Criminal Tax Manual
prev • next • help

40.00 ILLEGAL TAX PROTESTERS [FN1]

Updated October 2001

40.01 **GENERALLY**

Over the past thirty years, illegal tax protesters have developed numerous schemes to evade their income taxes and frustrate the Internal Revenue Service under the guise of constitutional and other objections to the tax laws. Individuals who merely express dissatisfaction with the income tax system are not criminally prosecuted. However, the right to freedom of speech is not so absolute as to protect conduct that otherwise violates or incites a violation of the tax laws. *United States v. Citrowske,* 951 F.2d 899, 901 (8th Cir. 1991). *See also United States v. Fleschner,* 98 F.3d 155 (4th Cir. 1996) (asking for First Amendment instruction); *United States v. Kuball,* 976 F.2d 529, 532 (9th Cir. 1992) (First Amendment does not protect those who go beyond mere advocacy, and assist in creation and operation of tax evasion schemes.)

Illegal tax protest schemes range from simply failing to file tax returns to concealing financial transactions and assets in warehouse banks and trusts to filing frivolous liens to interfere with IRS investigations. These schemes give rise to charges under all of the criminal tax statutes. [FN2] Thus, this chapter should be read in conjunction with those chapters of the *Manual* that discuss the various substantive offenses in detail. *See* Chapters 8.00 through 29.00, *supra*.

40.02 **SCHEMES**

40.02[1] **Paper Terrorism**

40.02[1][a] **Harassment Schemes**

Illegal tax protesters have employed various schemes designed to harass IRS employees and agents, as well as prosecutors and judges, and interfere with audits and criminal investigations. One of the earliest harassment schemes involved filing false Forms 1099 with the IRS, reporting that an IRS agent, judge, or prosecutor had been paid large amounts of money. This scheme was designed to trigger an IRS audit, during which the Form 1099 recipient would have to explain the discrepancy between the income reported on his or her return and that reported on the Form 1099. *See, e.g., United States v. Van Krieken*, 39 F.3d 227 (9th Cir. 1994); *United States v. Lorenzo*, 995 F.2d 1448 (9th Cir. 1993).

Form 1099 schemes have been prosecuted under a variety of criminal tax statutes. *See, e.g., United States v. Bowman*, 173 F.3d 595, 599-600 (6th Cir. 1999) (26 U.S.C. § 7212(a) is appropriate charge in Forms 1099/1096 scheme); *United States v. Winchell,* 129 F.3d 1093, 1098-99 (10th Cir. 1997) (26 U.S.C. §§ 7212(a) and 7206(1)); *United States v. Heckman,*30 F.3d 738 (6th Cir. 1994) (discussing application of sentencing guidelines in Form 1099 scheme charged as 26 U.S.C. 7206(1)); *United States v. Dykstra*, 991 F.2d 450 (8th Cir. 1993) (26 U.S.C. §§ 7206(1) and 7212(a)); *United States v. Higgins*, 987 F.2d 543, 544 (8th Cir. 1993) (26 U.S.C. §§ 7206(1) and 7212(a)); *United States v. Wiley*, 979 F.2d 365, 367 (5th Cir. 1992) (18 U.S.C. §§ 371, 472, 1001 and 1002); *United*

States v. Rosnow, 977 F.2d 399, 410-11 (8th Cir. 1992)(26 U.S.C. §§ 7206(1) and 7212(a), and 18 U.S.C. § 371); *United States v. Kuball*, 976 F.2d 529, 532 (9th Cir. 1992) (26 U.S.C. §§ 7206(1) and 7212(a)); *United States v. Parsons*, 967 F.2d 452, 453 (10th Cir. 1992) (18 U.S.C. §§ 287 and 1001); *United States v. Hildebrandt*, 961 F.2d 116 (8th Cir. 1992) (18 U.S.C. § 1001); *United States v. Yagow*, 953 F.2d 423, 427 (8th Cir. 1992) (26 U.S.C. §§ 7206(1) and 7212(a)); *United States v. Citrowske*, 951 F.2d 899 (8th Cir. 1991) (18 U.S.C. § 1001); *United States v. Telemaque*, 934 F.2d 169, 170 (8th Cir. 1991) (18 U.S.C. § 371).

A recent resurrection of the so-called "Redemption" scheme involves the filing of false Forms 8300 (Report of Receipt of More Than $10,000 in Cash in A Trade or Business), Forms 4789 (currency transaction reports (CTRs)), and Suspicious Activity Reports (SARs) for harassment purposes. [FN3] Forms 8300 are IRS reporting forms covered by the confidentiality provisions of 26 U.S.C. § 6103. [FN4] Forms 4789 and SARs are Financial Crimes Enforcement Network (FinCEN) documents not subject to tax information confidentiality requirements.

Essentially, the new "Redemption" scheme involves filing one of these forms with the IRS, reporting that a large amount of cash, sometimes foreign currency, was paid to the named recipient. IRS agents, federal and state prosecutors and judges, state troopers and private creditors are often targeted. Typically, the protester will send his or her victim an IRS Form W-9, requesting a social security number. Even without the target's social security number, the protester files Form 8300, which triggers a letter to the target from the IRS requesting additional information and warning of possible penalties for incomplete information. Once the IRS learns the document is fraudulent, the IRS attaches a "fraud" indicator to the computerized record and sends the form(s) to the appropriate office of the IRS Criminal Investigation Division (CID) or Treasury Inspector General for Tax Administration (TIGTA) for investigation. CID investigates all filings involving non-IRS employees, while TIGTA has jurisdiction over filings against IRS personnel. All cases, whether investigated by CID or TIGTA, require authorization for prosecution from the Tax Division.

There are several ways to prosecute these schemes. First, the prosecutor should determine if the protester has attempted to pass any fraudulent sight drafts or other financial instruments. This will require an inquiry with the U.S. Secret Service and the Federal Bureau of Investigation. If the protester has filed false Forms 8300 *and* used sight drafts, the prosecutor should consider charging the sight drafts pursuant to 18 U.S.C. § 514 [FN5] (*see* Chapter 40.02[1][b], *supra*), using the false Forms 8300 as evidence of intent. If the protester has filed a large number of false Forms 8300, 26 U.S.C. § 7212(a) is a possible charge. Because they are signed under penalties of perjury, false Forms 8300 may also be charged as violations of 26 U.S.C. § 7206(1). Neither Forms 4789 nor SARs contain jurats, so they cannot form the bases for Section 7206(1) charges.

In some cases, it may be best to simply use the false Forms 8300 as evidence to support an obstruction enhancement at sentencing. *See, e.g., United States v. Veral Smith*, 3:99-CR-00025 (D.ID 2000) (District Court considered false Forms 8300 filed against prosecutors and judge as evidence supporting obstruction enhancement).

