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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES Plaintiff V IRWIN SCHIFF, CYNTHIA NEUN Ans LAWRENCE N. COHEN, a/k/a/ LARRY COHEN, individually and All doing business as FREEDOM BOOKS, www.livetaxfree.com, www.paynoincometax.com www.ischiff.com, Defendants	CASE NO: CV - S-03-0281-LDG-RJJ DEFENDANTS' ANSWER TO THE GOVERNMENT'S RESPONSE THAT THE COURT RECONSIDER ITS ORDER GRANTING THE GOVERFNMENT A PRELIMINARY INJUNCTION

In its Response the Government states that a motion to reconsider under Fed. R. Civ. P. 60(b) –"should be predicated on identified grounds such as mistake, newly discovered evidence or fraud." Another reason, defendants suggest, is that "the judgment is void" which is what the Court's Order of June 16, 2003 is, as the following will show.

In preparing its fraudulent Response, the government falsely states, "Schiff identifies none of the above. Instead, in a motion brimming with *ad hominem attacks* on the Court, Schiff re-raises two arguments that the Court rejected in its June 27, 2003 Order: that the Court lacks jurisdiction, and that the income tax is unconstitutional because it does not fall within any of the Constitutions taxing clauses." Here the government presents as "two arguments" only <u>one</u> of those arguments Schiff made in his Motion for Reconsideration. It does so in order to avoid having to address one of those arguments, which Schiff will shortly get to.

But the fraud sought to be perpetrated by the government's "two argument" ploy is that allegedly 1) Schiff claims that the income tax is unconstitutional, 2) the income tax does fall within the taxing clauses of the Constitution, and 3) these claims constitute "two arguments," when, in fact, they only constituted "one" argument as the following will show.

First of all Schiff never claimed that the federal income tax is unconstitutional. Schiff agrees that the alleged tax is not imposed unconstitutionally[1] – it would only be imposed "unconstitutionally" if the law: 1) made its payment mandatory, 2) provided a provision making persons "liable" for the tax, and 3) provided provisions which would make it impossible for individuals to avoid paying the tax. But since there is no provision in the Internal Revenue Code making anyone "liable" for the tax, or requiring that such a tax be "levied, collected and paid" (as provided in Section 11 of the 1939 Code and in all prior revenue laws, but removed from the 1954 Code) the payment of income taxes is obviously voluntary. Even the mission statement of the IRS (as published in the Federal Register on March 29, 1974) admits that the income tax is based on "voluntary compliance." Therefore, why would Schiff claim that a *voluntary* "tax," which he is not required to pay, is unconstitutional?[2]

What Schiff did claim was that for a federal tax to be <u>mandatory</u> – and for this Court to have subject matter jurisdiction with respect to issuing injunctions with respect to it (according to *United States v. Hill*, 123 U.S. 681) - the tax's imposition would have to be "traceable" to one or more of the taxing clauses in the Constitution that confer on Congress the power to "lay and collect taxes." Schiff proved that the income tax is not "traceable" to any of those clauses – proof that this Court obdurately and illegally refuses to acknowledge, even though it is overwhelming and irrefutable. So both of Schiff's alleged "two arguments" on this issue were actually "one argument," which the government falsely represented as being "two" arguments, in order to avoid having to address Schiff's "second" argument.

Schiff's second argument – which the government failed to mention (let alone address) in its Response - involved Schiff's motion that the Court strike down all of the government's

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[1] However all of his books prove that the tax is "enforced" illegally, in violation of the laws as currently contained in the Internal Revenue Code and numerous provisions of the Constitution, which is why the government – with the illegal held of this Court - is seeking to keep such information out of the hands of the public.

[2] And defendant has elected not to "volunteer," which is one of the reasons he hasn't paid income taxes for over 10 years though he has filed a tax return in each of those years reporting "zero" income. Defendant can legally report "zero" income because, though he received "income" in an "ordinary sense" during those years, he received no "income" in the "constitutional sense" which is the only type of "income" that the 1954 Code makes "taxable" - as further discussed below.

pleadings (including its motion for injunctive relief) because they were all obviously based on fraud. The fraud sought to be perpetrated by the government in all of its pleadings was its attempt to pass off the term "income" as if it meant income received in the "ordinary sense" when, under the law, it means income received in a "constitutional sense," which is something entirely different from income received in the "ordinary sense." As shown in House Report No 1337 and Senate Report No 1622 (as referenced in footnote 11 in *C.I.R. v. Glenshaw Glass*, 348 U.S. 426) "income," as used in the 1954 Code means "income" received in a "constitutional sense." In both of these congressional reports – as both the Court and the government well know - Congress decreed that "income" as used in the 16th Amendment and Section 61 of the 1954 Code, means "income" received in the "constitutional sense." It is clear that income in its "constitutional sense" cannot mean the same thing as income in its "ordinary sense." However, in all of its pleadings – including its motion for injunctive relief – the government fraudulently used the term "income" in its "ordinary sense," and not in its "constitutional sense."

It is also clear that as a result of the 16th Amendment the Supreme Court fashioned a new meaning for the word "income." a meaning it never had before the Amendment was passed. And that new meaning was the direct result of the following holding of the Supreme Court as shown on page 17 of the *Brushaber* decision.

