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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES	)	
	)	
Plaintiff	)	CR-S-04-0119-KJD-LRL
	)	
V	)	DEFENDANT SCHIFF'S REPLY
	)	TO PLAINTIFF'S CONSOLIDATED
IRWIN SCHIFF, CYNTHIA NEUN	)	RESPONSE TO SCHIFF'S MOTIONS
And LAWRENCE N. COHEN, a/k/a/	)	THAT ALL COUNTS INVOLVING
LARRY COHEN,	)	INCOME TAXES BE DISMISSED
	)	
Defendants	)	

COMES NOW, Defendant Irwin Schiff in Reply to the Government's CONSOLIDATED RESPONSE to Schiff's motions that the Court dismiss all counts in the indictment involving income taxes, since the Court lacks subject matter jurisdiction on each of the four grounds as set forth in each of the four Memoranda of Law submitted by Schiff in support of each of those motions.

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

Since the Government could not find any statute in the Internal Revenue Code (IRC) that makes anyone "liable" for income taxes, its lawyers sought to fabricate and concoct a response in which they sought to fraudulently pretend that such a *statutory* "liability" exists. To do this, they sought to pretend that the "imposition" of the income tax on "taxable income" as contained in Section 1 of the IRC (in combination with sections 61, 63, 6012 and 7203) were the statutes that combined to make persons "liable" for income taxes, as that term is *specifically* used in such places as: (1) the Privacy Act Notice in a 1040 booklet; (2) in sections 6001 and 6011 of the IRC; and (3) as that term appears throughout the IRC in connection with other federal taxes. Such a claim by the Government is so *patently fraudulent* on so *many* grounds (as the following

will show) so as to require this Court to throw out the Government's *entire* Response of October 7, 2004, because *falsus in uno falsus in omnibus.* In addition, it is well established in American jurisprudence that: "Fraud destroys the validity of everything into which it enters," *Nudd v. Burrows,* 91 U.S 426*;* "Fraud vitiates everything", *Boyce v. Grundy*, 3 Pet. 210; "Fraud vitiates the most solemn contracts, documents and *even judgments,*" *U.S. v. Throckmorton*, 98 U.S. 61. Therefore, since the Government's arguments, which seek to establish an income tax "liability" (based on such statutes) when no such *statutory* "liability" *obviously* exists, is so transparently fraudulent, that the Government's *entire Response* must be disregarded, in accordance with the fundamental legal principle cited above.

Obviously, if IRC section 1 made persons "liable" for income taxes, the Government would have put that information in the Privacy Act Notice that appears in the 1040 Booklet (reproduced as Exhibit F in Defendant's Memorandum of Law) in the same manner as they put such information in the Privacy Act Notice used in connection with the federal wagering tax, as shown in Exhibit E of that Memorandum. As pointed out in that Memorandum, bookmakers were told in their Notice that: (1) Code section 4412 made them "liable" for the federal wagering tax, and (2) they had to file a form 730 and pay the tax pursuant to Code section 4401(a). The fact that Section 1 *is not even* ***mentioned*** in the 1040 Privacy Act Notice is ***proof*** that Section 1 has nothing to do with any requirement that persons are "liable" for income taxes and/or are required to file income tax returns and pay income taxes. If Section 1 made persons "liable" for income taxes, the Government was legally bound to put such information in the 1040 Privacy Act Notice. That is what the Notice was for. Obviously, no one would know that section 1 made him or her "liable" for income taxes, since the Government didn't tell them that in the Privacy Act Notice. In that Notice the public is merely told they need ***only*** look to sections 6001, 6011, and 6012 to determine what taxes they might be "liable for."

That Notice says: " Sections 6001, 6011, and 6012 say you have to file a return for **any *tax*** you are ***liable*** for." So, here the Government advises the public they need only look to Code sections 6001, 6011, and 6012 which presumably tell them that they have to file returns (and presumably pay such taxes, though the notice does not say that either) for "**any**" federal tax they might be "liable for." However, the public is not told: (1) which federal taxes they might be "liable" for, nor (2), what statute makes them *specifically* "liable" for income taxes. The public is left to *search out* that information for themselves, including finding the statute that makes them

"liable" for income taxes.[1] If Section 1 made persons "liable" for income taxes, wouldn't it have been logical for the Government to put *that* information in the Notice, somewhat as follows: "Section 1 makes those who have received taxable income, liable for the payment of income taxes" (or words to that effect), instead of sending the public off on a *wild goose chase* looking for a statute that ***even DOJ lawyers couldn't find?*** Therefore, the Government's claim is fraudulent on its face. There is absolutely no information in the 1040 Privacy Act Notice that informs the public that Section 1 makes anyone "liable for" income taxes, or that the "imposition" of the income tax in section 1 of the IRC makes persons "liable for" that tax. The public is ***specifically told*** to ***hunt*** for the statute that makes them "liable" for income taxes – in the same manner as numerous statutes in the IRC make persons *specifically* "liable" for a variety of other federal taxes. The public isn't told to find the statute that "imposes" the income tax. They are specifically told to find the statute that makes them "liable" for income taxes. *If they can't find such a statute, then sections 6001 and 6011 put them on notice that they are not* ***required*** *to file and pay income taxes.* There is no other way that Privacy Act Notice can be read, by anyone claiming to understand the English language.

In addition, Sections 6001 and 6011 make clear that *two statutes* are necessary in connection with (1) the imposition of a tax and (2) those who are "made liable" for the tax imposed. Section 6001 states: "Every person *liable* for any tax *imposed* by this title…." (Emphasis added). If the *imposition* of a tax and being *liable* for the tax both meant the same thing, section 6001 would have read: "Every person subject to a tax imposed in this title, shall etc. etc. etc.," while Section 6011 would make no sense at all. It states, "any person *made liable* for any tax *imposed* by this title." (Emphasis added). If the imposition of a tax automatically made one *liable*, what would the words "made liable" in that sentence mean? The fraud sought to be perpetrated by the Government in claiming that the "imposition" of a tax creates the "liability" for the tax, can be seen from the fact that wagering, tobacco, alcohol, and firearms taxes are all "imposed" by some statute. Does that mean that the Defendant is "liable" for all those taxes simply because they are all "imposed"?

[1] However, they won't find the statute by checking the Index of the IRC as published by the Research Institute of America, since no such listing appears anywhere in that Index. It doesn't appear in the Index entry covering "Liability for tax" nor in the Index devoted to "Income taxes." Therefore, Defendant does not see how the Government could expect the public to find the statute that makes them "liable" for income taxes.

In addition, Exhibit A is 26 CFR 602.101 as it formerly appeared. It shows the OMB numbers assigned to the collection of information in connection with IRS regulations. Regulation 1.1-1 is entitled "Income tax on individuals" and it implements section 1 of the Code. Notice, however, that the OMB control number assigned to that regulation is 1545-0067. This is the control number that is assigned to IRS Form number 2555 (Exhibit B), which is the form for reporting "Foreign Earned Income." The OMB number assigned to the 1040, "Income Tax Return" is 1545-0074 (Exhibit C). However that OMB control number for an IRS 1040 does not even appear until Regulation 1-31-2(a), or well beyond the regulations that implement the "imposing" of income taxes. This provides additional proof that Section 1 cannot make anyone "liable" for income taxes, since the Government does not even claim that Section 1 *even applies* to the reporting of "income" on a 1040 for income tax purposes! Thus, the Government's claim that section 1 provides the statutory basis for making person's "liable" for income taxes is revealed, just on the basis of these regulations *alone,* as being totally fraudulent.[2]

In order to pretend that it is offering legitimate opposition to Defendant's claim that no statute makes Defendant "liable" for income taxes, the Government seeks to pad its response with statements that are either irrelevant or fraudulent. For example, the Government states that "Gross income" is "defined" in section 61 and "Taxable income" is defined in section 63. So what? Neither section says who is "made liable" for income taxes, and that is what is before the Court on this issue. [3] Next the Government informs us that Section 6012 provides who "must file a federal income tax return." However, nothing in section 6012 says who is "made liable" for income taxes, and that is what is before the Court on this issue. Beside, in the *original* Privacy Act Notice which first appeared in 1976, *only* sections 6001 and 6011 were mentioned, section 6012 was not included until 1986. Obviously, if section 6012 had anything to do with establishing an income tax "liability," it would have been included in the *original* Notice, *and not added some 10 years later*. So, obviously, Section 6012 can have nothing to do with establishing the statutory basis that makes persons "liable" for income taxes. Next, the

[2] Defendant does not doubt that DOJ lawyers have used this fraudulent claim hundreds of times against a hapless public, who simply would not know any better – including the lawyers who represented them.