Tax protesters also file frivolous liens against the property of federal employees to harass them. The tax protester files with the local county recorder a lien for a large amount of money against the federal employee's real property. The purpose of the lien is to encumber the property. This tactic is designed to disrupt IRS audits and investigations by personally targeting the financial affairs of IRS personnel involved in the protester's case. The tax obstruction statute, 26 U.S.C. 7212(a) [FN6], may be a viable charge in these cases. *See, e.g., United States v. Boos*, Nos. 97-6329, 97-6330, 1999 WL 12741 (10th Cir. Jan. 14, 1999); *United States v. Gunwall*, Nos. 97-5108, 97-5123, 1998 WL 482787 (10th Cir. Aug. 12, 1998); *United States v. Marsh*, 144 F.3d 1229 (9th Cir. 1998) (dismissing § 7212(a) charges for lack of venue); *United States v. Trowbridge*, Nos. 96-30179, 96-30180, 1997 WL 144197 (9th Cir. Mar. 26,

1997); *United States v. Bailey*, No. 94-5219, 1995 WL 716276 (10th Cir. Nov. 22, 1995); *Kuball*, 976 F.2d at 531 (upholding Section 7212(a) conviction for sending threatening letters to IRS employees); *United States v. Reeves*, 782 F.2d 1323, 1326 (5th Cir. 1986) (upholding Section 7212(a) conviction for filing false liens) ("*Reeves II*"). *But see United States v. Bowman*, 173 F.3d 595, 599 (6th Cir. 1999) (refusing to extend holding in *Kuball*, *supra*).

Tax protesters also sue agents, prosecutors, and judges, and threaten "arrest" and "prosecution" in so-called "common-law" courts. "Common-law" courts -- which have no legal standing -- are often set up by anti-government groups. In some instances, they "indict" and "convict" individuals.

"Common-law" documents -- ranging from "promissory notes," to "arrest warrants," to "criminal complaints" -- are created to resemble authentic legal documents. *See, e.g., United States v. Hart*, 701 F.2d 749 (8th Cir. 1983); *United States v. Knudson*, 959 F. Supp.1180 (D. Neb. 1997); *United States v. Van Dyke*, 568 F. Supp. 820 (D. Or. 1983). Depending on the circumstances, use of the documents may give rise to 26 U.S.C. §7212(a) charges. *See, e.g., United States v. Wells*, 163 F.3d 889, 899-900 (4th Cir. 1998); *Reeves*, 782 F.2d 1323. Because use of "common law" documents often begins during investigation and continues during prosecution, their use is evidence of willfulness for substantive tax charges, or the basis for an obstruction of justice or other enhancement at sentencing. *See United States v. Lindsay*, 184 F.3d 1138, 1144 (10th Cir.) (upholding denial of acceptance of responsibility for obstructive conduct such as filing numerous frivolous documents), *cert. denied*, 528 U.S. 981 (1999); *Wells*, 163 F.3d at 894, 897 (upholding upward departure for "domestic terrorism" for use of common law arrest warrants).

Tax protesters also attempt to file frivolous lawsuits or criminal complaints against prosecutors and agents in legitimate state and federal courts. Cases based on these filings are rarely authorized for prosecution because such lawsuits and criminal complaints are difficult to distinguish from the host of frivolous cases filed in courts all the time -- thus, making it difficult to overcome a defense based on the right to petition for a redress of grievances.

40.02[1][b] **Bogus Financial Instruments**

For years, protesters have submitted bogus financial instruments to "pay" their tax liabilities and obtain erroneous IRS refunds, and to "pay" private creditors. These instruments -- often entitled "Certified Money Order," "Certified Bankers Check," "Public Office Money Certificate," or "Comptroller Warrant" -- are designed to deceive the IRS and financial institutions into treating them as authentic checks or real money orders.

For example, a protester will submit a large bogus check to the IRS or a creditor for an amount in excess of the amount owed and request refund of the difference. If the IRS or creditor rejects the bogus check, the protester writes threatening letters to force acceptance of the bogus payment.

Several groups promote use of such bogus financial instruments. One of the earliest "bogus money order schemes" was perpetuated by an organization in Wisconsin known as "Family Farm Preservation." *See, e.g., United States v. Stockheimer*, 157 F.3d 1082 (7th Cir. 1998) (noting that the potential loss calculation exceeded $180 million).

An organization known as "USA First" learned of the scheme and sold over 800 "Certified Money Orders" (CMOs) with a face value of $61 million. *See United States v. Mikolajczyk*, 137 F.3d 237, 239-240 (5th Cir. 1998); *United States v. Moser*, 123 F.3d 813 (5th Cir. 1997).

The Montana Freemen are perhaps the most notorious group to promote this scheme. *See, e.g., United States v. Wells*, 163 F.3d 889 (4th Cir. 1998); *United States v. Hanzlicek*, 187 F.3d 1228

(10th Cir. 1999). For other examples of similar schemes, *see Broderick v. Goodroe*, No. 99-55311, 2000 WL 194144 (9th Cir. Feb. 17, 2000); *United States v. Switzer*, Nos. 97-50265, 97-50293, 97-50442, 1998 WL 750914 (9th Cir. Oct. 19, 1998).

The most recent bogus financial instrument scheme is the so-called "Redemption" scheme. It involves the use of "Sight Drafts" or "Bills of Exchange" and the filing of Forms 8300, 4789 and SARs. *See* Chapter 40.02[1][a], *supra*.

The sight draft component of the recently resurrected "Redemption" scheme is based on the outlandish premise that, when the United States went off the gold standard in 1933, the government began to be funded with debt instruments secured with the energy of current and future inhabitants. The theory is that a fictitious identity or "straw man" was created for all Americans and the value of a person's birth certificate became the collateral for our currency. Supposedly, the value of an individual's birth certificate is determined by the number of times it is traded on the world futures market and the amount is purportedly maintained in a Treasury Direct Account under that person's social security number.

A participant in the scheme attempts to reclaim his or her "straw man" and therefore the value of the fictitious identity by redeeming his or her birth certificate. The participant first files a Form UCC-1 with the Secretary of State in any State, claiming title and security interest in his or her social security, driver's license, and birth certificate numbers. The individual then writes "acceptance for value," "non-negotiable charge back," or other prescribed language diagonally on a government paper and returns it to the government official who issued it. Typically, the types of documents used for redemption include anything from a traffic ticket to a federal indictment. The "charge back" allegedly creates a "treasury direct account" that contains the amount assigned to the charge back, which the participant purportedly can then draw upon by writing "sight drafts." "Sight drafts" are then written for varying amounts, some as high as trillions of dollars. A Form UCC-3 indicating the partial release of collateral in the amount of each sight draft is then filed with the same Secretary of State who accepted the Form UCC-1.

The "sight draft" or bogus financial instrument is of very high print quality and usually contains some reference to HJR 192, which is the House Joint Resolution that took the United States off the gold standard in 1933. These "sight drafts" or "bills of exchange" purport to be drawn on the United States Treasury Department.

Historically, bogus financial instrument cases involving private creditors were prosecuted under a variety of statutes such as:

* Conspiracy (18 U.S.C. § 371);

* Mail fraud (18 U.S.C. § 1341);

* Uttering a false security (18 U.S.C. § 472);

* Bank fraud (18 U.S.C. § 1344), and

* Possessing and uttering a counterfeit security (18 U.S.C. § 513).

See, e.g., United States v. Pullman, 187 F.3d 816 (8th Cir. 1999), *cert. denied*, 528 U.S. 1081 (2000); *Hanzlicek*, 187 F.3d at 1230; *Wells*, 163 F.3d 889; *Stockheimer*, 157 F.3d 1082.

Cases involving bogus financial instruments presented to the IRS can be prosecuted as *Klein* conspiracies (18 U.S.C. §371) or false claims for refunds (26 U.S.C. §287). To bring a false claim charge, a prosecutor should have evidence that the protester expected a refund from the IRS as a result of submitting the instrument. Such evidence might include : (1) the protester's written request for a refund; (2) proof that the protester

received an IRS notice of tax due and owing, and, in response, submitted a bogus check for a significant amount over the amount owed; and (3) that the protester learned of this scheme in a seminar which advertised it would teach participants how to obtain tax refunds. *See, e.g., Hanzlicek*, 187 F.3d at 1232 (discussing that a component of the scheme included obtaining large refunds). Submission of bogus financial instruments may also be used as an affirmative act of evasion (26 U.S.C. §7201).

