on its claim that the *Brushaber* Court held an income tax to be a **direct** tax, however, such was not the case**,** as the following show:

> The fact that taxation on income was in its nature *an **excise** entitled to be enforced as such*…that taxes on such income had been sustained as **excise taxes in the past**. (*Brushaber*, at ages 16 & 17.)

> Again the situation is aptly illustrated by [the income tax] …during what may be termed the Civil War period. It is not disputable that these latter taxing laws *were classed under the head of **excises** duties and imposts* because it was assumed that they were of ***that character*.** (*Brushaber*, page 14)

> The Amendment…excludes the criterion …for the purpose of destroying the classifications of the Constitution by taking **an excise** *(*the income tax) out of the class **to which it inherently belongs** and transferring it to a class in which **it cannot be placed** *consistent with the requirements of the Constitution.* (*Brushaber*)

> The provisions of the 16th Amendment conferred no new power of taxation but simply prohibited (a tax on income) from being ***taken out of the category of indirect taxation*** **to which**

[1] The *Eisner* Court also pointed out, in relevant part, at page 205: " *In Pollock v. Farmers' Loan and Trust*, it was held that taxes on rents and profits of real estate and upon returns from investments of personal property were in effect direct taxes upon the property from which such investments arose…and Congress could not impose such taxes without apportioning them….". Since *Pollock* has never been reversed or repealed – but has only been ***sustained*** - as all these **post 16th Amendment decisions show –** it is still the "law of the land" and therefore, a tax on "income" from real and personal property which has not been "apportioned" is **illegal** and **unconstitutional**.

> **it inherently belonged** and being placed in the category of ***direct taxation subject to apportionment*** by a consideration of the sources from which the income was derived.
> *Stanton v. Baltic Mining, 240 US 103, 112 (1915).*

Therefore, it is clear why Magistrate Judge Leavitt is opposed to oral argument. How would the government respond if, at oral argument, Schiff read the above quotations in open court and then said: "How can the government claim that it can rely on a decision that holds that the 16th Amendment gave Congress the authority to put a *direct* tax on income without apportionment, when, in fact the Supreme Court repeatedly ruled that income taxes were not *direct* **taxes** AT ALL, but were "inherently" *indirect***,** excise taxes which had 'been sustained as excise taxes as far back as the Civil War?**"**

And since, in order to support *In re Beacraft,* the government would also have to argue that the 16th Amendment gave Congress a new taxing power, how would the government respond at oral argument if Schiff first read directly from the Supreme Court decisions as holding that the 16th Amendment: (1) gave Congress no new taxing powers; and that (2) its taxing powers were still limited to those powers given to it in the original Constitution?"

Defendant appreciates the awkward position in which this places the Court. It feels that stare decisis imposes a duty on this Court to adhere to an obviously erroneous decision made by the 9th Circuit Court of Appeals. However 9th Circuit decisions are not "the law of the land," which this Court has sworn an oath to uphold. However, such Supreme Court decisions as: *Pollock, Brushaber, Stanton, Eisner,* and *Bowers* do represent "the law of the land," and they all show that the 9th Circuit Court of Appeals was clearly *led into error* in *In re Becraft.*

In any case, it is clear that Defendant possesses a *constitutional right* not to be subject to a federal tax that is not imposed either as: (1) an "apportioned" direct tax; or as (2) a geographically "uniform" excise. It is also clear that the Supreme Court sought to secure and protect Defendant's right in that regard in its *Pollock, Brushaber, Stanton, Eisner, and Bowers* decisions. 18 U.S.C. 241 makes it a crime for "two or more person to conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." Therefore, if this court were to subject Defendant to criminal prosecution (to say nothing of subjecting him to fines and imprisonment) in connection with a federal tax which was not imposed upon him in one of these two ways, then, apart from this Court having no subject matter jurisdiction as held in *United States v. Hill,* this Court, together with Magistrate Judge Leavitt and all of the government's

prosecutors, would be in obvious criminal violation of 18 USC 241 *just on this issue alone*. Therefore Magistrate Judge Leavitt's "Recommendation" on this issue must be disregarded, and all of the criminal charges against Schiff dismissed (based just on this issue alone), as set forth in all of Schiff's underlying pleadings.