[3] In addition, neither section actually "defines" either "Gross income" or "Taxable income" since both definitions are dependant on the meaning of "income," which is used in defining "Gross income" Since the IRC does not define "income" itself, the IRC does not, therefore, "define" either "gross" or "taxable" income. "No attempt has ever been made by Congress to define with specificity the term 'income' as it is used in the sixteenth amendment" *Conner v. U.S*, 303 F. Sup.1187, 1189. " The general term 'income' is not defined in the Internal Revenue Code," *U.S. v. Ballard*, 535 F.2d 400, 404.

Government cites section 7203 and claims: "There are criminal penalties, including potential jail time, for willfully failing to file a required tax return or pay the tax due." Notice the Government does not claim that Section 7203 necessarily applies to income taxes, only to the filing of "required" returns and the payment of a "tax due." [4] Since income taxes are not mentioned in section 7203, and since no statute "requires" anyone to file income tax returns, or "pay" such a tax, section 7203 cannot apply to income taxes. Besides, section 7203 does not state who is "made liable" for income taxes, and that is what is before the Court on this issue. [5]

Therefore, since the Government could not find a statute that makes persons "liable" for income taxes, as for example Code Sections 4401(c), 5005, and 5703(a)(1) do with respect to federal wagering taxes, liquor taxes, and tobacco taxes, it had to make up something. It did so by falsely claiming that five IRC sections, that say nothing at all about an income tax "liability," establish the statutory provision that makes persons "liable" for income taxes.

However, in citing these sections, the Government made no attempt in its Response to ***refute*** or *even* ***challenge*** Defendant's claim that sections 6001 and 6011 clearly establish that without a statute specifically making Defendant "liable" for income taxes, these statutes establish that Defendant is not subject to that tax. Therefore, applying Rule 8(d) of the Fed. Rules of Civ. Proc. the Government must be deemed to have admitted that fact.

Next the Government attempts to claim that because there are factual differences between the instant case and the various cases cited by Defendant in support of his claim on this issue, those cases cannot apply here. However, Defendant cited those cases because they all confirmed the legal principle that "liability" must clearly appear in some statute before any such "liability" can be said to exist with respect to any given federal tax. This legal principle, of course, has nothing to do with the factual issues or specific tax involved in each case. The government, therefore, makes the facetious argument that a legal principle enunciated in one court decision cannot be extrapolated and applied in another case, *unless* the underlying ***facts*** in both cases *are*

[4] Section 6012 states who "shall" file returns, not who is "required" to file them. And in that context "shall" has to be interpreted as "may", in order for that statute not to be unconstitutional because it would be in obvious violation of the 5th Amendment. Besides there is no statute in subtitle A, that states that income taxes "shall be paid." Nor is there reference to any such statute in the 1040, Privacy Act Notice. In addition the I040 Notice does not even mention a 1040 Form, let alone inform the public that anyone is "required" to file such a document. So where and how does the Government "officially" notify persons that they are "required" to file income tax returns?

[5] Defendant readily acknowledges that section 7203 has been used to criminally prosecute numerous individuals (including this Defendant) for alleged income tax violations. However this ***Reply*** proves that all those prosecutions ***were illegal.***

the same. The Government knows that such a claim is total nonsense. If it were true, the legal briefs filed by most U.S. lawyers would largely consist of blank pages.

When the 2nd Circuit in *Botta v. Scanlon* 288 F.2d 504, 506 (1961) stated: "Moreover, even the collection of taxes should be extracted only from persons upon whom a tax liability is imposed *by some statute*"(Emphasis added), the Court was obviously enunciating a legal principle that it believed applied to *all* taxes, and therefore, to the taxes at issue in that case. How could this principle *only* apply to the taxes at issue in *Botta*, but not to taxes in *other* cases?

When in *Higley v. Commissioner*, 69 F2d 160, the Court stated: "Liability for taxation must clearly appear," the Court was obviously enunciating a legal principle that it believed applied to all taxes, and therefore, to the taxes at issue in that case. How could this principle *only* apply to the taxes at issue in *Higley*, but not to taxes in *other* cases?

In *White v. Hopkins*, 51 F.2d 159 (5th Cir. 1931), the Court said:

> Appellee relies upon the following sections of the Revenue Act of 1926:
>
> "Sec. 2(a) When used in this act ... The term 'taxpayer' means any person subject to a tax imposed by this act." 26 USCA 1262(a)(9)" ...
>
> The word "subject" is given many shades of meaning by the dictionaries, among which are "actually placed or brought under," "exposed to," **"made liable."** See Webster's Standard and New Century Dictionaries, verbo "subject." The Revenue Act imposes taxes upon different classes of persons, but, except by requiring returns, *does not subject any particular individual to the tax*. (Emphasis added).

In this case, the Court was trying to determine what the word "subject" meant in that statute, and was led to two dictionaries which indicated that the words "made liable" might "subject" persons to a tax. It concluded that the mere *imposition* of a tax "does not subject any particular individual to the tax." This *alone* refutes the Government's claim that by "imposing" the income tax in section 1, persons are automatically "made liable" or made "subject" to the income tax. The *White* court *also* noted that merely requiring the filing of a return also "does not subject any particular individual to the tax." This *also* refutes the Government's claim that section 6012, which only relates to who "shall file" can make persons "liable" for income taxes or "subject" them to such a tax. Therefore, what the *White* court enunciated in this decision were legal principles that Defendant believes apply to *all* taxing statutes, and not just to the particular tax at issue in that case, as the Government would have this Court believe.

In *Fine v. United States*, 206 F. Supp. 520, the Court noted: "The Government is correct

when it states that the statute imposes the tax upon 'articles sold at retail.'" However, the *Fine* court went on to note that, "**Liability for the payment of the tax must be placed on a person**." Then the Court went on to say, among other things:

> Having determined that the plaintiffs are not persons **liable for the tax** within the meaning of the statutes, we now consider the right and authority of the Commissioner to **impose liability** by assessment upon persons who are not **made liable** for the tax by the statute.
>
> In this case we have a much narrower question -- the question of whether or not the Commissioner may make an assessment for unpaid taxes upon those who are not **made liable** for the tax by the taxing statute. (Emphasis added throughout).

What the *Fine* court was obviously attempting to do is state *certain legal principles* – the Commissioner may not make assessment for unpaid taxes "upon those who are not **made liable** for the tax by the taxing statutes" – and that principle must apply to <u>*all taxes*</u> in general, and not just **to the taxes at issue in the *Fine* case**. What the *Fine* Court was doing was applying those taxing principles to the taxes at issue in that case. But those principles should obviously be applied by <u>*all*</u> courts in connection with <u>all</u> taxes at issue before that court.

In *Drake v. U.S. ,* 355 F. Supp. 710, the court noted that "Section 4401 imposes an excise tax on 'wagers as defined in section 4421." The court further noted that Section 4401(c) "designates the persons liable for the tax…" Therefore the *Drake* court recognized that section 4401 did two things: it (1) imposed the tax, and (2) designated the persons made "liable" for the tax. Therefore the Court found in Drake's favor, because it found that Drake performed none of the duties that made him "liable" for the tax, notwithstanding that the tax had been "imposed."

Again, the *Drake* court found in favor of Drake by applying the obvious principle that one cannot owe a tax unless they are "made liable" for the tax by some statute, and this principle obviously applies to all taxes regardless of the specific tax at issue. And by citing *Drake*, Defendant was claiming that the **principle** applied by that Court had to be applied to the Defendant in this case.