In 1996, Congress passed 18 U.S.C. § 514 specifically in reaction to the use of comptroller warrants. Noting that anti-government groups use fictitious financial instruments to commit economic terrorism against government agencies, private businesses, and individuals, Congress enacted Section 514 as a Class B felony, which carries a maximum prison sentence of 25 years. 142 Cong. Rec. S10155-02 (Sept. 10, 1996), pp. 196-197.

Section 514 provides in pertinent part that:

> Whoever, with the intent to defraud --
>
> (1) draws, prints, processes, produces, publishes, or otherwise makes, or attempts or causes the same, within the United States;
>
> (2) passes, utters, presents, offers, brokers, issues, sells, or attempts or causes the same, or with like intent possesses, within the United States; or
>
> (3) utilizes interstate or foreign commerce, including the use of the mails or wire, radio, or other electronic communication, to transmit, transport, ship, move, transfer, or attempts or causes the same, to, from, or through the United States,
>
> any false or fictitious instrument, document, or other item appearing, representing, purporting, or contriving through scheme or artifice, to be an actual security or other financial instrument issued under the authority of the United States, a foreign government, a State or other political subdivision of the United States, or an organization, shall be guilty of a class B felony.

Section 514 of Title 18 of the United States Code is the obvious charge when prosecuting a case involving a sight draft. To date, four trials in the District of Idaho have had successful results utilizing this statute: *United States v. Boone*, 1:99-CR-00119; *United States v. Clapier*, 1:99-CR-00120; *United States v. Pahl,* 1:99-CR-00121; and *United States v. Smith*, 3:99-CR-0025. For filings relating to these cases, see the Idaho federal courts web page at *http://www.id.uscourts.gov*.

Before deciding which charges to bring in cases involving "sight drafts" or "bills of exchange," a prosecutor should investigate and evaluate all the evidence. The prosecutor should determine how often the protester used sight drafts or bills of exchange and whether he or she also filed false Forms 8300, CTRs or SARs.

One common concern in the prosecution of all bogus financial instrument cases is "intended loss" as compared to "actual loss." Often, little or no actual loss results from the use of the bogus instrument. In *United States v. Ensminger*, 174 F.3d 1143 (10th Cir. 1999), the court was faced with a scheme to obtain ownership of real property through submission of bogus financial instruments. The District Court enhanced Ensminger's mail fraud sentence under the sentencing guidelines based on an intended loss of $540,700, the uncontested value of the property. The facts in *Ensminger*, however, showed that there was no way the scheme could have succeeded, because the properties Ensminger attempted to obtain were already sold to third parties. Based on these facts and two previous decisions (*United States v. Galbraith*, 20 F.3d 1054 (10th Cir. 1994); *United States v. Santiago*, 977 F.2d 517 (10th Cir. 1992)), the Tenth Circuit held a ten-level enhancement clearly erroneous. The *Ensminger* court noted that the Fifth, Seventh, Ninth, Eleventh, and District of Columbia Circuits,

relying on application note 10 to section 2F1.1 of the guidelines (authorizing a downward departure where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it), disagreed with its analysis. *Ensminger*, 174 F.3d at 1146-47.

On the other hand, in a case specifically involving use of bogus financial instruments, the Fifth Circuit upheld sentencing based on the face value of the Certified Money Orders even though there was no actual loss. *See Moser,* 123 F.3d at 830. *See also Switzer*, Nos. 97-50265, 97-50293, 97-50442, 1998 WL 750914 (9th Cir. Oct. 19, 1998) (upholding sentence based on intended loss); *United States v. Lorenzo,* 995 F.2d 1448, 1460 (9th Cir. 1993).

40.02[2] **Warehouse Banks**

"Warehouse banks" were common in mid-1980's abusive tax shelter schemes, and they continue to be used by tax protesters to hide assets and income from the IRS. Typically, the warehouse bank operates as a subsidiary or service wing of a broader collective or association. Membership in the association is required to use the warehouse bank services. *See, e.g., United States v. Meek*, 998 F.2d 776, 778 (10th Cir. 1993).

A warehouse bank maintains total privacy of all "account holders" by commingling the funds of numerous depositors in a single bank account held at a legitimate bank. The depositor's privacy is achieved by using arbitrarily numbered accounts, tracked by the warehouse bank operator. Using only the account number, the depositor endorses all checks to the warehouse bank association.

Depositors retrieve their funds by requesting cash via registered mail or by instructing the warehouse bank operator to pay specific bills from the warehouse bank account. Warehouse bank promoters also sell gold and silver to members and claim to hold all deposit balances in gold or silver. *See United States v. Hawley*, 855 F.2d 595, 597 (8th Cir. 1988). The warehouse bank promoter asserts that only records of the current balance and immediately preceding transaction are maintained in order to avoid revealing records in the event of a subpoena or search warrant.

Some depositors also use trusts and unincorporated business organizations (UBOs) to further conceal their identities. For example, a warehouse bank customer might request that his or her paychecks be made payable in the name of a trust or UBO, which then endorses the check to the warehouse bank association. This method ensures that the original check deposited will not have the name of the depositor. It can be traced back to a specific individual only if the name of the trust or UBO being used by that individual is known.

Operators of warehouse banks have been prosecuted on *Klein* conspiracy charges (26 U.S.C. §371) with varied results. *See, e.g., United States v. Caldwell*, 989 F.2d 1056, 1058-1059 (9th Cir. 1993) (reversing conspiracy conviction for failure to prove or instruct jury that use of deceitful and dishonest means was an element of conspiracy charge); *United States v. Stelten*, 867 F.2d 446, 451 (8th Cir. 1989) (affirming conspiracy and tax evasion charges); *United States v. Cote*, 929 F. Supp. 364, 366-68 (D.Or. 1996) (dismissing conspiracy indictment for failure to allege an essential element of the crime, *i.e.,* deceitful and dishonest means, and for failure to so instruct the grand jury).

Warehouse bank operators have also been charged with violating currency transaction reporting requirements. *See Hawley*, 855 F.2d at 599-602 (upholding instruction that allowed jury to find that the Exchange was a "financial institution" because it was a "private bank").

Account holders have been charged with tax evasion, in violation of 26 U.S.C. §7201, and willful failure to file, in violation of 26 U.S.C. § 7203. *See United States v. Dack*, 987 F.2d 1282, 1285 (7th Cir. 1993); *Meek*, 998 F.2d at 778; *United States v. Becker,* 965

F.2d 383, 390 (7th Cir. 1992).

Use of a warehouse bank supports a "sophisticated means" enhancement at sentencing. *United States v. Frandsen*, No. 99-30159, 2000 WL 366272, at *2 (9th Cir. Ap. 10, 2000) (purchasing cashier's checks from a warehouse bank held to be use of sophisticated means), *cert. denied*, 531 U.S. 890 (2000); *Becker,* 965 F.2d at 390.