WITH RESPECT TO THE DEFENDANTS CLAIM THAT HIS INDICTMENT SHOULD BE DISMISSED SINCE IT WAS SECURED BY FRAUD

Schiff's claim of fraud was based on a simple and straightforward issue. He claimed that the Government secured his indictment by *fraudulently* misleading the grand jury as to the legal meaning of "income" as that term appears in the Internal Revenue Code. As Schiff stated in his initial Memorandum of Law and in his Reply to the Government's Response:

> Defendant has attached to this Memorandum (as Exhibit A) page 168 from Senate Report No. 1637 and page A18 from House Report No 1337, 83rd Congress, 2nd Session. Note that Congress stated in both reports that, "The definition (of income as contained in Section 61 of Title 26) is based upon the 16th Amendment, and the word 'income' is used in its constitutional sense." Obviously, "income" *used* in its "constitutional sense" is not the same thing as income "*used*" in its "ordinary sense," which is how the Government "used" that term both before the grand jury and in the language contained in the instant indictments. Had the Government correctly explained to the grand jury the true meaning of "income" as that term is used in our revenue laws, (i.e. the meaning "income" when used in its "constitutional sense") the Government never would have gotten any indictments involving income taxes, since none of the defendants, nor anyone they ever came in contact with, ever received "income" in the "constitutional sense."

As Schiff pointed out in his Reply to the Government's Response:

> In its Response, the Government: 1) never mentions those Congressional Reports; nor 2) denied Schiff's claim that it used, both before the grand jury and in his indictment, the meaning of income in its "ordinary sense" and not the meaning of "income" in its "constitutional sense," as ***mandated*** by those Congressional Reports. Therefore, pursuant to Fed. Rule Civ. Proc. 8(d), the Government's failure to deny that it used the term "income" in the manner charged by Schiff, must be deemed by this Court to have been "admitted" by the Government. "Averments in a pleading to which a responsive pleading is required…are admitted when not denied in the responsive pleading." Therefore, since based upon Rule 8(d), Schiff has already proved his allegation, no further argument on his part is legally necessary; however, to be on the safe side, Schiff will proceed anyway.

Therefore, since the government did not deny that it did not use the term "income" in accordance with those Congressional Reports then, pursuant to Fed. Rules Civ. Proc. 8(d), the Court must deem that the government admitted Schiff's charge. Therefore, Schiff wins this argument. Nothing more was needed to be said by the government. Either it used the term "income" in its "constitutional" and "legal" sense or it did not. And if it did not, it perpetrated a

fraud as charged by Schiff, and the indictment must be dismissed on this ground, for the reasons Schiff previously stated.

Since, in its Response, the government did not have the honesty to *either* admit that: (1) it did not use the term "income" in its "constitutional sense" before the grand jury (which it obviously did not do) but was afraid to admit, since, to have done so, would be to openly admit that it violated the law; nor (2) did it have the honesty to admit that it *used* the term "income" in its "ordinary sense," (which it obviously did do), since to admit that, would be to ***also admit*** that it violated the law. So, instead of resolving this issue simply, honestly and directly by stating how it had used the term "income" before the grand jury, the government sought to circumvent answering that question (as did Magistrate Leavitt in his "Report") by seeking to: (1) misstate the nature of Defendant's claim; and (2) by misstating the provisions of Code section 61. However, in doing so, the government actually admitted that it had, indeed, misled the grand jury by using "income" in its "ordinary sense" and not "income" in its "constitutional sense," in violation of those Congressional Reports.

In order to *avoid* having to address this issue *as specifically raised by Schiff,* Magistrate Judge Leavitt's Report fails to *mention* (as did the government) those House and Senate Reports which were the ***very basis*** of Schiff's claim on this issue, and, instead, simply repeated all of the false claims as contained in the government's Response - even though Schiff had already refuted them in his Reply. For example, Magistrate Judge Leavitt states: "Lastly, Schiff contends that his case should be dismissed because the government fraudulently secured the indictment by not informing the grand jury that income only includes corporate profit." In his Reply (as condensed below), Schiff points out how this claim, when made by the government, was false, because….

> By stating: "Schiff argues …that the constitutional sense of the term 'income' only includes corporate profit." This, of course, was not what Schiff "argued" at all. Schiff "argued" that "income," as used in section 61, ***means*** corporate profit, *not* that the term "income" *only* "***includes***" corporate profit. However, by: (1) deliberately misstating Schiff's position, and. (2) by *immediately* following that misstatement with a list of other items listed in Section 61, the Government sought to discredit Schiff's "claim" by suggesting that…all of these ***other*** **items** are listed in section 61 as constituting taxable income." However, none of the items listed in section 61 is made subject to the income tax, only the "profit" *generated* by those items is made subject to the income tax – which is what "income" in its "constitutional sense" means….
>
> In addition, it was not Schiff who makes the "claim" that only corporate profit falls within the meaning of "income" – **it was the Supreme Court *that made that claim*.**.. "Income" in our revenue laws *has to mean* "corporate profit," if a tax on "income" is: (1) to avoid the need of apportionment; and (2) to comply with those Congressional Reports… a distinction that the DOJ …refuses…. to …make, as shown by its Response.