> It is clear on the face of this text (the 16th Amendment) that it does not *purport to confer power to levy income taxes in a generic sense – an authority already possessed* and never questioned – or to limit and distinguish between one kind of income taxes and another, but that the *whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the sources whence the income was derived.*

Thus it is clear from just this one passage from the bedrock, *Brushaber* decision, that the purpose of the 16th Amendment was not to give the government a new power to tax income, an "authority already possessed," but its "whole purpose" was to provide for a tax on income which would be imposed without a "consideration of the sources whence the income was derived." In other words, without taxing the sources (such as wages, dividends, interest, fees, commissions etc. etc. etc.) that produced the income. Thus, as the result of the 16th Amendment, the *Brushaber* court fashioned a *new meaning* for the term "income," a meaning that the word never had before. The Supreme Court held that the term "income" as used in the 16th Amendment meant "income separated from its sources," and it did not mean "income" as defined in any

dictionary – as the government used that term in all of the pleadings it filed in this case. This "new meaning" was clearly defined by the Supreme Court in *Merchant's Loan & Trust Co. v. Smientanka,* 255 U.S. 509 (1921) at pages 518 and 519 wherein the Court stated as follows:

> There would seem to be no room to doubt that 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 what that meaning is has now become definitely settled by decisions of this court.

Therefore, "income," as used in all of the revenue laws, is synonymous with corporate profit, because in taxing corporate profit the "sources" themselves are not "considered" and thus are not taxed, in conformity with the principle laid down by the *Brushaber* court as quoted above. Proof of this (if further proof is even necessary) is shown by the fact that a corporation can have a billion dollars of income, but if it does not have a profit, it pays no income taxes on any of the "sources" that generated that "income" for the corporation. It would only pay an "income" tax on the "profit" those sources might have generated. Therefore the "constitutional meaning" of income is clear: it is synonymous with "corporate profit."

And this is precisely the "constitutional meaning" of "income" as referred to in House Report No. 1337 and Senate Report No. 1622 and as referred to in footnote 11, of *C.I.R. v. Glenshow Glass Co,* 348 U.S. 426.[3]

Therefore when the government said that the Court "disposed" of this argument, how did it dispose of it? It did so in the following manner: " THE COURT HEREBY ORDERS that Schiff's motion to strike (is) DENIED." That is how the court "disposed" of Schiff's motion. It didn't address it in any way. It simply ignored all of the pleadings that both Schiff and the government filed in connection with this issue. To say that the Court "disposed" of Schiff's motion without providing any statements of fact and conclusions of law would be an understatement. If other courts "disposed" of motions in a similar fashion, then no court would ever have to spend more than one line addressing and "disposing" of any motion presented to it.

It is clear that not only didn't the Court address this issue, but also this Court <u>*adopted the very fraud*</u>, which Schiff complained of, in his Motion to Strike. Since no one can have income

[3] Since *Glenshaw Glass* was a decision involving Section 22 of the 1939 Code, the decision itself is irrelevant to this litigation, since this litigation involves Section 61 of the 1954 Code and substantial changes were made concerning the meaning of "income" as that term is used in the 1954 Code and how the term was used in the 1939 Code. In adopting the 1954 Code both houses of Congress indicated that "income" as used in the 1954 Code, meant "income" in its "constitutional sense," which is obviously not the same thing as "income" in its "ordinary sense."

in a "constitutional sense" all of the Court's prohibitions directed against Schiff and the other defendants (as contained in paragraph VI, pages 33 and 34 of its Order of June 16 as analyzed below) are all based on the *fraudulent assumption* that "income," as used in the Internal Revenue Code, is used in its "ordinary sense" – which is contrary to the meaning given to it by House Report No. 1337 and Senate Report No. 1622, which this Court *was fully aware of* before it issued its Preliminary Injunction.

Since it is patently *impossible* for any individual to receive "income" in a "constitutional sense" within the meaning of House Report 1337 and Senate Report No. 1622; it is, therefore:

1) *Patently impossible* for defendants to market or sell "a plan or arrangement" that would enable anyone to "evade the assessment or collection" of a federal income tax concerning income not received in a "constitutional sense."

2) *Patently impossible* for defendants to market or sell "a plan or arrangement" that would enable anyone to "exclude" income not received in a "constitutional sense."

3) *Patently impossible* for defendants to assist anyone in preparing documents relating to an understatement (and hence an "understatement of tax liability") in connection with income not received in a "constitutional sense."

4) *Patently impossible* for defendants to encourage taxpayers – on *any* basis- to unlawfully evade taxes on "income" *not received* in a "constitutional sense."

   a) *Patently impossible* for defendants to take an "unlawful position" that persons are not required to pay income taxes on "income" *not received* in the "constitutional sense," in accordance with House Report No. 1337 and Senate Report No. 1622.

   b) Obviously, Congress would not have passed a law that would be inconsistent with House Report No. 1337 and Senate Report No. 1622. Since both Reports preclude any individual from receiving income in a "constitutional sense," Congress would not have passed a law requiring individuals to pay a tax on "income" that Congress itself precluded anyone from receiving. Since the laws in the 1954 Code are consistent, obviously the payment of income tax must be voluntary; otherwise the provisions of Title 26 *would be in conflict with each other*.