Caution is advised during any investigation of a warehouse bank, however, because of the danger of treading on First Amendment freedom of association rights. Prosecutors must take care to avoid overly broad searches or subpoenas. *See, e.g., United States v. Ford*, 184 F.3d 566, 578-79 (6th Cir. 1999) (where search warrant authorizes a broader search than is reasonable given facts in supporting affidavit, warrant is invalid and Fourth Amendment rights violated), *cert. denied,* 528 U.S. 1161 (2000); *National Commodity and Barter Ass'n v. United States*, 951 F.2d 1172, 1174 (10th Cir. 1991) (government must show compelling need and substantial relationship to overcome freedom of association objection by barter association); *In re First National Bank*, 701 F.2d 115, 118 (10th Cir. 1983). The remedy for an overbroad warrant is severance of the excess portions from those that are sufficiently particular. *Ford*, 184 F.3d at 578; *United States v. Blakeney*, 942 F.2d 1001, 1007 (6th Cir. 1991).

40.02[3] **Trusts**

Another well-known and frequently-promoted protester scheme is the use of sham trusts, both foreign and domestic, to hide assets and property. A valid trust is a legal arrangement whereby a grantor transfers property into a trust and a trustee holds legal title to property for the benefit of another person, the beneficiary. In order to be regarded as a valid trust for income tax purposes, the trustee must manage and control the property for the beneficiary's benefit. The beneficiary cannot manage or control the property. Treas. Reg. §301.7701-4(a)&(b). Every trust that has over $600 in gross income or any taxable income must file a tax return and must pay taxes on taxable income. 26 U.S.C. §6012(a)(4); 26 U.S.C. §641.

A trust is invalid for Federal income tax purposes if: (1) the grantor retains the same relationship to the property both before and after the trust is established, *or* (2) the trustee does not have independent control over the property in the trust, *or* (3) the beneficiary did not receive an economic interest in the property. 26 U.S.C. §§671-677; Treas. Reg. §1.671-1 *et seq*;. *Zmuda v. Commissioner*, 79 T.C. 714, 720-722 (1982), *aff'd*, 731 F.2d 1417 (9th Cir. 1984); *Markosian v. Commissioner*, 73 T.C. 1235 (1980); *Hanson v. Commissioner*, T.C. Memo 1981-675, *aff'd*, 696 F.2d 1232 (9th Cir. 1983).

The use of "trusts" and "unincorporated business organizations" is promoted on Internet web sites, by word-of-mouth, and through seminars. Trust scheme promoters can be charged with a variety of offenses, including *Klein* conspiracy (18 U.S.C. § 371), aiding and abetting tax evasion (26 U.S.C. § 7201 & 18 U.S.C. § 2), aiding in preparation of false tax returns (26 U.S.C. § 7206(2)), tax obstruction (26 U.S.C. §7212(a)) and tax evasion (26 U.S.C. §7201) if they knowingly used the trusts to evade taxes.

However, some trust scheme users may have a valid reliance defense if the promoters present the trust scheme as a legal way to avoid taxes. *See* Chapter 40.05[1][a] and [b], *supra*, for more discussion of the reliance defense.

40.02[4] **Church Schemes**

40.02[4][a] **Generally**

Some protesters claim tax exempt status by feigning ordination in a church.

Many become ministers in mail-order churches, such as the Universal Life Church, the Basic Bible Church of America, or the Life Science Church. Typically, officers and members of the congregation include only the protester and his or her immediate family.

Using church rubric, the protester usually adopts one of two schemes. Under the first, the protester takes a sham vow of poverty and purportedly assigns all income and worldly possessions to the church. The protester then contends that his or her income is the church's income and, therefore, not taxable to the minister, even though the protester uses the funds to pay personal and other expenses just as he or she did before taking the sham vow of poverty. *See*, *e.g.*, *United States v. Masat*, 948 F.2d 923 (5th Cir. 1991); *United States v. Dube*, 820 F.2d 886 (7th Cir. 1987); *United States v. Zimmerman*, 832 F.2d 454 (8th Cir. 1987); *United States v. Ebner*, 782 F.2d 1120 (2d Cir. 1986).

Under the second scheme, the protester supposedly makes charitable contributions to a church of 50 percent of his or her adjusted gross income (the maximum amount that can be deducted as a charitable contribution). 26 U.S.C. § 170(b). The "contribution" is then deposited into "the church's" bank account, and the protester claims a deduction on his or her individual return, even though the "donated" funds are used for his or her personal purposes. *See United States v. Heinemann*, 801 F.2d 86, 88 (2d Cir. 1986).

40.02[4][b] **Vow of Poverty**

Generally, the government introduces evidence proving the protestor's putative vow of poverty was not fulfilled in practice -- *i.e.*, protester lived and carried out his or her economic and financial affairs exactly as in the past. *See United States v. Peister*, 631 F.2d 658 (10th Cir. 1980), upholding the conviction of Peister for filing a false "withholding exemption certificate form W-4". Peister formed a church with himself as minister, and his wife and parents as trustees, took a vow of poverty, supposedly gifted all his worldly possessions to the church, set up church checking accounts, and used the funds in those accounts for personal purposes. *Peister*, 631 F.2d at 660. The government's evidence showed that "the church was a shell entity, fully controlled by Peister and his wife, . . . together with Peister's parents. The vow of poverty was one in form only, and had no substantive effect on defendant's lifestyle." *Peister*, 631 F.2d at 660.

40.02[4][c] **Charitable Contributions**

In this scheme, the protester purports to donate to his or her church 50 percent of adjusted gross income (the maximum allowable amount for a charitable contribution deduction). 26 U.S.C. §§ 170(a)(i); 170(b)(1)(A),(E). The protester then uses the "donated" funds for personal purposes. *See United States v. Michaud*, 860 F.2d 495 (1st Cir. 1988). In such cases, the government must prove that either no contribution or gift to the church was made or that it was not made to a qualified church under 26 U.S.C. § 170(c)(2), which requires that "no part of the net earnings . . . [inure] to the benefit of any private shareholder or individual."

There is no true charitable gift or contribution where a donor does not totally relinquish dominion and control over his or her property. *See Pollard v. Commissioner*, 786 F.2d 1063, 1066-67 (11th Cir. 1986); *Stephenson v. Commissioner*, 748 F.2d 331 (6th Cir. 1984); *Macklem v. United States*, 757 F. Supp. 6 (D.Conn. 1991); *Gookin v. United States*, 707 F. Supp. 1156 (N.D. Cal. 1988). If a gift is made with the incentive of anticipated economic benefit, no deduction is available even if the payment is made to a tax-exempt organization. *See Transamerica Corp. v. United States*, 902 F.2d 1540 (Fed. Cir. 1990); *DeJong v. Commissioner*, 309 F.2d 373 (9th Cir. 1962); *Hess v. United States*, 785 F. Supp. 137 (E.D. Wash. 1991); *Dew v.*

Commissioner, 91 T.C. 615 (1988) (members of Universal Life Church made contributions to church with understanding that church was to pay all personal bills incurred by the "contributor").

A tax protest church is not organized and operated exclusively for religious purposes; therefore, it is not exempt from taxation. 26 U.S.C. § 501(c)(3). To enjoy tax-exempt status under section 501(c)(3), an organization must satisfy three criteria: (1) it must be organized and operated exclusively for an exempt purpose ("the organizational test"); (2) no part of its net earnings may inure to the benefit of any private shareholder or individual ("the operational test"); and, (3) no substantial part of its activity may include carrying on propaganda, or otherwise attempting to influence legislation, or participating or intervening in any political campaign. 26 U.S.C. § 501(c)(3). *See also Ecclesiastical Order of Ism of Am v. Commissioner*, 80 T.C. 833, 838 (1983), *aff'd*, 740 F.2d 967 (6th Cir. 1984); *Unitary Mission of Church v. Commissioner*, 74 T.C. 507, 512 (1980), *aff'd*, 647 F.2d 163 (2d Cir. 1981).