Schiff …pointed out that the Supreme Court …in its 1921 decision, Merchant's *Loan & Trust Co v. Smietanka.*.. stated:

> The word (income) must be given **the same meaning** in all of the Income Tax Acts of Congress that was given to it in the Corporation Excise Tax Act (of 1909) and that what that meaning is has now become definitely settled by decisions of this court.

Therefore Magistrate Judge Leavitt had to know that his claim was false.

Further adopting the government's false representations, Magistrate Judge Leavitt then states that: "Schiff's argument is frivolous," because:

> Gross income means all income from whatever source derived including compensation for services, gross income derived from business, gains derived from dealings in property, interest and rents. 26 U.S.C. 61(a); see also *Ghalardi Income Tax Educ. Found.* (Sic) v. Commissioner, T.C. Memo 1998 – 460.

In his Reply, Schiff went to *great lengths* to explain why this claim was false, when it was made by the government in its Response, as shown in these substantially condensed excerpts from his Reply:

> In order to support its fraudulent position, the Government seeks to claim that Section 61 puts a tax on such sources of income as: "compensation for services, gross income derived from business, gains derived from dealings in property, interest and rents." [2] That statement is false. If a corporation receives "compensation for services," section 61 does not impose an income tax on such "compensation." If a corporation sells a piece of property for a "gain," section 61 does not impose an income tax on that "gain." If a corporation receives "interest," section 61 does not impose an income tax on that "interest." …If all of these *sources* of corporate "income" (together with all of its other *sources* of income) do not produce a "profit" – the corporation pays no income taxes, on such "compensation," "gain," "interest," or "rent," proving that the Government's claim that such items were made taxable under Section 61 *was totally false.*..
>
> What section 61 purports to tax is "income" derived ***FROM*** those "sources": it does not impose a tax ***ON*** the (listed) sources themselves, as the Government claims. If an income tax were imposed ***ON*** those "sources," such a tax would have to be imposed on the basis of apportionment – as held by the Supreme Court in Pollock *v. Farmers' Loan & Trust Co*, 158 U.S. 601 …which is still binding on this Court.[3] ….
>
> This means, that if this Court were to help the Government enforce an income tax levied directly on rent and wages (as the Government's Response admits to doing)…this Court would be *knowingly* cooperating with the Government in its **admitted *illegal* enforcement** of the income tax.

[2] Since the *Pollock* Court **specifically ruled** , in a ruling that has never been reversed or overruled (as fully covered in Schiff's underlying briefs) that **income from rent** can only be legally taxed on the basis of apportionment, the Justice Department, therefore, clearly admits that it enforces the payment of income tax *in violation of law.*

[3] Most lawyers and federal judges believe that the *Pollock* decision was overruled and reversed by the 16th Amendment and the *Brushaber* decision. However, this is not true, as Shephardizing this case will reveal.

Schiff provided the Court with additional excerpts from Supreme Court decisions, which confirmed that "income" in the "constitutional sense" means "corporate profit," condensed as follows:

> As has been repeatedly remarked, the Corporation Tax Act of 1909 was not intended to be and is not in any proper sense an income tax law… The act of 1909 avoided this difficulty by imposing not an income tax, *but an excise tax upon the conduct of business in a corporate* capacity, measuring, however, the amount of tax *by the income* of the corporation… *Stratton's Independence v. Howbert,* 231 U.S. 399, 414.

> Certainly the term "income" has no broader meaning in the 1913 Act than in that of 1909 (See *Stratton's Independence v. Howbert*) and for the present purpose we assume *there is no difference in it's meaning as used in the two acts.* *Southern Pacific v. Lowe,* 247 U.S. 330 (1918)

> It was not the purpose or effect of that (16th) Amendment to bring any new subject within the taxing power… "Income" has been taken *to mean the same thing* as used in the Corporation Excise Tax Act of 1909, in the Sixteenth Amendment and in the *various revenue acts subsequently passed.* *Bowers v. Kerbaugh-Empire Co.*

> And before the 1921 Act this Court has indicated … what it later held, that "income," as used in the revenue acts taxing income, adopted since the Sixteenth Amendment, has the *same meaning* that it had in the Act of 1909… *Burnet v. Harmel,* 287 U.S.103, (1932)

> Whatever difficulty there may be about a precise and scientific definition of 'income" it imports … *the idea of gain or increase arising from corporate activities*. *Doyle v. Mitchell Bros.*, 247 U.S. 179, (1918)

Therefore, in citing *Ghalardi Income Tax Educ. Found.* (Sic) v. *Commissioner*, Magistrate Judge Leavitt recommends that this Court follow a Tax Court Memo, *which even the I.R.S. says it does not have to follow* (See Exhibit A-5 of Defendant's Amended Reply filed on 12/22/2004) while recommending that it *disregard* and *refuse to follow* all six Supreme Court decisions as quoted above – as well as Senate Report No. 1637 and House Report No 1337.