c) Obviously there is no law requiring anyone to pay income taxes, since, again, Congress would not have passed a law requiring individuals to pay a tax on "income" that Congress itself (in House Report No. 1337 and Senate Report No. 1622) precluded anyone from receiving. Since the laws in the 1954 Code are consistent with each other, obviously, Congress would not passed a law requiring individuals to pay a tax on "income" the law itself precluded them from receiving.

d) Incredibly, in its provision (5) the Court actually seeks to enjoin defendants from correctly explaining to the public the meaning of House Report No. 1337 and Senate Report No. 1622. Since "income" in a "constitutional sense," as explained above, is synonymous with corporate profit – this Court would actually enjoin defendants from explaining this to the American public. Therefore, the fraud the Court seeks to perpetrate in its Order of June 16, 2003 simply knows no bounds. If this Court thinks that such fraud will go unnoticed, the Court is mistaken. The fraud this Court seeks to perpetrate and the violence it does to the Bill of Rights and 200 years of American tradition will be easily recognized by the American public for what it is, and, if it is not reversed, it will follow this Court to its grave and beyond.

e) Of course, it is legal "to report zero income" for income tax purposes, because no one can receive "income" in the "constitutional sense."

f) And for this Court to enjoin Schiff from advertising his "services as a witness at trial or a brief writer" is incredulous. Since Schiff has a right to testify at trial or to help prepare trial briefs, why can't he advertise his willingness to do so? Apart from tossing the 1st Amendment out the window, this Court would also seek to toss the 5th Amendment out of the same window by depriving Schiff of his right to make a living, without the *due process of law* as provided in the 5th Amendment.

Since provisions 5 through 11 are no more lawful or *rational* as provisions 1-4 as discussed above, defendant will not waste any more time analyzing these provisions further.

Since the payment of income tax is indeed voluntary for a variety of reasons, one of them being that no individual receives "income" in a "constitutional sense," there is no way that Schiff and the other defendants could have possibly misled the public concerning a form of "income" they never received. Indeed, Schiff's "zero" income tax return (and claim for refund) was largely based on House Report No. 1337 and Senate Report No. 1622 - while the government criminally extracts income taxes from the American public contrary to those Reports. And since the Court's entire Order of June 16, 2003 is based on its claim that income as used in the 1954 Code is "income" received in the "ordinary sense" the Court's entire Order of June 16th is based on fraud from beginning to end and is void just on this ground alone. And this has nothing to do as to why it is void on *other grounds*, such as its blatant disregard of the 1st Amendment as extensively and irrefutably argued by the ACLU in its Amicus briefs to this Court.

II
ADDING FRAUD ON TOP OF FRAUD THE COURT'S CLAIM THAT THE 16TH AMENDMENT AUTHORIZED CONGRESS TO IMPOSE A "NON-APPORTIONED DIRECT INCOME TAX" IS TOTALLY WITHOUT FOUNDATION

The other issue raised in Defendant's Motion for Reconsideration (apart from the issue discussed above, and other issues based on First and Fifth 5th Amendment violations) was based on the Supreme Court's holding in *United States v. Hill*, 123 U.S. 681, 8 S. Ct.308, 31 L.Ed. 275 (1887) which held, "The term 'revenue law' when used in connection with the jurisdiction of the court's of the United States, means …a law which is *directly traceable* to the power granted to Congress by 8, Art. I of the Constitution, 'to lay and collect taxes duties, imposts, and excises'"; a principle that was specifically reiterated by the 9th Circuit in *People v. Bruce,* 129 F.2d 431 (1942) at page 424.

This was the "argument" that the government stated in its Response that the Court "disposed of" in it June 27, Order and that, "the Government will not debunk in this response." Well how did the government "debunk" defendants' argument that the income tax does not fall into any of the Constitution's three taxing clauses and how did the Court "dispose" of it. Both the government and the Court held that the 16th Amendment authorized Congress to impose a a "non-apportioned direct income tax on United States citizens." So the government "debunked" defendants' claim, and the Court "deposed of it" by totally ignoring what *every* Supreme Court decision said about the matter.

How valid, therefore, is the claim made by both the Court and the government that the 16th Amendment authorized the imposition of an income tax as a *direct*, non-apportioned tax? Let us now examine the *truthfulness* and validity of such a claim.

Defendant pointed out to both the government and this Court that there are only three clauses in the Constitution granting Congress the power to "lay and collect duties, imposts, and excises," as follows:

> The Constitution confers on Congress the power to "lay and collect taxes" in three clauses. Clauses 2 and 4 of Article 1, Sections 2 and 9 confer power on Congress to impose direct taxes. While Section 8, Clause 1 of Article 1 mentions the "taxes" authorized in Sections 2 and 9, it goes on to confer power on Congress to impose indirect taxes, identified in that clause as "duties, imposts and excises." The Constitution further provides that all direct taxes must be imposed pursuant to the rule of *apportionment*, while indirect taxes must be imposed pursuant to the rule of *geographic uniformity*.