If a minister uses the religious organization's funds for personal purposes or receives an excessive or unreasonable salary from the net earnings of the church, there is deemed to be private inurement, and the church will fail the operational test. *United States v. Daly*, 756 F.2d 1076, 1083 (5th Cir. 1985). *See also Hall v. Commissioner.*, 729 F.2d 632, 634 (9th Cir. 1984); *United States v. Dykema*, 666 F.2d 1096, 1101 (7th Cir. 1981).

40.02[4][d] **First Amendment Considerations**

Tax protesters often attempt to use the Freedom of Religion clause of the First Amendment to prevent the government from questioning the integrity of the protester's alleged religious beliefs. The courts have long held, however, that the Freedom of Religion clause cannot be used as a blanket shield to prevent the government from inquiring into the possible existence of criminal activity. *Davis v. Beason*, 133 U.S. 333, 342-43 (1890); *Cohen v. United States*, 297 F.2d 760, 765 (9th Cir. 1962). Thus, although the validity of religious beliefs cannot be questioned, the sincerity of the person claiming to hold such beliefs can be examined. *United States v. Seeger*, 380 U.S. 163, 184-85 (1965). *See also United States v. Ward*, 989 F.2d 1015, 1018 (9th Cir. 1992) ("focus of judicial inquiry is not definitional, but rather devotional . . . That is, is the defendant sincere? Are his beliefs held with the strength of traditional religious convictions?"); *United States v. Daly*, 756 F.2d 1076, 1081 (5th Cir. 1985); *United States v. Moon*, 718 F.2d 1210, 1227 (2d Cir. 1983); *United States v. Dykema*, 666 F.2d 1096, 1098-1102 (7th Cir. 1981); *United States v. Peister*, 631 F.2d 658, 665 (10th Cir. 1980). In *Moon*, the defendant argued that the trial court was required to charge the jury that it must accept as conclusive the Unification Church's definition of what it considered a religious purpose. The Second Circuit flatly rejected the defense argument, citing *Davis v. Beason*, 133 U.S. 333 (1890), and explaining that:

> [t]he "free exercise" of religion is not so unfettered. The First Amendment does not insulate a church or its members from judicial inquiry when a charge is made that their activities violate a penal statute. Consequently, in this criminal proceeding the jury was not bound to accept the Unification Church's definition of what constitutes a religious use or purpose.

Moon, 718 F.2d at 1227.

A similar argument was rejected in *United States v. Jeffries*, 854 F.2d 254 (7th Cir. 1988). In *Jeffries*, the defendant argued that the IRS should not be permitted to define what constituted a church because to do so would result in the creation of a "federal church, which would restrict a person's individual religious beliefs." *Jeffries*, 854 F.2d at 256. In rejecting this argument, the court stated:

> There is no need to try to resolve any conflict there may be between a person's personal view of what constitutes a church and that which the tax law recognizes as a church qualifying it for tax exempt status, even if we could. For tax purposes, the tax law prevails.

Jeffries, 854 F.2d at 257.

Further, there is no First Amendment right to avoid federal income taxes on religious grounds. *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 629-31 (7th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001); *United States v. Ramsey*, 992 F.2d 831 (8th Cir. 1993). Therefore, the defendants' religious objections to filing tax returns signed under penalty of perjury do not eliminate the requirement to file tax returns. *See United States v. Dawes*, 874 F.2d 746, 749 (10th Cir. 1989) ("the requirement that the tax return be signed under penalty of perjury is not an unconstitutional restriction on defendant's right to freedom of religion"); *Hettig v. United States*, 845 F.2d 794 (8th Cir. 1988); *Borgeson v. United States*, 757 F.2d 1071 (10th Cir. 1985). *But see Ward*, 989 F.2d at 1018 (conviction of tax protester overturned because trial court refused to allow him to swear oath of his own creation; "the court's interest in administering the precise form of oath must yield to Ward's First Amendment rights").

An order requiring a defendant to comply with federal income tax laws as a condition of probation does not violate the First Amendment. *Ramsey*, 992 F.2d at 833.

The courts also have held that the Internal Revenue Code sets forth objective requirements or criteria (*e.g.*, 26 U.S.C. §§ 170 and 501), which enable the Internal Revenue Service to determine whether an organization qualifies as a tax-exempt organization or whether an individual's contribution qualifies as a deductible charitable contribution, without entering into the type of subjective inquiry that is prohibited by the First Amendment. *Dykema*, 666 F.2d at 1100; *Hall v. Commissioner*, 729 F.2d 632, 635 (9th Cir. 1984). *See also United States v. Masat*, 948 F.2d 923, 927 (5th Cir. 1991) (proper for district court to give instruction that allowed jury to decide whether defendant was a minister in a tax-exempt organization as defined in 26 U.S.C. § 501(c)(3)).

40.03 **TRIAL TACTICS/CONSIDERATIONS**

40.03[1] **Criminal Summons**

The government has the option, in misdemeanor cases, to charge the defendant by filing a criminal information and issuing the defendant a summons instead of arresting him pursuant to a warrant. Protesters have argued, however, that a showing of probable cause is required under Fed. R. Crim.P. 9 and 4(a) for issuance of a summons. The courts, however, have held to the contrary. *See United States v. Dawes*, 874 F.2d 746, 750 (10th Cir. 1989); *United States v. Birkenstock*, 823 F.2d 1026, 1030-31 (7th Cir. 1987); *United States v. Bohrer*, 807 F.2d 159, 161 (10th Cir. 1986). *See also United States v. Saussy*, 802 F.2d 849, 851-52 (6th Cir. 1986). *Compare United States v. Kahl*, 583 F.2d 1351, 1355 (5th Cir. 1978), where the court held that an arrest warrant, rather than a summons, not based on a sworn affidavit violated the requirements of Fed. R. Crim. P. 9.

40.03[2] **26 U.S.C. § 6103(h)(5) Juror Audit Information**

Prior to August 5, 1997, Section 6103(h)(5) allowed any party in a tax administration proceeding to obtain audit information about a prospective juror. The information was limited to a "yes" or "no" answer to the inquiry about whether a "prospective juror in such proceeding has or has not been the subject of any audit or other tax investigation" by the IRS. 26 U.S.C. 6103(h)(5). This

provision was repealed on August 5, 1997. The repeal applies to "judicial proceedings commenced after the date of enactment." Pub.L.No. 105-34, § 1283 (The Taxpayer Relief Act of 1997). [FN7]

40.03[3] **IRS Agents' Authority**

Illegal tax protesters sometimes raise the bizarre argument that IRS agents cannot investigate tax offenses or appear in court because they are not agents of the United States government but are agents of an alien foreign principal, the International Monetary Fund (IMF). *See United States v. Rosnow*, 977 F.2d 399, 413 (8th Cir. 1992). This argument is based on the startling premise that the United States has been in bankruptcy since the gold standard was eliminated. Because of the alleged bankruptcy, the United States purportedly has no standing to demand money or file liens. Instead, the IMF was supposedly given the power to collect income taxes, with the IRS as its depository and fiscal agent. The theory is that the income taxes collected by the IRS do not go into the United States Treasury but instead are deposited into the Federal Reserve Bank for the benefit of the IMF. *See DeLaRosa v. Agents for International Money Fund Internal Revenue Service*, No. CIV-S951170DFLGGH, 1995 WL 769395 (E.D. Cal. Oct. 16, 1995). This argument has been deemed "completely without merit [and] patently frivolous." *United States v. Jagim*, 978 F.2d 1032, 1036 (8th Cir. 1992); *see also United States v. Higgins*, 987 F.2d 543, 545 (8th Cir. 1993).