It is again clear why Magistrate Judge Leavitt opposes oral argument. Since both he and the government avoided mentioning those Congressional Reports, how could the government avoid doing so at oral argument, if Schiff read directly from those Reports, and then asked:

(1) "Did the federal prosecutors who secured Defendant's indictment explain to the grand jury the difference between *income* in the *ordinary sense* and income in the *constitutional sense* as distinguished in these Reports?"; and (2) "In what way does the government regard income in the *constitutional sense* as being different from income in the *ordinary* sense, or does

the government claim there is no difference?"; and (3) "If there is no difference, why did those Congressional Reports make such a distinction?"

It is therefore clear that Magistrate Judge Leavitt's "Report and Recommendations" are totally biased, totally incomplete and inaccurate on a variety of grounds and should not be adopted by this Court.

WITH RESPECT TO DEFENDANT'S CLAIM THAT THIS COURT HAS NO SUBJECT MATTER JURISDICITION WITH RESPECT TO ALLEGED CRIMINAL VIOLATIONS OF TITLE 26

Defendant based his claim on the fact that Section 7402(f) of Title 26 entitled "General jurisdiction" only confers *civil* jurisdiction on district courts in connection with alleged violations of Title 26, but does not confer on such courts any *criminal* jurisdiction. It states:

> For general jurisdiction of the district courts of United States *in civil actions* involving internal revenue, see Section 1340 of Title 28 of the United States Code.

It is Defendant's contention that if Congress intended federal courts to have criminal jurisdiction, as well as civil jurisdiction, it certainly would have said so in Section 7402(f), in the same manner as it said so in connection with Title 8, as shown in 8 U.S.C. 1329, which states:

> The district courts of the United States shall have jurisdiction of all causes, civil *and criminal*, arising under any of the provisions of this Title.

In support of his contention, Defendant cited a fundamental legal principle as articulated in a number of court decisions cited by Schiff and also pointed out that this principle dated back to Roman Law: "The express reference of one thing implies the exclusion of others." ***Expressio unius est exclusio alterius.***

Schiff pointed how both in *Murphy v. Lanier,* 204 F.3d 911(2000) and International *Science & Technology Institute, Inc. v. Inacom Communication, Inc*, 106 F.3d 1146 (9th Cir. 1997); both courts held, in accordance to that principle, that:

> When in S 227(b) (3) of the TCPA, Congress authorized jurisdiction over private actions in state courts *without mentioning Federal courts*, it did not intend to grant jurisdiction over TCPA claims in Federal district courts" Id. at 1152.
>
> Because Federal court jurisdiction is limited to that conferred by Congress, the express reference to state court jurisdiction does not mean that Federal jurisdiction also exists; *instead, the failure to provide for Federal jurisdiction indicates that there is none.*

Similarly, Schiff argued, the failure of Congress "to provide for criminal jurisdiction in Section 7402(f) indicates that there is none." Is it *believable* that if Congress intended for federal courts to have criminal jurisdiction it would *not* have included such authority in Title 26? Is it *believable* that Congress simply "*forgot*" to do so? How come Congress *didn't forget* about doing so in connection with Title 8?

In any case, neither the government in its Response, nor Magistrate Judge Leavitt in his "Report," even mentions *this issue* as raised by Defendant, let alone attempt to explain why section 7402(f) *fails* to include "criminal" jurisdiction along with its grant of "civil" jurisdiction. Schiff offered an explanation, as follows:

> The fact that 26 U.S.C. 7402(f) fails to confer criminal jurisdiction on federal courts in connection with income taxes is logical and consistent with the 1954 Code, because the 1954 Code (unlike the 1939 Code) was written *to be constitutional*, and *in compliance* with all of the Supreme Court decisions cited by Schiff in his Memorandum of Law and in this Reply. Therefore, in order for the 1954 IRC to be *in compliance* with those decisions, the enforcement of income taxes could not be made mandatory, as it had been prior to the 1954 Code. That is why Congress made significant changes from what had appeared in the 1939 Code, including: (1) making sure that no provision in the 1954 Code made anyone "liable" for income taxes; and (2) defining taxable "income" in such a way that no one would have any. Why, therefore, would Congress confer on federal courts jurisdiction to criminally prosecute individuals: (1) pursuant to a tax for which it did not make anyone "liable"; and (2) in connection with "income" which it made sure that, by law, nobody could receive?