The *Drake* court cited *United States v. Calamaro,* 354 U.S. 351 which the Government also seeks to claim is not relevant because the taxes at issue in both cases are different. **However, the principle at issue is the same.** In *Calamaro,* the Supreme Court noted that the: " Provisions [under section 3291] simply provide that one **liable** for any tax imposed by the statute must register etc. etc. etc…" The Court further observed that Treas. Reg. 132 par

325.41, Example 2 (26 CFR, 1957 Cum. Pocket Supp.) provided that: "'a secretary and bookkeeper' of one 'engaged in the business of accepting horse bets' are **not liable** for the occupational tax" while "those who 'receive wagers by telephone' are **so liable**." (Emphasis added). The point is, the Supreme Court affirmed the appellate court's reversal of Calamaro's conviction and fine of $1,000 because it concluded he was not made "liable" for the tax by the statutes imposing the wagering tax. Since Schiff was **also** not "made liable" for the income tax imposed in section 1, he is not subject to the income tax **on the same basis** as the Supreme Court applied to Calamaro.

Another case where this same principle was enunciated and applied is in *Bente v. Bugbee* 137 A. 552, 553, 103 N. J. Law 608 . In that case the court held:

> 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.*** (Emphasis added).

In *State v. Chicago & N.W.R. Co*., 112 N.W. 515, 520; 132 Wis. 345, quoting and adopting the definition in *State v. Certain Lands in Redwood County*, 42 N.W. 473, 40 Minn. 512, the court held:

> That a tax is *a liability created by statute* we think admits of no doubt, either upon principle or authority. (Emphasis added)[6]

Therefore, all of the above cases enunciated and applied the *same,* self-evident tax principle that "liability" for a tax must clearly appear in some statute or it does not exist. This principle must obviously apply to all taxes, and not just to the taxes at issue in each of the decisions cited above.

In any case, 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. And both statutes (to which the Privacy Act Notice directed him to) say that *only* persons "***liable*** for any tax imposed by this title" or "any person ***made liable*** for

[6] However, *Bente v. Bugbee, State v. Chicago & N.W.R. Co*., and *State v. Certain Lands in Redwood County* were not cited in Defendant's Memorandum of Law.

any tax imposed by this title" need "make returns" and "comply with such rules and regulations" which "show whether or not such person is liable for tax under this title." Clearly, since no statute makes Defendant Schiff "liable" for income taxes within the meaning and provisions of these statutes, it was unnecessary for Schiff to cite **any** court decision in support of his claim that neither he, nor anyone else, is subject to the income 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.[7]

In addition, Schiff bases his claim that no law makes him "liable" for the payment of income taxes on the fact that Congress never passed a statute establishing such a "liability," even though it did so with respect to a variety of other federal taxes as were extensively shown and quoted in Defendant's Memorandum of Law. One such obvious example was section 4401, which, as Schiff pointed out, states: "Each person who is engaged in the business of accepting wagers shall be liable for and *shall pay* the tax under this subchapter." (Emphasis added). Schiff even pointed out that section 1461, which relates to the withholding of income tax from foreign nationals, provided that: "Every person required to deduct and withhold any tax under this chapter is hereby *made liable* for such tax and is hereby indemnified etc. etc. etc."

In its Response the Government failed to explain why, if the IRC contains specific statutory provisions making persons "liable" for a variety of other federal taxes, why doesn't the IRC provide a similar provision in connection with income taxes?

Therefore, the Government's last statement in this segment (Page 6, lines 8 & 9) that "Therefore, the cited cases are irrelevant to defendant's Schiff's argument that no one is liable for income taxes," is, indeed, correct. Defendant Schiff agrees with that statement. 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." However, what those cases *do prove* (and for which they *are* "relevant") is that the

[7] However, Defendant has discovered that law in America is based on the assumption that, in general, judges cannot apply a law unless they are supplied with numerous other decisions showing how other judges interpreted and applied the same law. (It seems to Defendant that if a judge cannot figure out what a statute means from the wording of the statute itself, than the statute has to be declared "void for vagueness." If a judge cannot figure out what a statute means from the wording of the statute itself, how is the public supposed to know what it means?) Sections 6001 and 6011 are quite clear: pursuant to both statutes the income tax cannot apply to Schiff (nor anyone else for that matter), unless a statute specifically makes them "liable" for that tax – a condition that both statutes establish as a condition precedent before anyone can be subject to a federal tax. Therefore, based on the clear wording of these two statutes, all the court decisions cited by Schiff *were* superfluous, but Schiff was compelled to cite them, since this is how law is practiced in the United States.

Government's claim that Sections 1, 61, 63, 6012, and 7203 combine to make persons "liable" for income taxes, is a blatant fabrication. And what the Government's Response also proves, is:

1) There is no law that makes anyone "liable" for income taxes, since the Government was unable to produce any such law.

2) Justice Department lawyers will make whatever fraudulent and facetious claims are necessary in order to rationalize, justify, and support their lawless and criminal enforcement of the federal income "tax."

Therefore, based upon the Government failure to challenge let alone refute, Defendant's claim that :

1) The provisions of Code sections 6001 and 6011 establish that Defendant is not subject to the income tax; and

2) The Government's failure to produce a statute that makes this Defendant (or anyone else) liable for federal income taxes;

clearly establish that this Court can have no subject matter jurisdiction to conduct a criminal prosecution against this Defendant in connection with an alleged federal tax to which he is not subject, and for which **no statute** makes him, or anyone else, "liable."

II
WITH RESPECT TO THE GOVERNMENT'S RESPONSE TO DEFENDANT'S CLAIM THAT HIS INDICTMENT WAS SECURED BY FRAUD

Schiff's claim of fraud was based on his claim 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 IRC. As Schiff stated in his Memorandum:

> 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."

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.

The Government begins its alleged refutation of Defendant's claim by stating:

> Defendant Schiff argues …that the constitutional sense of the term "income" only includes corporate profit. This is untrue; 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)

Thus, it can be seen that the Government's penchant for making false and fraudulent statements continues unabated. If "gross income," means what the Government says it means, how would the receipt of such items constitute the receipt of *income* in the "constitutional sense," as opposed to *income* received in the "ordinary sense"? The Government does not explain how it distinguishes between the *two* kinds of "income". It didn't do so because it ***never*** makes such a distinction. For over 40 years the Justice Department has prosecuted people and seized property on the basis of "income" that such persons – ***by law*** - *never received*. The Government even claimed in its Response that "wages received for services are taxable as income." Obviously, the receipt of wages constitutes "income" received in its "ordinary sense." On what basis would "wages" constitute "income" received in its "constitutional sense"? It is therefore clear that the Justice Department prosecutes people and seizes property on the basis of people receiving "income" in the "ordinary sense," and not on their receiving income in the "constitutional sense," ***as provided in Section 61*** of the IRC, which was *re*written (from how "income" appeared in the 1939 IRC) in order **to *comply* with those Congressional Reports**.

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" [8] 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 a corporation receives "rents," section 61 does not impose an income tax on that "rent." 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.* If a corporation does not show a "profit", it pays no income taxes, *regardless* of how much "income" it receives. If it pays any income taxes *at all*, it will be based on the **amount** of its "profit," *not* on the **amount** of its "income." [9] Since section 61 does not define "income" one way for corporations, and another way for individuals, whatever "income" means with respect to corporations has to apply *equally* to individuals. Therefore, since individuals, for a variety of economic and accounting reasons, do not generate "profits," section 61 does not make anything an individual earns subject to the income tax.

Therefore, the Government's claim that section 61 puts a tax on those "sources" of income, which it listed, **is *a false claim***. 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 a decision that has never been reversed or overruled and is still binding on this Court.[10] In that decision the Supreme Court held that a tax imposed on income derived from real estate and personal property had to be "apportioned" or the tax was unconstitutional. The Court *specifically held* that a tax **on rent** was unconstitutional unless apportioned, while an income tax imposed directly on wages, dividends, and interest would also have to be apportioned, since such a tax would represent a tax on the income from

[8] Since the *Pollock* Court **specifically ruled** (as covered further on) in a ruling that has never been reversed or overruled) 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.*

[9] The Government simply calls "profit" "taxable income" in order to confuse the public as to what is made taxable under the law, as the Justice Department lawyers are trying to do here.