40.03[4] **Indictment Not Sufficient Notice of Illegality**

A tax protester may argue that an indictment is insufficient because it fails to cite 26 U.S.C. § 6012, the section that requires a return to be filed, or other Internal Revenue Code sections containing provisions for tax liabilities. If the indictment contains the elements of the offense charged, fairly informs the defendant of the charge against which he must defend, and enables him to "plead an acquittal or conviction in bar of future prosecution for the same offense," the indictment is constitutionally sufficient. *United States v. Vroman*, 975 F.2d 669, 670-71 (9th Cir. 1992) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). The government need not specifically cite 26 U.S.C. § 6012 in an indictment alleging willful failure to file in violation of 26 U.S.C. § 7203. *Vroman*, 975 F.2d at 671; *United States v. Kahl*, 583 F.2d 1351, 1355 (5th Cir. 1978).

In a similar vein, the Ninth Circuit has rejected the argument that an indictment charging a violation of 26 U.S.C. § 7206 and setting forth the elements of the offense was insufficient simply because the CFR provisions dealing with the enforcement of section 7206 reference the Bureau of Alcohol, Tobacco and Firearms, an agency unrelated to the case against the defendant. *United States v. Cochrane*, 985 F.2d 1027, 1031 (9th Cir. 1993). An indictment need only provide "the essential facts necessary to apprise the defendant of the crime charged; it need not specify the theories or evidence upon which the government will rely to prove those facts." *Cochrane*, 985 F.2d at 1031.

40.03[5] **Filing of Protest Documents: Is the Document Filed a Tax Return?**

40.03[5][a] **Generally**

Tax protestors frequently fail to file tax returns or file returns -- frequently unsigned, or signed with the jurat crossed out -- that report no financial information and/or espouse tax protest rhetoric. *See Morgan v. Commissioner*, 807 F.2d 81 (6th Cir. 1986); *Mosher v. Internal Revenue Service*, 775 F.2d 1292, 1294 (5th Cir. 1985); *Edwards v. Commissioner*, 680 F.2d 1268 (9th Cir. 1982); *Lovelace v. United States*, No. 89-375TD, 1990 WL 284740, at *1 (W.D.Wash. Oct. 18, 1990), *aff'd*, 951 F.2d 360 (9th Cir. 1991).

40.03[5][b] **What Is a Tax Return?**

A tax return consists of an IRS Form 1040 (or other relevant form) containing enough information about the taxpayer's income to compute the tax. *Commissioner v. Lane-Wells Co.*, 321 U.S. 219 (1944); *United States v. Saussy*, 802 F.2d 849, 854 (6th Cir. 1986); *United States v. Green*, 757 F.2d 116, 121 (7th Cir. 1985); *United States v. Grabinski*, 727 F.2d 681, 686 (8th Cir. 1984); *United States v. Verkuilen*, 690 F.2d 648 (7th Cir. 1982); *United States v. Moore*, 627 F.2d 830, 834 (7th Cir. 1980); *United States v. Smith*, 618 F.2d 280, 281 (5th Cir. 1980); *United States v. Edelson*, 604 F.2d 232, 234 (3d Cir. 1979); *United States v. Irwin*, 561 F.2d 198, 200-01 (10th Cir. 1977); *United States v. Daly*, 481 F.2d 28, 29 (8th Cir. 1973); *United States v. Porth*, 426 F.2d 519, 523 (10th Cir. 1970).

A taxpayer who submits a form containing only his name, address, and arguments supposedly excusing him from filing tax returns has not filed a "return" within the meaning of the Internal Revenue Code. In *Porth* and *Daly*, *supra*, taxpayers filed Forms 1040 containing only their names and addresses, and references to various constitutional provisions which purportedly excused them from filing tax returns. Appellate courts upheld both convictions. The *Porth* court held that:

> The return filed was completely devoid of information concerning his income as required by the regulations of the IRS. A taxpayer's return which does not contain any information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code or the regulations adopted by the Commissioner.

Porth, 426 F.2d at 523 (citations omitted). *See also United States v. Kimball*, 925 F.2d 356, 357 (9th Cir. 1991) (*en banc*) (asterisks and no signature not a return); *United States v. Upton*, 799 F.2d 432, 433 (8th Cir. 1986); *United States v. Green*, 757 F.2d 116, 121 (7th Cir. 1985); *United States v. Mosel*, 738 F.2d 157, 158 (6th Cir. 1984); *United States v. Vance*, 730 F.2d 736, 738 (11th Cir. 1984); *United States v. Grabinski*, 727 F.2d 681, 686 (8th Cir. 1984); *United States v. Stillhammer*, 706 F.2d 1072, 1075 (10th Cir. 1983) ("the test is whether the defendants' returns themselves furnished the required information for the IRS to make the computation and assessment, not whether the information was available elsewhere"); *Verkuilen*, 690 F.2d at 654; *United States v. Reed*, 670 F.2d 622, 623-24 (5th Cir. 1982) (Form 1040 reflected only the amount withheld from earnings and no other dollar figure, with refund claimed); *United States v. Crowhurst*, 629 F.2d 1297, 1300 (9th Cir. 1980); *United States v. Schiff*, 612 F.2d 73, 77 (2d Cir. 1979); *Edelson*, 604 F.2d at 234 .

Generally, Forms 1040 which report only zeros are not valid returns. *Mosel*, 738 F.2d 157; *United States v. Rickman*, 638 F.2d 182, 184 (10th Cir. 1980); *Moore*, 627 F.2d at 835 ("when apparent that the defendant is not attempting to file forms accurately disclosing his income, he may be charged with failure to file a return"); *United States v. Smith*, 618 F.2d 280, 281 (5th Cir. 1980);. *But see United States v. Long*, 618 F.2d 74, 75 (9th Cir. 1980) (zeros on Long's tax forms, unlike blanks, constituted information as to income from which a tax could be computed just as if the return had contained other numbers).

Courts have also held that tax forms reporting nothing or small amounts in the blanks provided for income and expenses do not constitute legal returns. *Kimball*, 925 F.2d at 357 (conviction upheld where returns only reported asterisks); *United States v. Malquist*, 791 F.2d 1399, 1401 (9th Cir. 1986) (Form 1040 with word "object" written in all spaces requesting information is not a return); *Edelson*, 604 F.2d at 234

(total income figure based on his interpretation of "constitutional dollars" and a blanket claim of the Fifth Amendment as to all other items); *United States v. Brown*, 600 F.2d 248, 251-52 (10th Cir. 1979) ("unknown" or claimed "Fifth Amendment" responses on Forms 1040 are not returns).

> A Form 1040 that shows only a bottom line figure for taxable income with no information as to how the reported taxable income was derived (such as the source of the income, the amount of gross income and deductions, and the number of exemptions claimed) is not a valid income tax return, as a matter of law.

Grabinski, 727 F.2d at 686-87.