Therefore, it is clear that before this Court could have subject matter jurisdiction to issue any injunctive relief with respect to income taxes, the government would have to correctly identify for this Court into which of the three clauses, as identified above, it claims the income tax falls. It obviously must fall into one or more of these clauses or it is not "*traceable* to the power granted to Congress by 8, Art. I of the Constitution, 'to lay and collect taxes duties, imposts, and excises'"

The government in its initial Response to Defendants' Motion to Dismiss based on defendants' claim that the income does not fall into any of the Constitutions three taxing clauses, stated that the 16th Amendment authorized Congress to impose "a non-apportioned direct income tax on United States citizens residing in the United States." And this was the exact position taken by this Court in its Order of June 26, 2003. So it is the position of this Court that the 16th Amendment:

1) Authorized Congress to impose a **direct** tax on income.
2) Authorized Congress to impose the **direct** tax *without apportionment* as required by Article 1, Sections 2 and 9, Clauses 3 and 4 of the original Constitution.
3) Gave Congress a *new* power that it never had before, that would allow it to circumvent the apportionment provisions of the Constitution as contained in the two clauses identified above.

Let us, therefore, examine what the Supreme Court said about the matter, to see if the

Court's position (as stated above) accurately reflects that opinion, and the way the Supreme Court held the 16th Amendment impacted on Congress' power to tax income.

While both the government and the Court cited *Brushaber v. Union Pacific* RR, 240 U.S.1 as an authority for their claim, both the government and the Court set the *Brushaber* decision *squarely on its head* – since what the Supreme Court held in *Brushaber* is *just the opposite* of what the government and this Court contended. The *Brushaber* court held that the 16th Amendment established the income tax as an *indirect* excise tax which could only be constitutionally imposed on income "separated from its source" and that an income tax imposed directly on sources of income (such as wages, dividends, interest, etc. etc. etc.) would still have to be apportioned as held by the Supreme Court in *Pollock v. Farmers Loan and Trust,* 158 U.S. 601. The *Pollock* court held that an income tax imposed directly on "sources" of income, such as wages, dividends, interests, (as opposed to income "separated" from such sources, as occurs in a profit and loss statement) is subject to apportionment – and declared the Income Tax of 1894 unconstitutional for want of apportionment. Since the Pollock decision has never been reversed or repealed *it is still binding on this Court*. In other words, an income tax in which the "sources" are "considered" and *taxed* is still subject to the rule of apportionment, and this constitutional requirement was not modified, changed or overruled *in any way* by the 16th Amendment, as the following will show.

Indeed, the *Brushaber* court ruled the 16th Amendment was designed *to prevent just what the government and this Court contend*; which was to prevent an income tax from being taken out of the category of an indirect tax, a class to which it "inherently belonged" and being placing in the category of a direct tax "a class into which it *cannot be placed* consistent with the requirements of the Constitution."

Indeed, defendant pointed out in his Memorandum in support of his Motion to Reconsider that the Supreme Court specifically held in *Brushaber* that a tax on income was an *excise* tax, *not a direct* tax as the government and this Court contend. The *Brushaber* court *clearly held that:*

> The Pollock Case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but on the contrary recognized the fact that taxation on income *was in its nature an excise tax entitled to be enforced as such* …indeed it was expressly declared that no dispute was made upon the subject and attention was called to the fact that taxes on such income had been sustained as *excise taxes in the past*

(*Brushaber*, p 16-17 emphasis added)

And further the *Brushaber* court noted, in again stating an income tax is an *excise* tax:

> 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* consistently with the requirements of the Constitution. (Emphasis added)

Defendant went on to show how the clear-cut holding by the *Brushaber* court that an income tax was "in its nature an excise tax entitled to be enforced as such" was further clarified and supported by the Supreme Court in *Stanton v. Baltic Mining*, 240 US 103 (1915) as follows:

> 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" (Emphasis added)

And further:

> This must be unless it can be said that although the Constitution as a result in express terms excludes the criterion of source of income yet remains 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* consistently with the requirements of the Constitution. Indeed from another point of view, the Amendment demonstrates that no such purpose was intended and on the contrary shows that it was drawn with the object of *maintaining the limitations of the Constitution* and harmonizing their operation. (*Brushaber* p.19, emphasis added)

So here the *Brushaber* court states that the purpose of the 16th Amendment was to *prevent* an income tax from being taken *out of the classification of excises* taxes and enforced as a direct tax, "a class in which it cannot be placed," because such an event would "destroy the classifications of the Constitution" and "no such purpose was intended" So here the *Brushaber* court not only identifies an income tax as being an *excise tax* (subject only to the rule of uniformity), but points out that any other classification (as the government and this Court seeks to claim) would "destroy" the tax classifications contained in the Constitution and "no such purpose was intended" by the 16th Amendment.

Reading further from *Brushaber*, we find:

> Again the situation is aptly illustrated by the various acts taxing income derived from property of every kind and nature, which were enacted beginning in 1861 and lasting 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 <u>*that character*</u>. …And this *practical construction* came in theory to be the *accepted one* since it was adopted without dissent by the most eminent of text writers (*Brushaber* at page 14).

So here ***<u>AGAIN</u>*** the *Brushaber* court <u>points</u> out that historically income taxes were regarded as <u>*excise*</u> *taxes* in the past.