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

personal property. [11] Wages are derived by a worker selling his labor, (his personal property) for money; dividends and interest are derived from personal property, the corporate stock and the money in the bank that generated the dividends and the interest. However, an income tax imposed on corporate profit is not imposed on either rent or on other forms of property, since the tax falls on the corporation's *profit*, without any *consideration* as to what *sources* of income produced that profit, or any portion of it.

Since the *Pollock* Court ruled that income taxes levied on rent and income from personal property were unconstitutional unless apportioned, and since the *Brushaber* Court ruled that: "The (16th) Amendment contains nothing repudiating or challenging the ruling in the *Pollock* case," the *Pollock* decision is still "good law" today (see footnote 10), which this Court is *bound* by its oath-of-office to follow. This means, that if this Court were to help the Government enforce an income tax levied directly on rent and wages (and on various other "sources" of income which the Government's Response admits to doing), such an enforcement, as shown above, is *unquestionably* unconstitutional and therefore illegal, and therefore this Court would be *knowingly* cooperating with the Government in its **admitted *illegal* enforcement** of the income tax.

Since the *Brushaber* Court affirmed the *Pollock* Court's holding that a tax on the income of personal property had to be apportioned in order for it to be constitutional, the *Brushaber* Court had to design **a different *form*** of "income" that could be *directly* taxed without being unconstitutional pursuant to its *Pollock* decision. It did that when it held (on page 17) that: "The whole purpose of the (16th) Amendment was to relieve all income taxes when imposed from apportionment from a *consideration of the source* whence the income was derived." Therefore, as stated in Defendant's Memorandum:

> The "whole purpose" of the 16th Amendment was not to amend the Constitution but "to relieve all income taxes when imposed *from apportionment* from a consideration of the source whence the income was derived." Therefore, in order to be "relieved" from the constitutional requirement of "apportionment," a tax on "income," cannot take into "consideration" the "sources" from which "the income is derived." Therefore, an "income tax," based on the 16th Amendment, must be imposed in a manner in which the "sources" that produced the "income" (such as commissions, dividends, wages, interest, rents) are not "considered" and are thus not directly taxed. This occurs only when the "sources" of income (i.e. such as fees, commissions,

[11] In its Response, the Justice Department claims section 61 allows it to put an income tax on "wages" and "rents" even though the *Pollock* Court specifically held that an income tax on rent had to be apportioned, and "wages" represent "income" from personal property, a person's labor. See *Butcher's Union v. Cresent*, 111 U.S. 746 (1884). Therefore, the Justice Department *openly admits* that it enforces the income tax in violation of law.

> dividends, interest, etc…) are funneled through a corporate profit-and-loss statement and emerge either as a "profit" or a "loss." If they emerge as a profit, a tax on that "profit" (as was made taxable in the Corporate Excise Tax Act of 1909) would not be a tax on the "sources" that produced the profit but would only on be a tax on the profit itself. Thus the "sources" that produced the profit would not have been "considered" and would not have been directly taxed.

Therefore, what section 61 purports to tax is "income," which means a "gain or a profit" "derived from," or generated ***by***, those sources listed in section 61. It does not purport to impose an income tax on those listed "sources" themselves. Unless those listed "sources," generate a "profit," none of the income generated by those "sources" would be taxed. [12]

In its Response the Government fraudulently seeks to suggest that section 61 makes the specific items listed in Section 61 directly subject to the income tax. That is exactly what U.S. attorneys told the grand jury in order to secure Defendant's indictment. However, all such representations made to the grand jury ***were lies*** – as those U.S. attorneys had to know, as shown by their willingness to make the same fraudulent representations in their Response, despite Defendant having clarified these distinctions for them in his Memorandum.

In order for the Government to advance its fraudulent representations on this issue, its lawyers had to misrepresent Schiff's position with respect to section 61. They did so 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 Schiff's claim was *obviously* incorrect "because 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. An income tax levied directly on those "sources" of income would constitute a tax on "income" received in the "ordinary sense," not on income received in the "constitutional sense," and would be unconstitutional pursuant to the *Pollock* decision, as confirmed by those House and Senate Reports.

[12] However, while corporate profit can constitute "Gross income" within the meaning of section 61, the IRC does not make corporations "liable" for a tax on their profit. . In order to make corporate profit taxable, the Government would have to impose the tax either on the basis of: (1) apportionment, or (2) as a uniform excise tax; and the present law does neither.

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***. Schiff only brought its claim to the attention of *this* Court. "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 that distinguish between "income" in the "constitutional sense" and "income" in the "ordinary sense"; a distinction that the DOJ lawlessly refuses to even acknowledge, let alone make, as shown by its Response.

Schiff's Memorandum pointed out that the Supreme Court could not have stated this principle **more clearly** then it did in its 1921 decision, *Merchant's Loan & Trust Co v. Smietanka,* 255 U.S. 509, in which it stated, on pages 518-519:

> 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.

Since Schiff's Memorandum claimed that: (1) what was made taxable under the Corporation Excise Tax of 1909 was corporate profit, and (2) if income "in all of the Income Tax Acts of Congress" means the *same thing,* then (3) "income" in our revenue laws has to mean "corporate profit." If Schiff misinterpreted or misstated what the Supreme Court held in *Merchant's,* why didn't the Government contest that claim in its Response? It didn't do so, because the Government's lawyers knew that Schiff's claim was accurate and irrefutable.

Schiff further confirmed that this was indeed what "income" under our revenue laws means, by supplying the Government with *additional* quotations from the following Supreme Court decisions: *Stratton's Independence v. Howbert*, 231 U.S. 399, 414; *Southern Pacific v. Lowe*, 247 U.S. 330 (1918); and *Burnet v. Harmel*, 287 U.S.103, (1932), none of which the Government contested. Since the Government cited *Bowers v. Kerbaugh-Empire Co.*, 271 U.S. 170, 174 (1926) on page 3 of its Response, Schiff will again quote from his Memorandum, showing that the *Bowers* Court confirmed that "income" in our revenue laws means the same thing as what the term "income" meant in the Corporation Excise Tax Act of 1909.

> 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 <u>*to mean the same thing*</u> as used in the Corporation Excise Tax Act of 1909, in the Sixteenth Amendment and in the <u>*various revenue acts subsequently passed.*</u>
> (Emphasis added)

While openly admitting in its Response that it illegally taxes rent and wages (as shown above), it has the nerve to cite *Brushaber v. Union Pacific RR*. along with *Commissioner v. Glenshaw Glass Co*, 348 U.S. 426 (1955) as allegedly establishing that it obeys *current* law in its enforcement of the income tax. One would think the Government would be *too embarrassed* to even *mention Brushaber*, since Defendant had already shown in his Memorandum of Law how the Government enforces the income tax in *total violation* of that decision. The Government does not enforce the income tax as: (1) the excise tax the *Brushaber* Court held it to be, nor (2) does it enforce the tax without a "*consideration of the source* whence the income was derived," which, as the *Brushaber* Court ruled, was "the whole purpose" of the 16th Amendment. In fact, the IRS (in league with the courts and the DOJ) imposes the tax *directly* on those sources, in blatant violation of the *Brushaber* decision, and the statutes in the1954 IRC, which were modified from what they were in the 1939 IRC, so that the 1954 IRC would be in *compliance* with the *Brushaber* decision.