On the other hand, omission of isolated information, such as a taxpayer's social security number or names of dependent children, which does not impede the IRS's ability to check a taxpayer's asserted tax liability, does not disqualify the document as a valid a return. *Grabinski*, 727 F.2d at 686. (*But see, contra, Crowhurst*, 629 F.2d at1300, in which defendant filed Forms 1040 which were blank except for the defendant's signature and request for refund of income tax withheld and attached Forms W-2. The Ninth Circuit held that the Form 1040 with attached W-2s constituted returns because they provided "the IRS with ostensibly complete information from which a tax could be computed" and upheld the defendant's conviction under section 7206(1) for filing false returns. *Crowhurst*, 629 F.2d at 1300).

The Sixth Circuit has held that a return filed *after* the IRS assesses deficiencies is not a return because it no longer serves a tax purpose and has no legal effect. *In re Hindenlang*, 164 F.3d 1029, 1034 (6th Cir.), *cert. denied*, 528 U.S. 810 (1999).

40.03[5][c] **What Is or Is Not a Tax Return: A Matter of Law or Fact?**

Some courts hold that the determination whether a return is valid for section 7203 purposes is a question of law for the court to decide. *United States v. Grabinski*, 727 F.2d 681, 686 (8th Cir. 1984). *See also United States v. Upton*, 799 F.2d 432, 433 (8th Cir. 1986); *United States v. Green*, 757 F.2d 116, 121-22 (7th Cir. 1985); *United States v. Moore*, 627 F.2d 830, 834 (7th Cir. 1980) (unsigned Form 1040 not a return as a matter of law). This determination "in no way removes from the jury fact questions regarding whether a defendant was required to file a return, . . . actually failed to make a return, . . . and whether a failure to file was willful." *Grabinski*, 727 F.2d at 686. *See also Green*, 757 F.2d at 121.

Other courts caution that a jury should decide whether or not the filing met the definition of a return. For example, the Sixth Circuit held that the trial court should only "properly stat[e] the law respecting the definition of a return, and [leave] it to the jury to decide whether [the] defendant had properly filed a return." *United States v. Saussy*, 802 F.2d 849, 854 (6th Cir. 1986).

In *Saussy*, 802 F.2d at 854, the court found the following jury instruction proper:

> A document which does not contain sufficient information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code and the Regulations thereunder. Whether any document submitted by the defendant constitutes [a] tax return[] is a matter for the jury to decide.

In *United States v. Goetz*, 746 F.2d 705, 709 (11th Cir. 1984), the Eleventh Circuit held that the trial court improperly invaded the province of the jury by "determin[ing] that the documents filed by the defendants did not contain any financial information, and conclud[ed] that, as a matter of law, these documents were not returns." *Goetz*, 746 F.2d at 708. *See also United States v. Grote*, 632 F.2d 387, 391 (5th Cir.

1980).

40.03[6] **Discovery of IRS Master Files**

Each individual who has filed a tax return with the IRS has a record in the IRS master computer under his or her social security number. The IRS Individual Master File (IMF) is the transcript generated by the IRS master computer. It contains coded information about the individual's tax history, including the filing of federal income tax forms, payment of taxes, refunds due, audits, and IRS notices sent to the individual. The Certificates of Assessments and Payments -- certified IRS records reflecting filings and payments by an individual which are generally introduced at trial -- are prepared from the information contained within the IMF.

Rule 16 of the Federal Rules of Criminal Procedure does not require the government to provide the IMF in discovery absent some showing of materiality. *See United States v. Pottorf*, 769 F. Supp. 1176, 1181 (D. Kan. 1991). When portions of the IMF are relevant, it may be sufficient to provide just those relevant parts of the IMF in discovery. *See United States v. Fusero*, 106 F.Supp.2d 921, 925 (E.D. Mich. 2000). However, in *United States v. Buford*, 889 F.2d 1406, 1407-08 (5th Cir. 1989), the Fifth Circuit reversed the conviction of a defendant where the district court denied his request for the IMF in discovery and failed to perform a promised *in camera* inspection of the IMF. In *Buford*, the government introduced evidence, for impeachment purposes only, that the defendant failed to file his tax returns for several years. The defendant testified that he had filed. In rebuttal, the government called an IRS records custodian, who based her testimony on the Certificates of Assessments and Payments, which were hand prepared using information taken from the IMF. After eliciting evidence on cross-examination of the IRS custodian which contradicted the information in the Certificates of Assessments and Payments, the defendant repeatedly asked for an *in camera* review of the IMF. The review never took place. The Fifth Circuit found that the district court abused its discretion in denying discovery of the IMF and failing to provide the *in camera* review of the IMF. *Buford*, 889 F.2d at 1408.

40.03[7] **Motions in Limine**

In many tax protester cases, the defendant will attempt to present "evidence" or argument relating to what the law should be, the constitutionality and validity of the tax laws, or alternative interpretations of the tax laws not relied upon by the defendant. In such cases, it may be useful to file a motion *in limine* requesting an order to prevent the defendant from presenting inappropriate and irrelevant materials that could confuse the jury. The text of a sample motion in limine is set out as Appendix I at the end of this chapter.

40.03[8] **Attorney Sanctions**

Attorneys representing protesters will sometimes repeatedly make frivolous arguments or behave inappropriately in court. Such behavior is sanctionable. *See United States v. Engstrom*, 16 F.3d 1006, 1010-12 (9th Cir. 1994)(although defense counsel could not be held in contempt after a summary procedure pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure for asserting during opening statement his client's belief in the trial court's participation in a conspiracy to defraud the American people, his "various disrespectful and confrontational remarks" to the trial judge warranted order suspending his permission to practice in jurisdiction for three years); *United States v. Collins*, 920 F.2d 619, 633-34 (10th Cir. 1990) (upholding district court's revocation of defense counsel's *pro hac vice* status after counsel, who had a "past reputation for hijacking judicial proceedings onto his tax protester bandwagon," filed several legally frivolous pre-trial motions); *In re Becraft*, 885 F.2d 547, 550 (9th Cir. 1990) (pursuant to Fed. R. App. Proc. 38, ordering defense counsel to pay $2,500

in damages for filing frivolous petition for rehearing); *United States v. Summet*, 862 F.2d 784, 786-87 (9th Cir. 1988) (upholding district court's formal censure of defense attorney and revocation of his *pro hac vice* status when he violated local rules by continuously challenging the court's authority and ignoring repeated warnings of the court); *United States v. Howell*, 936 F.Supp. 774, 775-76 (D. Kansas 1996) (denying defense attorney's motion for reconsideration of order revoking his *pro hac vice* admission because he failed to appear at a pretrial motions hearing, made false and misleading statements regarding his past disciplinary proceedings to magistrate judge, and failed to disclose all past disciplinary proceedings in an affidavit submitted to the court).

40.03[9] **Evidentiary Issues**

40.03[9][a] **Prior or Subsequent Tax Protest Activities: Rule 404(b)**

Evidence of tax protest activities of the defendant prior or subsequent to the criminal conduct charged may be admissible at trial. It may be argued that such evidence, if "intrinsic" or "intricately related to the facts of the case," is not even subject to Fed. R. Evid. 404(b) because it is directly probative of willfulness, an element of the tax crime charged. *United States v. Hilgeford*, 7 F.3d 1340, 1345 (7th Cir. 1993); *see also United States v. Williams*, 900 F.2d 823, 825 (5th Cir. 1990) (other act evidence is "intrinsic" and thereby not governed by Rule 404(b) when the evidence of the other acts and the evidence of the crime charged are "inextricably intertwined," both acts are part of a "single criminal episode," or the other acts were "necessary preliminaries" to the crime charged). Intrinsic evidence is subject to the Fed. R. Evid. 403 balancing test, which requires the exclusion of relevant evidence if its prejudicial effect substantially exceeds its probative value.