In speaking of the Tax Act of 1894 the *Brushaber* court said, in pertinent part, (at pages 14-15):

> The constitutionality validity of this law was challenged on the ground that it did not fall within the class of excises duties and imposts, but was direct in the constitutional sense and therefore void for want of apportionment…in *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429, 158 U.S. 601. The court, fully recognizing in the passage we have previously quoted the *all-embracing character of the two great classifications* including, on the one hand, *direct* taxes subject to *apportionment*, and the other, *excises* duties and imposts subject to *uniformity*…As this conclusion but enforced regulation as to the mode of exercising power under particular circumstances, it did not in any way dispute the *all-embracing taxing authority possessed by Congress* (again reiterating that Congress did not need the 16th Amendment to impose an income tax), including necessarily therein the power to impose income taxes if only *they <u>conformed</u> to the constitutional regulations which were applicable to them.*

Based solely on these excerpts from the *Brushaber* and *Stanton* decisions, the claim by the government and this Court that the Supreme Court held that the income tax as provided in the 16th Amendment was a <u>*direct tax*</u> constitutes nothing less than ***<u>naked, outright, and blatant, fraud.</u>***

Even a cursory reading of the *Brushaber* and *Stanton* decisions reveals that any contention by this Court that the 16th Amendment gave Congress a new taxing power that would permit it to impose an income tax as a direct tax absent the need of apportionment is no more valid than a contention that the moon is made of green cheese or the defendant, in reality, is the King of Romania. Indeed the *Brushaber* court specifically addressed the proposition that the government and this Court now contend and <u>*totally rejected it*</u>! The Court pointed out (at pages 11-12) that there cannot be a federal tax "lying intermediate between these two great classes and embraced by neither," and that the proposition that the 16th Amendment gave the government the power to impose a direct, non-apportionment income tax *as claimed by the government and this Court:*

> 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*. (At pages 11-12, emphasis added)

In addition to all of the above, defendant has attached as Exhibit A, page 5 from a "Congressional Research Report" prepared by John R. Luckey. Note that paragraph 3 of the Report is captioned **"WHAT DOES THE COURT MEAN WHEN IT STATES THAT THE INCOME TAX IS IN THE NATURE OF AN EXCISE TAX?"** So here the CRS confirms that the *Brushaber* court held that the income tax, as contained in the 16th Amendment, was to be regarded as an *excise tax* and *imposed* as such.

Based on all of the excerpts as quoted above, and in light of the *CRS Report* as attached hereto – there is no way that this Court can hold that the *Brushaber* court ruled that the 16th Amendment authorized Congress to impose a "direct non-apportioned" tax on income – as contended by the government and this Court. To do so would require this Court to shut its eyes to what everyone else can see and understand – which is that the Supreme Court in *Brushaber* (and other cases as contained in all of the Supreme Court quotations shown above, and as confirmed in the CRS Report as attached hereto) held the income tax as contained in the 16th Amendment was "in its nature an *excise tax* entitled to be enforced as such" and that it "had been sustained as *excise taxes in the past.*"

While all of the above information should be enough to knock both the Court's and the government's claim that the 16th Amendment authorized Congress to impose a "direct non-apportioned" tax on income into a cocked hat, defendant is compelled to proceed further – since he realizes that he faces an uphill fight in getting *any* lower, federal court to *face the truth about the federal income tax* and to rule accordingly, consistent with their oath to uphold the law and the U.S. Constitution. Therefore defendant will proceed further and proceed to beat what should now be considered a dead horse.

It is *obvious* that since the Constitution specifically requires that all direct taxes be apportioned, any claim by this Court that Congress acquired the power to levy a direct tax ***without apportionment*** would have to mean that Congress, as a result of the 16th Amendment, acquired a *new power to tax, a power that it never had before the Amendment was passed.* However an such assumption would be entirely false as shown by the following excerpts from

relevant Supreme Court decisions all of which clearly confirm that *Congress got no new taxing power as a result of the 16th Amendment* and its power to impose direct taxes – of *any* kind – was still subject to the rule of apportionment as required in the original Constitution. In *Stanton v. Baltic Mining Co*, 240 US 103, Chief Justice White, speaking for a unanimous Court stated:

> 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,* supra, emphasis added)

And the Brushaber Court held at page 17:

> It is clear on the face of this text (the 16th Amendment) that it does not *purport to confer power to levy income taxes in a generic sense – an authority already possessed* and never questioned – or to limit and distinguish between one kind of income taxes and another, but that the *whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the sources whence the income was derived.*

Thus it is clear from just these two excerpts from these bedrock decisions, that the "whole purpose" of the 16th Amendment was not to give the government a new power to tax income, an "authority already possessed," but its "whole purpose" was to provide for a tax on income which would be imposed without "consideration of the sources whence the income was derived." In other words, without taxing the sources (such as wages, dividends, interest, fees, commissions etc. etc. etc.) that produced the income. Thus, as the result of the 16th Amendment, the *Brushaber* court fashioned a *new meaning* to the term "income," a meaning that it never had before. The Supreme Court held that the term "income" as used in the 16th Amendment meant "income separated from its sources," and it did not mean "income" as defined in any dictionary – as the government uses that term here, and indeed in all litigation and criminal prosecutions involving income taxes. This therefore is the "constitutional meaning" of "income" as referred to House Report No. 1337 and Senate Report No. 1622 and as referred to in footnote 11, of *C.I.R. v. Glenshow Glass Co,* 348 U.S. 426.[4]

[4] Since *Glenshaw Glass* was a decision involving Section 22 of the 1939 Code, the decision itself is irrelevant to this litigation, since this litigation involves Section 61 of the 1954 Code and substantial changes were made concerning the meaning of "income" as that term is used in the 1954 Code and how the term was used in the 1939 Code. In adopting the 1954 Code both houses of Congress indicated that "income" as used in the 1954 Code, meant "income" in its "constitutional sense," which is obviously not the same thing as "income" in its "ordinary sense."