In citing *Glenshaw Glass,* the Government admits to enforcing the income tax based on the provisions of 1939 Code and not on the provisions of the 1954 Code. As stated in the *Glenshaw* decision: "The common question is whether money received as exemplary damages…must be reported by a taxpayer as gross income under Sec. 22(a) of the Internal Revenue Code of 1939." So that decision was based on section 22 of the 1939 Code, and not on section 61 of the 1954 Code, which is the statute at issue here. And as Defendant has already established, unlike section 22 of the 1939 Code, the only thing that can fall within the wording of section 61 of the 1954 Code is corporate profit. In addition, the issues before the *Glenshaw* Court concerned whether income received in the form of punitive damages by two separate corporations "must be reported as gross income." Since the controversy in that case involved corporate "income" and not "income" received by *individuals*, the corporations in that case could not complain of, nor raise the issue, that they were being wrongfully taxed on "income" they received in the "ordinary sense," and not on "income" they received in the "constitutional sense" – which is what is at issue here. And indeed, such a "complaint" or issue: (1) was never raised in that case; (2) the *Glenshaw* Court was never briefed on any such issue, and (3) nor is their anything in the *Glenshaw* decision that seeks to explain the difference between "income" received in the "constitutional sense" and "income" received in the "ordinary sense," or how such a distinction applied, or didn't apply, to the issues involved in that litigation. In addition, there is nothing in

the *Glenshaw* decision that refutes, in any way, Defendant's claim that the DOJ lawyers who secured Defendant's indictment did so only because they fraudulently misled the grand jury into believing that "income" received in the "ordinary sense" was made taxable under our *current* revenue laws, contrary to its meaning as stated in those Congressional Reports and section 61.

In addition, there is nothing in the *Glenshaw* decision that states that federal courts are free to disregard such Supreme Court decisions as: *Pollock v. Farmers' Loan & Trust Co, Brushaber v. Union Pacific RR, Stanton v. Baltic Mining, Eisner v. Macomber, Merchant's Loan & Trust Co v. Smietanka, Stratton's Independence v. Howbert, Southern Pacific v. Lowe, Bowers v. Kerbaugh-Empire Co., Burnet v. Harmel,* and *Doyle v. Mitchell Bros,* all of which have a bearing on the issues before this Court. Therefore, *Glenshaw Glass,* on a variety of grounds, is totally irrelevant to what is at issue here.

Therefore, instead of attempting to refute Defendant's claim on this issue in any material way, the Government sought to avoid the issue by citing irrelevant lower court decision in which this issue was never addressed and which are of no consequence anyway.[13] However, as an indication of just how misleading, irrelevant, and erroneous were the lower court decisions cited by the Government, Defendant will address them. In *Funk v. Commissioner*, 687 F. 2d 264, the 8th Circuit said, among other things, that Funk's claim that "compensation for labor is not constitutionally subject to the federal income tax is without merit." However, as shown by all of the excerpts from the Supreme Court cases cited above, Funk was dead right, and the 8th Circuit was dead wrong. One of the cases cited by the 8th Circuit in support of its *Funk* decision was *United States v. Francisco*, 614 F.2d 617. In that decision the 8th Circuit stated:

> Francisco's challenge is premised upon two theories: (1) the income tax is an indirect tax; and (2) income received in exchange for labor or services is not income within the meaning of the Sixteenth Amendment.
>
> The cases cited by Francisco clearly establish that the income tax is a direct tax, thus refuting the argument based upon his first theory. See *Brushaber v., Union Pacific RR,* …(the purpose of the Sixteenth Amendment was to take the income tax "out of the class of excises, duties and imposts and place it in the class of direct taxes").

As is more fully shown on page 21, the 8th Circuit totally misstated what the *Brushaber* Court actually said. The *Brushaber* Court had stated that the *purpose* of the 16th Amendment

[13] Since the IRS maintains that they are not bound by decisions other than Supreme Court decisions and can "nonacquiesce" to lower court decisions and refuse to apply them to other cases, how can such lower court decisions be binding on Defendant? If the IRS is not bound by lower court decisions, neither is Defendant.

was "***to prevent***" taking the income tax out of the class of excises duties and imposts the class "to which it inherently belongs" and transferring it to the class of direct taxes, a class "in which it cannot be placed *consistent with the requirements of the Constitution."* The 8th Circuit left out the words "to prevent" and in so doing *completely reversed* what the *Brushaber* Court had said. So , as in *Funk,* Francisco was dead right, and the 8th Circuit, was dead wrong. [14]

Next the Justice Department cites *United States v. Letcher*, 83 F. Supp. 367, 383, where the following comment appears on page 383: "While the defendant contends that his tax was assessed on 'excise income,' there is no support for that proposition." Schiff, of course, never made such a claim. If anything, he argued that the income tax was (illegally) *not imposed* as an excise. So Letcher's "contention" has *absolutely* no bearing on anything that is in "contention" in this case. Since the Government cannot refute Schiff's *actual* "contentions" on this issue (which are based on bedrock, Supreme Court decisions, Congressional Reports, and the provisions of 28 U.S.C 61), the Government was compelled to pad its Response with a totally irrelevant comment by a district court judge which has no legal or factual bearing on anything Schiff has ever alleged to this Court, nor on the issue of whether or not the Government's lawyers engaged in the fraud alleged by Schiff before the grand jury.

Since the Government, **in no way**, addressed, Defendant's claim on this issue (let alone sought to refute it), that the Government secured Defendant's indictment by fraudulently misleading the grand jury concerning the legal meaning of income, as distinguished and reflected in Senate Report No. 1637 and House Report No 1337, 83rd Congress, 2nd Session, (and which the Government actually *confirmed* by its false representation of what section 61 made taxable); then, pursuant to the provisions of Fed. Rule Civ. Proc. 8(d), Schiff's charge on this issue must be deemed by this Court to have been "admitted" by the Government.

III
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 their Response the DOJ lawyers state:

> The Constitution originally required that direct taxes be apportioned among the states in accordance with their respective populations …However, the Constitution was amended [by the 16th Amendment] in 1913 to remove any requirement of apportionment for income taxes,

[14] Defendant analyzes this case more fully on pages 265-268 of his book ***The Great Income Tax Hoax*** (Freedom Books, 1985) under the caption, "Standing The Law On Its Head."

> regardless of the source of the income …Therefore, since the passage of the Sixteenth Amendment, it is immaterial as to whether an income tax is considered to be a direct or indirect tax; Congress has the power to impose a tax on income from any source without apportionment.

The fact that DOJ lawyers could make such a claim in their Response, despite the fact that Defendant had already provided them with ample proof from *Brushaber* and other Supreme Court decisions that revealed that such a claim was not true, provides ample proof that "truth" plays no role *whatsoever* in pleadings prepared by DOJ lawyers. As the following will show, what the Supreme Court actually ruled in regard to the 16th Amendment was that: (1) the Amendment did not amend the Constitution; (2) the Amendment gave the Government no new taxing power; (3) despite the Amendment, Congress' power to levy taxes was still *limited* by the limitations placed on its taxing powers by the original Constitution; (4) an income tax (to be constitutional) had to be imposed as an indirect, *excise* tax, on "income" *separated* from its sources; and (4) any such proposition as suggested by the Government in its Response, as quoted above, the *Brushaber* Court pointed out:

> If acceded to, would cause *one provision* of the Constitution *to destroy another*: that is, they would result in bringing the provisions of the Amendment exempting a direct tax from apportionment into *irreconcilable conflict* with the general requirement that all direct taxes be apportioned. Moreover, the tax authorized by the Amendment, being direct, would not come under the rule of uniformity applicable under the Constitution to other than direct taxes, and thus it would come to pass that the result of the Amendment would be to authorize a particular direct tax not subject either to apportionment or to the rule of uniformity…This result …would *create radical and destructive changes* in our constitutional system and *multiply confusion*. (Emphasis added)

And further, on page 17:

> The contention that the Amendment treats a tax on income as a direct tax although it is relieved from apportionment and is necessarily therefore not subject to the rule of uniformity as such rule only applies to taxes which are not direct, thus destroying the two great classifications which have been recognized and enforced from the beginning, *is also wholly without foundation*

Therefore, despite the fact that the DOJ lawyers who prepared the Government's Response, already knew (since the above quotations were in Defendant's original Memorandum of Law) that the Supreme Court in *Brushaber* had already *rejected* that argument, because such a proposition would: (1) "cause one provision of the Constitution to destroy another"; (2) "would create radical and destructive changes in our constitutional system and multiply confusion"; and (3) that "the contention that the Amendment treats a tax on income as a direct tax although it is

relieved from apportionment ….is wholly without foundation," ***THEY MADE THE ARGUMENT ANYWAY!*** Therefore, it is unnecessary for this Defendant to refute the Government's contention as stated above, since the *Brushaber* Court has *already done so* - in language that is far more eloquent, persuasive, and binding on this Court than anything this Defendant could have put together.