In any case, Schiff also stated in his Reply:

> Since the Government made no attempt in its Response to address any of these four claims made by Schiff with respect to this issue, *let alone challenge or refute them in any way*, Rule 8(d) of the Fed. Rules of Civ. Proc. must apply. Therefore, this Court is required to deem that the Government has admitted all four of these claims as made by Schiff on this issue.

Therefore, since the government *did not deny* Schiff's claim with respect to 7402(f), Schiff's claim on this issue must be *deemed to have been admitted by the government,* and accordingly, all counts alleging Title 26 violations must be dismissed for lack of subject matter jurisdiction, just on this ground alone. Schiff should not have to proceed any further than this with respect to this issue. However, Schiff feels that he still should address all of the false claims contained in that "Report," which, while ignoring the relevant and significant failure of Section 7401(f) to mention criminal jurisdiction, proceeds to repeat all of the government's false claims, which Schiff had already refuted in his Reply. Magistrate Judge Leavitt's "Report" states:

> Because the federal income tax laws are valid (Again, raising that straw man; Schiff never contended that federal income tax laws are **not** valid) as applied to citizens like

> Schiff, this court has jurisdiction. *See* 18 U.S.C 3231; see also *United States v. Collins*, 920 F. 2d 619, 629 1990) ("Efforts to argue that federal jurisdiction does not encompass prosecutions for federal tax evasion have been rejected as either 'silly' or 'frivolous' by a myriad of courts throughout the nation.") (citations omitted.)

18 U.S.C. 3231 states, in pertinent part as follows:

> The district courts of the United States shall have original jurisdiction, exclusive of the ` courts of the States, of all offenses against the laws of the United States.

What statute provides that alleged income tax violations constitute "offenses against the laws of the United States"? Despite his indictment (which Schiff has already established was fraudulently obtained and legally unenforceable on a variety of grounds), Schiff asks the Court to take judicial notice that nowhere in sections 7201, 7203 or 7206, those statutes that Schiff is charged with violating, is there any mention of income taxes. Nor is there any mention of "income tax crimes" in Title 18. However, Title 18 does list crimes involving: Liquor (section 1261), and tobacco taxes (section 2341 – 2344); and there is no reference to criminal penalties anywhere in subtitle A of the IR Code, nor does the Index of the Code, as published by Research Institute of America, show any entries involving income tax penalties. And it is an established rule (but apparently disregarded in connection with income tax prosecutions) that criminal statutes "must be strictly construed. " And by merely citing section 3231, this does not explain why, if Congress intended federal courts to have criminal jurisdiction with respect to Title 26, it did not include such jurisdiction in 7402(f) as it did in 8 U.S.C. 1329? And how could raising such an issue be "silly" or "frivolous" as contended in Magistrate Judge Leavitt's "Report"? That claim ***ALONE*** should be enough to discredit his entire Report.

Magistrate Judge Leavitt's attempt to attribute some relevance to *U.S. v. Collins* is totally disingenuous as Schiff pointed out in his Reply when the government made the same claim, and Schiff pointed out the following with respect to it:

> *In U.S. v Collins*, the only jurisdictional issue raised was appellant's claim that "federal criminal jurisdiction only extends to the District of Columbia, United States territorial possessions and ceded territories," and it was only with regard to that jurisdictional argument that the *Collins* court applied the terms "silly" and "frivolous." Therefore, for the Government to imply that the *Collins* court applied those terms to the jurisdictional argument raised by Schiff is totally disingenuous. The jurisdictional argument addressed in *Collins* has absolutely nothing to do with the jurisdictional argument raised by Schiff here.

The government's and Magistrate Judge Leavitt's failure to make any attempt to explain why, if Congress intended federal courts to have criminal jurisdiction over alleged Title 26 violations, it did not include such jurisdiction in Section 7402(f), at *least* provides a basis for oral

argument, since neither the government nor Magistrate Judge Leavitt provided any court decision which attempted to explain this anomaly. As the Supreme Court held in *Gould v. Gould* 245 U.S. 150 (1917): "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication … In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

Therefore, if this Court is not prepared to dismiss all counts involving alleged Title 26 violations, as it should, based on the government's failure to deny that the absence of such jurisdiction in section 7402(f) means this Court doesn't have any, then at least, it should permit oral argument on this contested issue of law.

WITH RESPECT TO DEFENDANT'S CLAIM THAT NO LAW MAKES ANYONE "LIABLE" FOR INCOME TAXES

Clearly the most egregious aspect of Magistrate Judge Leavitt's "Report" is how it dealt with the issue of "liability," as raised by Defendant and as contested by the government. The basis of Schiff's claim on this issue is that he maintained that there was simply no statute that made him "liable" for income taxes, despite the fact that there were numerous such statutes (examples of which Schiff reproduced in his briefs) that established such a "liability" with respect to numerous other federal taxes. So this issue needed to be resolved in only *one way*. Either the government could produce such a statute, or it couldn't. If it couldn't produce such a statute, Schiff wins this issue; nothing more needed to be said.