Further proof that the 16th Amendment gave the Government no new taxing power is furnished by the authoritative decision, *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, obviously, this Court cannot make a decision the effect of which would be "to repeal or modify those provisions of the Constitution that require apportionment." And all direct taxes – on whatever basis imposed – still require apportionment, the 16th Amendment not withstanding. And "This limitation …is not to be overridden by Congress or ***disregarded by the courts.***"

So for this Court to hold that Congress has the authority to impose a "direct non-apportioned tax" on income would mean that this court has *indeed* "disregarded this limitation" *as the Supreme Court has enjoined this Court from doing!*

Therefore, since both this Court and the government deny that the income tax is imposed as 1) the excise tax the Supreme Court ruled it to be, pursuant to Clause 1, Section 8 of Article 1, and since both claim that 2) the income tax is imposed as a direct tax, but absent apportionment as required by clauses 3 and 4 of Sections 2 and 9 of Article 1 of the Constitution, both this Court and government have admitted that the income tax at issue is not imposed in accordance with any one of the Constitutions three taxing clauses. Therefore, both this Court and the government have admitted that the income tax at issue is not "*directly traceable* to the power granted to Congress by 8, Art. I of the Constitution, 'to lay and collect taxes duties, imposts, and excises.'" Therefore this Court cannot have subject matter jurisdiction to issue injunctions in connection with a tax that is not so "traceable," as held by the Supreme Court in United *States v. Hill*, supra, as fully quoted above. This is yet another reason why this Court must reverse its order of June 16, 2003 since it has no subject matter jurisdiction to issue such an injunction.

III
WITH RESPECT TO OTHER FALSE AND IRRELEVANT OBSERVATONS

CONTAINED IN THE GOVERNMENT'S "RESPONSE" OF JULY 2, 2003

1) The government states in its Response. "At pages 3-4 of its preliminary injunction reply brief it stated" the following, and that "Nowhere in Schiff's voluminous court papers or in his oral testimony does Schiff try to refute this concise recitation of the law that makes Americans liable to pay income taxes." Mr. Davis is of course wrong, as anyone who listens to the preliminary hearing on Schiff's website can attest to. The fact is that neither Schiff nor any of his witnesses (all of whom admitted that they pay no income taxes and filed "zero" returns) have been charged with any tax crimes, and stated that they would begin paying income taxes again if Mr. Davis would only show them the law, on cross-examination, that required them to do so – which Mr. Davis couldn't do. And the fact that Schiff offered to withdraw his opposition to the government's request for injunctive relief if Mr. Davis would only produce the law that made Schiff "liable" for the payment of income taxes – which, again, he couldn't do. In addition, nowhere in his Response in which he lists some 15 (irrelevant) Code Sections, does he claim that anyone of them establishes a "liability" for income taxes. But, in any case, let us examine the Code Sections, which he says Schiff failed "to refute." He claims that: 1) section 1 "imposes a tax on taxable income of Americans and others"; 2) "Section 63 defines taxable income which is gross income as defined in Sec. 61"; 3) "Under Section 6012 or 6013 a taxpayer must file an income tax return"; 4) "Section 6151 requires individuals to pay any tax shown on their return"; 5) "If a taxpayer understates income on a return or fails to file a return, the Secretary of the Treasury is authorized to determine, assess, and collect taxes, penalties, and interest against the taxpayer under section 6201, 6212, 6213 and 6301."; 6) "This authority has been delegated to IRS agents"; 7) "Section 6155 requires individuals to pay any tax shown on a notice and demand from the IRS at the place and time stated in the notice"; and 8) "The I.R.C. contains civil penalty and criminal sanction sections, notably 7201, 7203, 7205, and 7206, and 6702 applicable to those who fail to file tax returns or file false income tax returns of other documents."

All of the above claims are either false or fraudulent and are typical of the false information that Justice Department lawyers routinely spew out to uninformed and gullible Americans who couldn't possible comprehend that Justice Department lawyers are capable of

lying on such a grand scale as is shown by Mr. Davis' claims. Therefore, Schiff will expose as false, every one of Mr. Davis' statements as contained above.

1) In statements a and b "income," within the meaning of sections 1, 61 and 63 means "income" in the "constitutional sense." Since nobody receives "income" in a "constitutional sense" no one can receive "income" as that term is used in sections 1, 61, and 63.

2) Since all information on a tax return can be used against those who file, no American can be "required" to file an income tax return. As noted in Schiff's Motion to Reconsider, even Professor Saltzman in his definitive book "IRS Practice and Procedure" noted that a 1040 is actually a "confession." Can the federal government "require" Americans to "confess" about anything? There is no provision in the U.S. Constitution that allows the federal government to compel Americans to "confess" annually to the Government (under penalty of perjury no less): whether they are: employed or not; whether they are married or not; how many children they have; how much money they have in the bank; etc. etc. etc. So obviously they cannot be "required," by law, to give such information to the government on a 1040. For this reason the "must" as shown in claim 3 means "may" – it does not mean "required" as Evan J. Davis fraudulently seek to imply.