But in the interest of demonstrating the extent to which DOJ lawyers deliberately pervert the truth in order to prosecute individuals in violation of law, the following represents additional facts which those lawyers also *knew to be true,* and which they also *knew* contradicted *everything* they claimed in their Response as quoted above.

The Supreme Court stated in the *Brushaber* decision that the "whole purpose" of the 16th Amendment was not to "amend" the Constitution but that its "Whole purpose …was to relieve all income taxes when imposed from apportionment from a consideration of the sources whence the income was derived." Therefore, that Court pointed out that the Constitution was **not amended** to give Congress the power to tax "income" without apportionment. It held that if an income tax were imposed as an *excise tax* on income *separated* from its sources – it could legally tax such "income" without apportionment (as provided in the 16th Amendment), and it was only *on that basis* that the *Brushaber* Court ruled that an income tax could be imposed "without apportionment" and without being in conflict with the *Pollock* decision.

To do this, the *Brushaber* Court held that a tax on income was inherently an "excise tax" "entitled to be enforced as such" (as opposed to being regarded as a direct tax, as it held in the 1895 *Pollock* decision), and as it was regarded during the Civil War, when an income tax was imposed as an "internal duty." So the claim by the Government that it is "immaterial as to whether an income tax is considered to be a direct or indirect tax" is to *deliberately misrepresent* what the Supreme Court held in the *Brushaber* and subsequent supporting decisions. The *Brushaber* Court held that a tax on income could ***only*** be constitutional (and not be in conflict with its former *Pollock* decision) if it were imposed as an excise tax. The following quotations from the *Brushaber* and subsequent Supreme Court decisions *cannot make this fact any clearer*.

> 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,* Pages 16 & 17, Emphasis added)

> 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, emphasis added)

> 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* , Emphasis added)

So, here are three quotations from the *Brushaber* decision, which clearly show that Court held that an income tax was "in its nature an **excise tax** entitled to be enforced as such." And while the Government claims that it is "immaterial as to whether an income tax is considered to be a direct or indirect tax," the *Brushaber* Court *specifically* held: (1) an income tax to be an "excise tax, and (2) that it could not "be placed" in the category of being a direct tax "consistent with the requirements of the Constitution." So it *is* "material" whether the income tax is imposed as a "direct or indirect tax," and if it weren't "material," the *Brushaber* Court would not have made these distinctions. Therefore, the Government's *deliberate misrepresentation* of the *Brushaber* decision (since these quotations were included in Defendant's Memorandum of Law), demonstrate that the Government's lawyers are not litigating in good faith, and are making representations to this Court they know ***are false.*** Therefore, they are clearly in violation of the provisions of Rule 11 and warrant Rule 11 sanctions being imposed upon them.

The fact that the *Brushaber* Court ruled that, notwithstanding the 16th Amendment, an income tax had to be imposed as an excise tax is further verified by this clear-cut holding from *Stanton v. Baltic Mining, 240 US 103 (1915)* which held, in pertinent part:

> 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. (At page 112, Emphasis added.)

So *Stanton* provides further confirmation that "the 16th Amendment conferred no new power of taxation" (such as the power to levy a direct tax without apportionment), and that the income tax was held to be an excise tax in which "*the sources* from which the income was derived" were *not* to be "considered" and thus *not directly taxed, as the Government is now doing.*

Thus, any claim by the Government that the 16th Amendment gave the Government a new taxing power, such as the power to levy a direct tax without apportionment, is further

refuted by the following holding from the definitive Supreme Court case, *Eisner v. Macomber* 252 US 189 (1920), which held:

> 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.* (At page 205, emphasis added.)
>
> 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. (And wages and dividends are personal property.) This limitation still has an appropriate and important function, and is not to be overridden by Congress or *disregarded by the courts.* (Page 206, emphasis added.)

So, the Supreme Court in *Eisner* held that Congress' power to tax income "must be construed" in terms of the limitations placed on its powers "before the Amendment was adopted," and that the 16th "Amendment shall not be extended ….so as to repeal or modify…those provisions of the Constitution that require an apportionment…for direct taxes upon [income from] property, real and personal," and that these "limitations on its taxing powers shall not be overridden by Congress and disregarded by the Courts." Congress sought to comply with this injunction, when it adopted the 1954 IRC. It rewrote and eliminated statutes that were contained in the 1939 IRC, so that the statutes in the 1954 Code would not "override its taxing powers," in conformity with the *Eisner* decision. However, as shown in the Government's Response and in this Reply, both the federal judiciary and the Justice Department have *misrepresented, misapplied***,** and *ignored* **those** changes, as they "overrode" and "disregarded" those "limitations" placed on Congress' taxing powers, in open defiance of the above holding in *Eisner* and in open defiance of all of the Supreme Court decisions as quoted above, as well as the provisions of 26 U.S.C 61 and those House and Senate Reports.

The Government sought to bolster its fraudulent Response with court decisions, which were either irrelevant or misrepresented. It boldly states, that the *Brushaber* Court "held that the federal income tax is constitutional" (Schiff never claimed that it wasn't) and that it "extensively analyzed and upheld the constitutionality of the federal income tax." What the Government left out is that the *Brushaber* Court did so, *only* because it held that an income tax could be constitutionally levied as: (1) an excise tax, and (2) on "income" in which the sources of that income would not be "considered" and thus not directly taxed; which is *not* how the Government enforces the income tax today. Of course, the Government knew this from

Defendant's Memorandum, but disregarded it, so it could put these misleading statements in its Response.

Then the Government states: "In *Tyee Realty Co. v. Anderson*, 240 U.S. 115 (1916) the Supreme Court held that the *Brushaber* decision 'considered and adversely disposed of' contentions that the federal income tax exceeds the power of taxation included in the Sixteenth Amendment.'" However, Schiff never "contended" *anywhere* in this litigation that he believed that the statutes imposing the federal income tax "exceed the power of taxation included in the Sixteenth Amendment." What Schiff has been contending in this litigation is that the income tax is being (illegally) extracted in **violation** of those statutes which were written so that the tax *would not* be extracted in a manner that would "exceed the power of taxation included in the Amendment." But getting back to *Tyee*, the reason the Supreme Court made the statement referred to was because the plaintiff in that case argued that the income tax was "void as an attempt to levy a direct tax without apportionment." The Supreme Court had already rejected that argument by ruling, in *Brushaber,* that the 16th Amendment provided for an excise tax which did not require apportionment, and therefore, the income tax was not "void" on the basis claimed by Tyee. Therefore, the Supreme Court declined to even address that issue here, and stated in its one page decision: "We need now not enter into an original consideration of the merits of these contentions because each and all of them were considered and adversely disposed of in *Brushaber*…(and)…That case is here absolutely controlling." Therefore, the Government's citing of *Tyee,* like its citing of *Letcher,* is totally irrelevant. If anything, it supports Defendant's position, not the Government's. It also demonstrates that since the Government could find nothing of any legal substance with which to contest Defendant's claim on this issue, it was compelled to pad its Response with court decisions that were totally irrelevant and unresponsive to what Schiff was contending on this issue.

Next, it cites *Bowers v. Kerbough-Empire Co*, 271 U.S. 170 (1926) as holding that "The Supreme Court reiterated the constitutional basis for Congress' power to impose taxes on income." However as shown on page 15 herein, the *Bowers* Court ruled that "'Income' has been taken *to mean the same thing* as used in the Corporation Excise Tax Act of 1909". So *Bowers* confirms that the "power" the Government speaks about, is only the "power" to tax "income" (without apportionment) when it is received in the form of corporate profit. So *Bowers*

supports the Defendant, not the Government, and would indicate that DOJ lawyers fail to even read the decisions they cite.