So instead of producing the statute that would immediately settle the question, both the government and Magistrate Judge Leavitt proceeded to raise essentially irrelevant arguments which were designed to circumvent and obfuscate this *simple* issue.

Relevant to this issue was Schiff's showing that: (1) the Disclosure Notice in the 1040 booklet (which Schiff previously referred to as the "Privacy Act Notice") specifically notifies the public that "Sections 6001, 6011, and 6012 say you have to file a return for **any *tax*** you are ***liable*** for"; while (2) Code Sections 6001 and 6011 both state that the payment of any federal tax is contingent upon a statute that "makes persons liable" for that federal tax. Based upon Schiff's inability to find any statute that made him "liable" for income taxes, he concluded (relying on the 1040's "Disclosure Notice," and the provisions of sections 6001 and 6011) that he was not subject to such a tax, and therefore this Court could have no subject matter

jurisdiction to prosecute him with respect to an alleged federal tax for which no statute made him "liable" and for which he was, therefore, not subject to[4]

To counter Schiff's argument that no statute made him "liable" for income taxes, the government claimed that sections 1, 61, 63, 6012 and 7203 were the IR Code sections that made Schiff (and presumably others) "liable" for income taxes. However, the government's primary focus was on Section 1, the Code section that "imposes" the income tax. For a variety of reasons (and supported by numerous Exhibits) Schiff explained why none of these Code sections could have anything to do with establishing an income tax "liability." For one thing, Code sections: 1, 61, 63, and 7203 were not mentioned in the "Disclosure and Privacy Act Notice," as contained in the 1040 Booklet. Schiff pointed out that, if these Code sections were relevant to the payment of income taxes or establishing an income tax "liability," they would have had to be included (by law) in that "Disclosure Notice," along with Code sections 6001, 6011 and 6012. However, while section 6012 is included in that "Disclosure Notice," Schiff pointed out that section 6012 could have nothing to do with making persons "liable" for income taxes for at least two reasons: (1), the word "liability" appears nowhere in that statute; and (2), Section 6012 was not added to the "Disclosure Notice" until 10 years after that Notice first appeared.

In order to illustrate the importance of a tax "liability" being contained in a some statute before one could be subject to that tax, Schiff quoted from numerous court decisions which clearly articulated that principle: "A tax is a legal imposition exclusively of statutory origin (37 Cyc.724, 725), and, naturally, liability to taxation must be read in the statute, or it does not exist," *Bente v. Bugbee* 137 A. 552, 553; 103 N. J. Law 608. "That a tax is a liability created by statute we think admits of no doubt, either upon principle or authority." *State v. Chicago & N.W.R. Co*, 112 N.W. 515, 520; 132 Wis. 345; "Moreover, even the collection of taxes should be extracted only from persons upon whom a tax liability is imposed by some statute," *Botta v. Scanlon* 288 F.2d 504, 506; "Liability for taxation must clearly appear," *Higley v. Commissioner*, 69 F.2d 160. *Obviously*, these courts were expressing a *general* legal principle that applied to <u>*all*</u> taxes and not just to the specific taxes at issue in those cases

[4] An obviously, the inability of either the government in its Response or Magistrate Judge Leavitt in his "Report" to identify any such statute, proves that Schiff was right.

However, in its Response the government claimed that the court decisions Schiff cited (to illustrate a legal principle) were "irrelevant" because they did not involve income taxes. In Reply, Schiff agreed that those cases were irrelevant, because:

> Defendant does not base his claim that this Court does not have subject matter jurisdiction based on the cases cited above. Defendant bases his claim on ***two statutes*** and the ***representations*** made to him by the Government in the Privacy Act Notice discussed above. Defendant cited court decisions merely *to confirm* that his understanding of sections 6001 and 6011 was correct, and that other courts came to the same **legal** conclusion. It is clear from sections 6001 and 6011 that Defendant is not subject to the income tax because no statute makes him "liable" for that tax…. These two statutes (and the 1040 Privacy Act Notice as discussed above) provided **all the legal authority** that Schiff should have needed to make his case…Therefore [Schiff agrees with] the government's statement …that the cited cases are irrelevant. The **only thing that is relevant** is the Government's ***failure*** to produce any statute that makes anyone "liable" for income taxes – and that is what *proves* that "no one is liable for income taxes."

In its Response, the government did not even mention sections 6001 and 6011 and how they related (or didn't relate) to Schiff's claim, nor why Schiff's reliance on the 1040's "Disclosure Notice" was either irrelevant or erroneous.