3) As far as Section 6151 "requiring" individuals "to pay any tax shown on their return," obviously if you don't file a return, or if you file a return showing "zero" income and a "zero" tax due, you have shown no taxes on a return, and thus you have nothing to pay even pursuant to this Code section. But Section 6151 has nothing to do with income taxes anyway. If it had anything to do with income taxes, it would appear in the Privacy Act Notice of a 1040, but only Code Sections 6001, 6011, and 6012 are shown there. In addition, all provisions related to income tax would have to be contained in subtitle A, the subtitle specifically relating to income taxes. Section 6151 is contained in subtitle F, and there is no provision in subtitle A (as are contained in other subtitles) making the provisions of subtitle F applicable to subtitle A.

4) Mr. Davis next states, "If a taxpayer understates income on a return or fails to file a return, the Secretary of the Treasury is authorized to determine, assess, and collected taxes, penalties, and interest against the taxpayer under section 6201, 6212, 6213 and 6301." For one thing, Mr. Davis states that it is only the "Secretary of the Treasury " that has such authority, not anyone at the IRS. So the IRS, admittedly, has no authority to do any of these things. Secondly, the Secretary has no authority to impute "income" to anyone who doesn't impute "income" to

themselves. Is the Secretary going to claim that somebody has "income" in a "constitutional sense" when they obviously cannot have such "income"? The income tax, as stated in Treasury Regulation 601.103(a), is based on "self-assessment." If anyone does not choose to assess themselves by filing a return and showing a tax due, the only recourse the government has in seeking to collect such an alleged tax is to sue that party civilly under Code sections 6501(c)(1) or (c)(3).

5. Next Davis says, "This authority has been delegated to IRS agents." This statement is false. The Secretary had never delegated any such authority to the IRS, as Mr. Davis well knows. Unless Mr. Davis can produce any such delegation of authority and prove that it was published in the Federal Register, then any such claim by him is pure fiction – and he cannot produce any such proof of publication.

6. Next, Mr. Davis states that "Section 6155 requires individuals to pay any tax shown on a notice and demand from the IRS at the place and time stated in the notice." Pursuant to Treasury Decision 1995 (which has never been revoked or repealed), the official, statutory notice and demand for payment of income taxes is IRS Form 17. However, you will not find that form listed in any official IRS list of official documents, since the IRS never sends out such a notice, and so the IRS never makes an official demand for the payment of income tax. This is confirmed in Professor Saltzman's book *IRS Practice and Procedure* in which he notes, "Although there is an explicit statutory requirement that a taxpayer receive notice of the assessment and demand for payment of the amount assessed, a demand need not be formal – that is, by way of official government form." This is his way of protecting the income tax system of which he is still a part. Since there is no official government form making a "demand for payment" he pretends that such a "demand" need not be "formal" and there doesn't need to be an "official government form" that makes such a "demand" – all of which is nonsense. Why shouldn't there be an "official government form" that makes a demand for payment? In any case, Mr. Davis will be unable to produce an official government form that makes a demand for the payment of income tax, together with a Treasury Decision (other than T.D. 1995) or Treasury Regulation that officially identifies that IRS form as being the official "demand" for the payment of income taxes. Since he cannot produce any such documentation, his claim that there is such a thing as a notice demanding the payment of income taxes is pure fiction.

7) Mr. Davis then states, "The I.R.C. contains civil penalty and criminal sections, notably 7201, 7203, 7205, and 7206, and 6702, applicable to those who fail to file tax returns or file false income tax returns or other documents." As usual Mr. Davis is wrong again. There are no such "laws" as Mr. Davis claims. Therefore Justice Department prosecutions involving any of these Code sections merely establishes the criminal character of Justice Department lawyers who engage in such prosecutions – as the following will prove. In Exhibit B defendant has attached the entire entry regarding "Alcohol taxes" as shown in the Index of the Internal Revenue Code as published by the Research Institute of America. Notice that the list contains entries entitled "liability for," "payment for," "penalties," "failure to file return or pay tax," and "record keeping and inspection" In Exhibit C, defendant has attached the similar entry for "Income taxes." Notice that there are no comparable entries with respect to "liability," "payment," "penalties" "failure to file return or pay tax," or "record keeping and inspection." What does the absence of such entries prove? It proves that the I.R.C. contains no provisions that: 1) requires anyone "to pay" income taxes, 2) makes anyone "liable" for income taxes, 3) provides penalties in connection with income taxes, especially for "failure to file and failure to pay" and 4) requires no one to keep books and records for income tax purposes. It also means that the attempt by Evan J. Davis to indicate otherwise, was based on fraud.