The Government also cites the 9th Circuit decision *In re Becraft*, 885 F.2d 547, because in that decision the 9th Circuit stated that the, "Sixteenth Amendment's authorization of a non-apportioned direct 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." Schiff' s Memorandum pointed out that he was willing to attribute this *totally erroneous* 9th Circuits holding, on the basis that:

> Apparently the 9th Circuit was led into error because it was not supplied with the research furnished to this Court in this Memorandum, if it had, it would have obviously reached a different conclusion. In addition, it should also be noted that the Defendant/Appellant in that case raised other issues not contained here. It could be that these other issues contributed to the Court's error. It should also be noted that the only Supreme Court case mentioned in *In re Becraft* was the *Brushaber* decision, and certainly that decision does not support the conclusion reached in *In re Becraft.* On the contrary, the *Brushaber* Court held that the conclusion reached by the 9th Circuit in that decision "is ….wholly without foundation" and "if acceded to … would *create radical and destructive changes* in our constitutional system and *multiply confusion*." In any case, this Court took an oath "to support the Constitution" as was interpreted for it by the Supreme Court decisions quoted and cited above. It never took an oath to support erroneous and contrary decisions handed down by lower Courts as represented by *In re Becraft.*

The 9th Circuit made this claim despite the fact that the *Brushaber* Court: (1) repeated over and over again that it was holding an income tax to be an excise tax; and (2) that holding an income tax to be a direct tax would be to "transfer it to a class into which *it cannot be placed consistent with the requirements of the Constitution."* Thus the 9th Circuit's holding in *In re Beacraft* would be tantamount to the Supreme Court having repeatedly stated in a decision that "the earth is round," and the 9th Circuit claiming that what it had stated in that decision was that "the earth is flat." In the final analysis, the 9th Circuit decision in *In re Becraft* is no more valid than was the 8th Circuits decision in *United States v. Francisco,* as referred to on page 17.

Next, the Government cites *United States v. Sibla,* 624 F., 2d 864, in which a "*pro se* defendant filed pleadings contesting the validity of the federal income tax." Schiff has never contested "the validity of the federal income tax" and did not do so here. Schiff has consistently contended that the laws encompassing the federal income tax are totally "valid." His contention has always been that the Government does not enforce the tax in conformity with those laws, as the Government's instant Response obviously confirms.

Next, the Government cites *Lovell v. United States,* 755 F. 2d. 517, as if it could validly challenge all of the Supreme Court decisions Schiff offered in support of his position on this

issue. In any case, the 7th Circuit stated in this case, "Plaintiff's contend that the Constitution prohibits imposition of a direct tax without apportionment. They are wrong." Oh contraire, the plaintiffs were dead right, and the 7th Circuit was dead wrong, as is clearly demonstrated in all of the quotations excerpted from those decisions and reproduced in this Reply.

Next the Government cites *Parker v. C.I.R.*, 724 F.2d 469, another erroneous, lower court decision that is not binding on either the IRS or Defendant. In any case, the 5th Circuit stated in that decision that the claim of that pro se litigant, that, "'The IRS and the government in general, including the judiciary, mistakenly interpret the sixteenth amendment as allowing a direct tax on property (wages, salaries, commissions, etc.) without apportionment.'" Therefore, Parker hit the nail *squarely* ***on the head.*** In allegedly refuting that claim, the 5th Circuit said: "As we observed in *Lansdale v. CIR*, 661 F.2d 71 (5th Cir. 1981), the sixteenth amendment was enacted for the express purpose of providing for a direct income tax." So, here the 5th Circuit totally misrepresents what the Supreme Court held in *Brushaber, Eisner, Stanton*, while also disregarding the *Pollock* decision, which has never been reversed. .

Therefore, the *Lovell* and *Parker* decisions, like *Francisco* and *In re Beacraft*, merely reveal how lower court decisions are totally at variance with: (1) what the Supreme Court actually held in connection with the 16th Amendment, and (2) what it held that the Government can lawfully tax as "income." In any case, the Government cannot contest Schiff's contention on this issue, which is based entirely on quotations from Supreme Court decisions as contained herein, unless it can show that: (1) Schiff has misquoted those decisions, or (2) they have been overturned by other Supreme Court decisions – and in its Response, the Government has done neither. The Government cannot contest Schiff's claim on this issue merely on the basis of lower court decisions which *clearly* misconstrue what the Supreme Court held in those decisions.

As Defendant pointed out in his original Memorandum, the Supreme Court held in *United States v. Hill*, 123 U.S. 681, 8 S. Ct. 308, 31 L. Ed. 275 (1887), "The term 'revenue law' when used in connection with the jurisdiction of the courts of the United States, means …a law which is <u>*directly traceable*</u> to the power granted to Congress by 8, Art. I of the Constitution, 'to lay and collect taxes duties, imposts, and excises.'"[15] Therefore, in order for this Court to have

[15] This principle was also stated by the 9th Circuit in *People v. Bruce*, 129 F.2d 431 (1942) at page 434

subject matter jurisdiction to prosecute this Defendant (and the other defendants) for alleged income tax offenses, the income tax at issue has to be "directly traceable" to the taxing powers granted to Congress by Article 1, Section 8, clause 1 of the Constitution "to lay and collect taxes, duties, imposts, and excises." "Taxes" as used in that clause means "direct taxes," while "duties, imposts, and excises" refers to Congress' power to levy "indirect taxes." As was specifically pointed out in the *Brushaber* decision, 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. (Emphasis added)

However, as shown by all of the Supreme Court decisions shown and quoted above, and by the Government's Response, the income tax is not imposed pursuant to either rule. It is not imposed as the excise tax the *Brushaber* Court ruled it to be, nor is it imposed as an apportioned direct tax. So, the income tax is not "directly traceable" to any power "granted to Congress" by Article 1, Section 8, Clause 1, of the Constitution to "lay and collect taxes, duties, imposts, and excises." Based upon the numerous holdings of the Supreme Court, as quoted above, the Supreme Court clearly ruled that the 16th Amendment did not give Congress *a <u>new</u> taxing power* that would free it from the limitations placed upon its powers to "lay and collect taxes, duties, imposts, and excises" as identified by the *Brushaber* Court, as quoted above. Defendant would *again* remind the Court of the crystal clear message that the *Eisner* Court sent to all federal judges (as is more fully quoted above).

> (1) Congress' power to tax "must be construed in connection with the taxing clauses in the <u>*original*</u> Constitution," and such powers as Congress now has, must be "construed" in terms of whatever powers it had "<u>*before the Amendment was adopted.*</u>"
>
> 2) "The 16th Amendment shall not be extended …so as to repeal or modify…those provisions of the Constitution that require an apportionment …for direct taxes upon property real and personal… (and) …This limitation …is not to be overridden by Congress or ***disregarded*** by the courts."

Therefore, the 16th Amendment cannot be <u>*considered*</u> by any federal court seeking to determine Congress' *current* taxing powers, since any such determination has to *be* "<u>*construed*</u>" only in terms of the taxing powers contained "in the original Constitution."

WHEREFORE, since nothing in the Government's Response has refuted, challenged, or contradicted, anything alleged in Defendant's Memorandum of Law in support of his motion on this issue; THEREFORE, pursuant to the Supreme Court's Ruling in *United States v. Hill*, supra (and just plain common sense) this Court cannot have subject matter jurisdiction to prosecute this Defendant (nor any of the other defendants) in connection with an alleged tax that is not "directly traceable" to any of the powers granted to Congress in the (original) Constitution "to lay and collect taxes, duties, imposts, and excises." THEREFORE, all criminal charges in the indictment involving income taxes (Counts 1-31) must be dismissed.