In his "Recommendation," Magistrate Judge Leavitt makes *no comment whatsoever* on the government's claim that sections 1, 61, 63, 6012 and 7203 are the statutes that make persons "liable" for income taxes. And despite the fact that neither Magistrate Judge Leavitt nor the government could identify any statute that makes anyone "liable" for income taxes, he, nevertheless, states that Schiff's argument "that this court lacks jurisdiction because no statute makes him or anyone else 'liable' for income taxes …is frivolous and does not merit discussion." Obviously the government's *counter argument* that sections 1,61, 63, 6012 and 7203 established the "liability" for income taxes also did "not merit discussion," since Magistrate Judge Leavitt declined to address that argument also. Therefore, why didn't Magistrate Judge Leavitt *also* claim that the government's (obviously absurd) counter *argument* was also "frivolous"?

Magistrate Judge Leavitt's "Report" also adopted the government's spurious argument that because those court decisions Schiff cited, to illustrate the principle that a tax "liability" must appear in some statute before a person could be said to be subject to that tax, were irrelevant because they didn't involve income taxes. The "Report" did so in the following manner: "Moreover, the cases cited by Schiff are inapposite," However, Magistrate Judge Leavitt overlooked the fact that Schiff had already stated in his Reply that he was *not basing* his claim on this issue on those cases, but on: (1) the government's failure to produce the Code

Section at issue; (2) the provisions of sections 6001 and 6011; and (3) the representations made by the government in the 1040 "Disclosure Notice" - three issues that Magistrate Judge Leavitt's "Report" totally failed to address.

Obviously concluding that he could not render a decision favorable to the government based on the government's own absurd argument that sections 1, 61, 63, 6012 and 7203 make persons "liable" for income taxes, Magistrate Judge Leavitt had to find another basis for doing so, and concluded that *Wilcox v. Commissioner,* 848 F. 2d 1007, 1008 and *Rowlee v. Commissioner* 80 T.C. 1111, 1116 - 1117 (two court decisions that the government apparently overlooked) might provide him with just such a solution.

However neither *Wilcox* nor *Rowlee* has anything to do with any contention that no statute makes anyone "liable" for income taxes. *Wilcox* had to do with a pro se appeal of a Tax Court decision in which it had dismissed Wilcox's petition. As stated in the 9th Circuit decision:

> Wilcox contends the tax court erred in dismissing his petition. He raises four allegations of error: (1) his wages are not income. (2) payment of taxes is voluntary for American citizens; (3) the tax courts imposition of burden of proof upon him violates due process, and (4) the Commissioner's failure to provide him with an administrative fact finding hearing prior to issuing the notice of deficiency violates due process. Wilcox's contentions lack merit.[5]

Obviously the issue of whether or not there was a statute making anyone liable for income taxes was not **even an issue** in this case. Therefore, Magistrate Judge Leavitt's attempt to help out the government with this case, must fail.

Rowlee involved a Tax Court decision in which Rowlee, a pro se litigant apparently challenged the deficiency and additions to the tax on eight grounds as listed and enumerated, in pertinent part, in the Tax Court decision as follows:

> First petitioner contends that Tax Court is unconstitutional because it is not created under article III of the Constitution… Second, petitioner claims that he has been wrongfully denied a jury trial… Third, petitioner claims that he was wrongfully denied discovery and a continuance of the trial for the purposes of discovery… Fourth, petitioner complains of an order that certain matters be deemed stipulated pursuant to Rule 91(f)… Fifth, petitioner complains that he was not confronted by his "accuser" whom he deems to be the District Director of Internal Revenue for the Buffalo District whose signature appears on the notice of deficiency… Sixth, Petitioner complains of allegedly prejudicially remarks made by the Court during a conference in chamber prior to trial and other alleged indicia of bias… Seventh: petitioner complains of the Court's refusal to admit into evidence an "affidavit" from a "teacher…."; and… Eight, petitioner has filed a motion after trial to correct the trial transcript.

[5] While this case has absolutely nothing to do with the issue at hand, Schiff would be prepared to argue that his first two allegations have *plenty* of merit, while also seeing some merit in his last two allegations.