The fraud that Evan J. Davis sought to perpetrate when he listed all of these Code sections as somehow meaning they require Americans to pay income taxes is also revealed in Exhibit D. As the Court will observe, all the entries involving alcohol taxes are shown as falling within Code Sections 5001 to 5691 with approximately 6 sections falling in the 6000 range and no sections falling in the 7000 range. Exhibit D contains Chapter 51 of the I.R.C. which is shown as covering "Distilled Spirits, Wines and Beer." Note that the Code Sections covered in Chapter 51 go from section 5001 to 5692. Note further that the penalty provisions covering "Distilled Spirits, Wines and Beer" are shown as falling within Code sections 5601 to 5690, all of which fall within Chapter 51, the very Chapter which imposes a tax on alcoholic products.

The income tax is imposed in Chapter 1 of subtitle A of the I.R.C. Chapter 1 runs from section 1 to section 1400J, while subtitle A runs to section 1564. Note that, unlike the provisions related to alcohol taxes, none of the sections listed by Mr. Davis, other than Sections 1, 61 and 63 fall into Chapter 1, the Chapter that imposes the income tax. As a matter of fact, none of the sections he cites *even fall into <u>subtitle A</u>*, the very subtitle in which Chapter 1 is

contained. Therefore, unlike the enforcement provisions dealing with alcohol taxes, not only do none of those enforcement provisions fall either into Chapter 1, they *don't even fall into subtitle A!* What does this prove? It proves that none of the Code sections listed by Evan J. Davis can have anything to do with the mandatory payment of income taxes or the imposition of penalties with respect to such an alleged tax.

It also reveals the extent to which Justice Department lawyers mislead the American public concerning their legal requirement to pay income taxes – and the illegal prosecutions they are obviously involved in. It also explains why the Justice Department is seeking to enjoin Freedom Books from distributing books and other information regarding income taxes. Because we are about the only place where the public can learn the truth about the government's criminal enforcement of the income tax and how Americans can "fight back."

2) Turning to another matter, in page two (line 9) of the government's Response, Davis states, that "Schiff also suggests, in Exhibit B, that his clients (fraudulently) claim 9 withholding exemptions if an employer fails to honor the 'exempt' W-4." This, of course, is not true since as explained in Exhibit B all American wage earners have a perfect right to claim exempt on a W-4 because: 1) they are not "liable" for income taxes; 2) wages are not "income" received in a "constitutional sense," 3) no assessment would have been currently in force with respect to their current wages, 4) withholding taxes, as provided in Section 3402, are not even income taxes, but represent an attempt by the government to unconstitutionally and fraudulently impose a direct tax on wages in the guise of withholding income taxes "at the source," and 5) Schiff's suggestion involved the claiming of "withholding allowances" as provided for in section 3402(m) and had nothing to do with "withholding exemptions" as provided in 3402(d).

And in any case, Schiff's suggestion concerning "withholding allowances" was offered as one of several alternatives to the illegal actions currently being taken by the IRS against those who legally and correctly claim "exempt." In any case, such suggestion can hardly constitute "commercial speech" since the information was posted free of charge on Schiff's website and would have been available free of charge to the public who can order Schiff's Motion for Reconsideration directly from the Clerk of the Court – for which Schiff would not have earned a penny.

IV
NEW EVIDENCE INDICATING

THE DENIAL OF "EQUAL PROTECTION UNDER THE LAW"

Attached as Exhibit E is a letter that was sent by the Internal Revenue Service to John B. Kotmair on June 12, 2003. The "Area Director" informed him that the IRS was "considering possible action under Sections 6700 and 7408 of the Internal Revenue Code relating to penalties and an injunction action for promoting abusive tax schemes." He was asked to meet "with the examiner" and provided with a list of "documents, books and records (he) should have available" and "questions (he) should be prepared to reply to at that time."

He was given "an opportunity to present any facts or legal arguments which you feel indicate that such action should not be taken."

Since such an opportunity was never afforded to defendants prior to the government issuing its request for injunctive relief - it is clear that defendants were denied equal protection under the law – as accorded to Mr. Kotmair, as shown in the IRS' letter to him.

Apart from the "new evidence " as mentioned above, defendants have shown that the government's Response has in no way refuted any of defendants' grounds as to why this Court must reverse its Order of June 16, 2003 which defendants have clearly shown is based on the false assumptions that 1) "income" as used in the Internal Revenue Code means income in its "ordinary sense" and 2) that the 16th Amendment gave Congress a new taxing power – the power to impose a direct tax on income without apportionment. Both of these assumptions are blatantly erroneous, as this Court has to know. In addition, Schiff's books and supplemental material are 1) not "commercial speech" 2) do not promote income tax evasion on *any* basis, and 3) do not constitute an "abusive tax shelter" on *any* basis. And any such claims by this Court would be just as erroneous as its claim that "income" as used in the 1954 Code is used in its "ordinary sense" and that the 16th Amendment gave Congress the power to impose a *direct tax* on income not subject the to apportionment. For all of these reasons this Court must reconsider and reverse its order of June 16, 2003 if this Court is going to be bound by its oath to uphold the law and the U.S. Constitution.

Dated: July 14, 2003

Respectfully submitted

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Irwin Schiff, Pro per

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Answer to the Government's Response to Defendants Motion to Reconsider by placing a copy in United States mail on July 14, 2003 to Evan J. Davis, Tax Division, U.S. Department of Justice, PO Box 7238 Ben Franklin Station, Washington, DC. 20044.

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Irwin Schiff