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

In Defendant's Memorandum of Law on this issue, Defendant pointed out, among other things, that Section 7402(f) of Title 26 entitled "General jurisdiction" only confers *civil* jurisdiction on district courts in connection with alleged Title 26 violations, but does not confer *criminal* jurisdiction on them, since 7402(f) 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. (Emphasis added)

It was Defendant's contention that if Congress intended federal courts to have criminal jurisdiction as well as civil jurisdiction, it certainly would have included that in Section 7402(f), in the same manner as Congress conferred both civil and criminal jurisdiction on district courts in 8 U.S.C. 1329, which states, in pertinent part:

> 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. (Emphasis added)

In support of his contention Defendant cited a fundamental legal principle as articulated in Murphy *v. Lanier,* 204 F.3d 911(2000); *International Science & Technology Institute, Inc. v. Inacom Communication, Inc*, 106 F.3d 1146 (9th Cir. 1997); *EireNet*, 156 F. 3d at 516-17; *Foxall Realty,* 156 F. 3d at 435; *Nicholson,* 136 F. 3d at 1288-89; and *Chair King*, 131 F. 3d at 510-11.

In *Murphy v. Lanier,* this legal principle was expressed, in pertinent part, as follows:

> A provision that suits "may" be brought in (state) court "cannot confer jurisdiction on unmentioned courts of limited jurisdiction. which require a *specific grant."* Id. at 1151. Because Federal courts may hear only those cases specifically

> authorized by Congress, and because the statute does not specifically state that a Federal district court may hear a claim under the TCPA, the Fourth Circuit concluded that the language of the statute showed 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.

Then the *Murphy* court, adopting the reasoning of the 9th Circuit, went on to quote the following from the *International Science & Technology* decision.

> The conclusion that there is no Federal jurisdiction over private actions under the TCPA does not hang on the meaning of the word "may," but on the statute's silence on the matter of Federal jurisdiction. 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.*

All of the decisions Defendant relied upon merely affirmed a legal principle that extends all the way to back to Roman law. "The Express mention of one thing implies the exclusion of others." ***Expressio unius est exclusio alterius.***

The Government attempts to refute Schiff's claim on this issue, on the basis of an eight line response based solely on two lower court decisions, neither of which *even addresses* this issue: *United States v. Przybyla*, 737 F. 2d 828, and *United States v. Collins*, 920 F.2d 619.

In *Przybyla* the court stated:

> Appellant argues the district court has jurisdiction only of prosecutions under Title 18, and not of prosecutions under Title 26. The language of 18 U.S.C. 3231 is not limited. It grants district courts jurisdiction 'of all offenses against the laws of the United States.' Appellant argues, that according to the Reviser's notes, section 3231 was intended to effect no change in substance in prior sections that has explicitly granted jurisdiction only over Title 18 offense. This language was broadened in the Reviser's notes, however, refers only to the House Bill. A Senate amendment to the 1948 revision broadened this section to include all crimes against the United States.[16]

However, the only jurisdictional issue raised in *Przybyla* was that 18 U.S.C 3231 only provided for criminal prosecutions for crimes listed in Title 18. He did not raise the jurisdictional issue posed by: (1) the utter failure of Section 7402(f) *to provide for criminal jurisdiction* with respect to Title 26, while (2) certainly giving no indication that such jurisdiction was to be found in 18 U.S.C. 3231, as such issues were raised by Defendant.

[16] Defendant, in addition to the other issues he raised, raised this issue too. However, since Defendant was not aware of the Senate amendment referred to, he will not press this specific issue.

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.

In addition to raising the issue as described above, Schiff also argued the following in connection with this issue.

> When it is pointed out to the Justice Department that Congress never gave Federal courts criminal jurisdiction with respect to alleged criminal violations of Title 26, (as shown above) the Justice Department will attempt to fabricate such jurisdiction (in violation of the principle discussed above) by claiming that such jurisdiction is conferred in 18 USC 3231. The bogus nature of such a claim is obvious. Apart from being directly contrary to the principle enunciated in all of the cases cited above, the government, obviously, cannot charge defendants with violating one Title, but claim its jurisdiction to do so lies in another Title – which is not even cited in the instant indictments as being somehow related to the court's jurisdiction with respect to the alleged Title 26 violations. If Congress intended district courts to have criminal jurisdiction with respect to alleged Title 26 violations, they would have included such authority in 26 U.S.C 7402(f) in the same manner as they included it in 8 U.S.C. 1329. In addition, the Supreme Court ruled in *Gould v. Gould* 245 U.S. 150 (1917) that:
>
> > In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen.

Defendant requests this court take Judicial Notice that neither *Przybyla* nor *Collins* addressed, let alone refuted, any of the following claims made by Schiff with respect to this issue, which were that: (1) the failure of Section 7402(f) to confer criminal jurisdiction on 18 U.S.C 3231 or any other statute *meant that federal courts were never given any such jurisdiction by Congress*; and (2) the legal principal expressed in *Murphy v. Lanier*, supra, International *Science & Technology Institute, Inc. v. Inacom Communication, Inc*, supra, and the other cases he cited *supported Schiff's claim* on this issue; (3) the Government could not charge Defendant with violating one Title, but claim its jurisdiction to do so lies in *another* Title – which is not even cited or mentioned in the indictment at issue; and (4) if Congress intended district courts to have criminal jurisdiction with respect to alleged Title 26 violations, *it would have included such jurisdiction* in 26 U.S.C 7402(f) *in the same manner as they included it in 8 U.S.C. 1329.*

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.

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?

Therefore, in addition to all of the other grounds covered in this Reply as to why this Court is without subject matter jurisdiction on various grounds and with respect to various counts, this Court cannot be deemed to have criminal jurisdiction with respect to counts 2 through 31, since 26 U.S.C. 7402(f) only confers civil jurisdiction on federal courts with respect to Title 26 and does not confer on them criminal jurisdiction.

V

ADDITIONAL IRRELEVANT ARGUMENTS RAISED BY THE GOVERNMENT

Since the Government could not find any arguments of legal substance with which to contest any of the above four issues as raised by Schiff, it was compelled to *further* pad its "consolidated response" with a two page peroration of Schiff's court battles, as if these irrelevant observations might somehow influence the Court to overlook the fact that the Government had not refuted Schiff's four contentions on *any* basis. In furtherance of this ploy, the Government observed, "Unfortunately, defendant was not deterred by the sanctions, nor by his criminal convictions for tax offenses in 1981 and again in 1985, nor by the time he spent in federal prison as a result of his tax offenses." Quoting from a 2nd Circuit opinion, the Government also

observed, "It (is) inconceivable that he was unaware of his obligation to file returns and pay taxes." Based on the material covered in Schiff's Reply, not only is such a situation "conceivable," but also, as his Reply clearly establishes, all such "sanctions" and "criminal convictions" were illegally engineered, illegally imposed, and illegally affirmed.

WHEREFORE, PREMISES CONSIDERED, it is clear that this Honorable Court can have no subject matter jurisdiction to prosecute this Defendant (and all other defendants) in connection with any count involving the federal income tax, and that all such counts must be dismissed because:

1) No statute makes Defendant (or anyone else) "liable" for income taxes.
2) The income tax is not "directly traceable" to any of Congress' constitutional powers, as contained in the original Constitution, to "lay and collect taxes, duties, imposts, and excises";
3) The indictments were secured by fraud; by the Government fraudulently misleading the grand jury as to the legal meaning of "income" and such illegal meaning was also fraudulently used wherever the term "income" appears in the indictment; and
4) Section 7402(f) fails to confer jurisdiction on this Honorable Court to conduct criminal trials in connection with alleged criminal violations of Title 26.

Dated: November 23 , 2004 Respectfully submitted

ORAL ARGUMENT REQUESTED Irwin A Schiff, pro per

CERTIFICATE OF SERVICE

I certify that I have this date hand delivered a copy of the foregoing "Schiff's Reply to the Government's Consolidated Response to Defendant Schiff's Motions to Dismiss" to

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And that I have this day mailed a copy of the forgoing by first class mail, to the following Attorney's of record.

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