Therefore, it appears that *Rowlee* did not specifically raise the issue that no statute made him "liable" for income taxes as that issue is being raised and litigated here. However, it appears, in what can only be described as dicta, that at some point Rowlee did argue that: " Taxation of the amounts paid to him in exchange for his labor is a tax on the 'source' of income and not on income itself." In that claim Rowlee was, of course, 100% correct. However the Tax Court (incorrectly) claimed that "this 'taxation on source' argument is spurious." Then the decision goes on to state that, "Similarly unworthy of extended comment is petitioner's assertion that he is not a 'person liable' for tax." However since Rowlee raised a number of valid issues (all of which were apparently rejected by the Tax Court as being either "frivolous," "spurious," or "unworthy of comment") it is unclear on what basis Rowlee claimed he was not a "person liable." However, such Tax Court decisions are not binding on anybody, including the IRS itself. And whether or not there is a statute making Defendant "liable" for income taxes does not rest upon the opinion of a Tax Court judge, but *whether or not the government can produce such a statute* – which, so far, it has not been able to do.

Obviously, the opinion of a Tax Court judge on this issue is no more authoritative or binding on this Court than is the opinion of Magistrate Judge Leavitt himself. However, since Magistrate Judge Leavitt could not find the statute at issue, he attempted to lend support to the government's case on the basis of an irrelevant Tax Court opinion (that was apparently not even briefed or seriously argued) that neither federal courts, nor the IRS itself need follow (See Exhibit A-5, of Defendant's "Amended Reply" filed Dec. 22, 2004).

Based on all of the above it is clear that Magistrate Judge Leavitt's "Report and Recommendation" was: (1) not based on law; (2) not based on the validity of Schiff's arguments; and (3) not based on the validity of the government's arguments; but simply sought to support the government's arguments (whenever it was remotely possible to do so) on any and all conceivable basis, and to even supplement the government's arguments in an attempt to make them appear more credible.

IN CONCLUSION

A trial or any hearing before a legitimate, judicial tribunal is an attempt by the court to uncover the truth in the issue before the court. But this Court already *knows the truth* in connection with this case. It *already knows* from the pleadings filed in this case, that all of the charges at issue have no basis in law. It *knows* that: (1) Defendants have not received any

income in the "constitutional sense," as decreed by Congress that can be taxable as "income"; and (2) it *already knows* there is no law making defendants "liable" for the income taxes at issue. It also knows that it has *no legal authority* to conduct this criminal trial, because: (1) the income tax, as enforced, is not "traceable" to any constitutional power given to Congress to "lay and collect taxes"; and (2) no such criminal jurisdiction was ever conferred on federal courts to conduct criminal trials based on alleged violations of the IR Code. Therefore, the entire indictment should be dismissed for these reasons, and other reasons previously stated. So what purpose would a trial serve? Its only purpose would be an attempt on the part of the Court, in collusion with the government's prosecutors, in violation of 18 U.S.C 241, to try and get defendants convicted (of crimes they could not possibly have committed), so the government will be less hampered in its illegal enforcement of income taxes, because of the efforts of the defendants to expose such illegal enforcement. In which case, any such "trial" will not be conducted in a court of law, as most Americans understand that term, it will be conducted in a Star Chamber which will be masquerading as a court in order to fool the public. The "law" will not "come from the bench," as the jury will be told, only misstatements of law will reach the jury. Since defendant has already spent four years imprisoned and four years on parole and probation for income tax crimes that didn't exist (and which he couldn't have committed even if they did exist), he is not going to pretend, like some witless dummy, that he lost eight years of his liberty due to the action of legitimate federal courts.

Based on all of the pleadings that Defendant has filed which clearly establish that this Court has no subject matter jurisdiction to conduct the criminal trial at issue on at least four grounds, Defendant respectfully requests that this Court, in the interest of Law, Truth and Justice, and to demonstrate to the American public that: (1) there are still some federal judges who take their oaths of office seriously; and (2) that the United States Constitution is still breathing – *if only a little* - that it pick one of those four grounds , and dismiss all of the criminal charges against him on that ground. If this Court were to do any less, it would be demonstrating to the world, that America's legal system and its alleged commitment to Justice and due process of law is a myth. *Fiat justitia ruat coelum*

Date: December 30, 2004 Respectfully submitted:

_____

Irwin Schiff, pro per

CERTIFICATE OF SERVICE

I certify that I have this date hand delivered a copy of the foregoing Objection to Magistrate Judge Lawrence R. Leavitt's "Report and Recommendation."

MELISSA SCHRAIBMAN
LARRY J. WSZALEK
Trial Attorneys, Tax Division
US Department of Justice
333 Las Vegas Blvd., South, Suite 5000
Las Vegas, Nevada 89101

And that I have this day mailed a copy of this Motion for an Enlargement of Time by first class mail, to the following Attorney's of record.

CHAD BOWERS, Esq.
Counsel for Defendant Cohen
3202 W. Charleston Blvd.
Las Vegas, Nevada 89102

MICHAEL CRISTALLI, Esq.
Counsel for Defendant Neun
3960 Howard Hughes Pkwy, Suit 850
Las Vegas, Nevada 89109