If it is determined that the evidence of other crimes or acts is extrinsic to the case, the evidence may be admissible under Fed. R. Evid. Rule 404(b) to show "intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Other act evidence may be admitted if the following four requirements are met: (1) the evidence is offered for a proper purpose, a purpose other than to demonstrate the defendant's propensity to commit the crime charged; (2) the evidence is relevant; (3) the trial court makes a Fed. R. Evid. Rule 403 determination that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and (4) the district court submits a limiting instruction, if requested. *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988); *United States v. Grissom,* 44 F.3d 1507, 1513 (10th Cir. 1995); *United States v. Zapata*, 871 F.2d 616, 620 (7th Cir. 1989). Evidence of other similar acts is relevant only if the evidence is sufficient to support a jury finding that the defendant committed the similar act. *Huddleston*, 485 U.S. at 689, *Zapata*, 871 F.2d at 620; *See United States v. Ayers*, 924 F.2d 1468, 1473 (9th Cir. 1991) (articulating four-part test for admission under 404(b) -- (1) sufficient evidence must exist for jury to find defendant committed other acts; (2) other acts must be introduced to prove a material issue; (3) other acts must not be too remote in time; and (4) if admitted to prove intent, other acts must be similar to offense charged).

A defendant's prior or subsequent tax protest activities, filing and payment history, or participation in civil tax court proceedings will often be relevant in criminal tax cases, especially where the defendant raises a good faith defense. *See United States v. Wisenbaker*, 14 F.3d 1022, 1028 (5th Cir. 1994) (prior state tax convictions relevant to prove willfulness and to negate defendant's assertion of good faith defense); *United States v. McKee*, 942 F.2d 477, 480 (8th Cir. 1991) (in section 7201 prosecution, testimony concerning prior IRS audit and defendant's prior filing of false exempt Form W-4 relevant to issues of intent or absence of mistake under Fed. R. Evid. 404(b)); *United States v. Fingado*, 934 F.2d 1163, 1165 (10th Cir. 1991) (in section 7203 prosecution, evidence of defendant's failure to file in prior years admissible pursuant to Fed.R.Evid. 404(b) to prove willfulness); *United States v. Johnson*, 893 F.2d 451, 453-54 (1st Cir. 1990) (evidence that defendant submitted Form W-4 in 1987 claiming more allowances than he was entitled to and failed to file a return in 1987 relevant to show

willfulness and absence of mistake in filing false Schedule C forms from 1982 to 1986); *United States v. Poschwatta*, 829 F.2d 1477, 1484 (9th Cir. 1987) (prior tax conviction admissible to show why defendant was required by law to file income tax returns); *United States v. Birkenstock*, 823 F.2d 1026, 1028 (7th Cir. 1987) (in section 7203 prosecution, defendant's prior "pseudo-dollar/gold standard" returns properly admitted to show intent and absence of mistake); *United States v. Grosshans*, 821 F.2d 1247, 1253 (6th Cir. 1987) (defendant's attendance at protester meetings admissible to show that she knew what she was doing and knew she had an obligation to pay taxes); *United States v. Bergman*, 813 F.2d 1027, 1029 (9th Cir. 1987) (in section 7203 prosecution, filing of false exempt W-4 admissible under Fed.R.Evid. 404(b) to show willfulness); *United States v. Blood*, 806 F.2d 1218, 1222 (4th Cir. 1986) (where defendant represented himself and testified in prior Tax Court proceedings, prior Tax Court decision admissible to show intent and pattern of tax avoidance); *United States v. Upton*, 799 F.2d 432, 433 (8th Cir. 1986) (evidence that defendant had sent tax protester materials to the IRS and had failed to comply with tax laws in prior and subsequent years probative of willfulness); *United States v. Ausmus*, 774 F.2d 722, 727 (6th Cir. 1985) (in section 7203 failure to pay case, evidence that defendant failed to pay income taxes for years prior to and following the years charged admissible to show pattern, plan and scheme indicating that failure to pay taxes was not the result of accident, negligence or inadvertence);*United States v. Verkuilen*, 690 F.2d 648, 656 (7th Cir. 1982) (in section 7203 prosecution, evidence of defendant's submission of correct Form W-4 and two subsequent false Forms W-4 prior to years charged properly admitted to show willfulness, motive, and common pattern of illegal conduct); *But see United States v. Mikolajczyk*, 137 F.3d 237, 244 (5th Cir. 1998) (trial court erred in admitting evidence of prior filing of public notice "rescinding" tax returns during cross-examination of defendant in mail fraud prosecution for submission of USA First "Certified Money Orders," because government offered no evidence that defendant had protest motive in submitting the "Certified Money Orders").

40.03[9][b] **IRS Agent's Testimony and Sequestration**

IRS agents usually testify during the course of a tax trial. Often such testimony will consist of summarizing the government's documentary evidence and providing tax requirements and calculations based on that testimony. Provided the agent has been properly qualified as an expert witness, would be helpful to the jury, and does not offer any opinion on the ultimate issue of guilt, such testimony is fully admissible pursuant to Fed. R. Evid. 702. *See United States v. West*, 58 F.3d 133, 140-41 (5th Cir. 1995) (admission of testimony of IRS expert witness testimony, which included summary of testimony given by other government witnesses, was not error because the agent referred to other evidence when necessary to explain his analysis); *United States v. Moore*, 997 F.2d 55, 58 (5th Cir. 1993) (citing cases); *United States v. Beall*, 970 F.2d 343, 347 (7th Cir. 1992) (IRS expert's summary of documentary evidence and testimony regarding tax consequences of subcontractor relationship within agent's area of expertise); *United States v. DeClue*, 899 F.2d 1465, 1473 (6th Cir. 1990) (IRS special agent with accounting degree, regular IRS training and experience spanning seven years qualified to testify as expert about tax due and owing); *United States v. Mann*, 884 F.2d 532, 539 (10th Cir. 1989); *United States v. Barnette*, 800 F.2d 1558, 1568-69 (11th Cir. 1986) (IRS expert auditor and accountant properly permitted to give his opinion of the "income tax implications" as applied to the defendant); *United States v. Marchini*, 797 F.2d 759, 765-66 (9th Cir. 1986) (district court has discretion to allow agent of IRS to testify as an "expert summary witness" based upon the agent having heard the testimony of the other witnesses and having reviewed the exhibits). *But see United States v. Benson*, 941 F.2d 598, 603-06 (7th Cir. 1991) (conviction reversed where IRS expert gave opinions not based on special knowledge or skill that was helpful to jury).

An IRS agent who does testify as an expert/summary witness should be allowed to remain in the courtroom during the trial, in addition to an investigatory case agent designated as the representative of the government under

Rule 615(2). Fed. R. Evid. 615; *see United States v. Lussier*, 929 F.2d 25, 30 (1st Cir. 1991); *United States v. Kosko*, 870 F.2d 162, 164 (4th Cir. 1989) (IRS agent to testify as expert witness allowed to remain in courtroom along with DEA agent). Some courts have found that the government may only identify one agent for each subsection of Rule 615. *See United States v. Pulley*, 922 F.2d 1283, 1286 (6th Cir. 1991) (allowing only one agent under Rule 615(2) and one agent under Rule 615(3); *United States v. Farnham*, 791 F.2d 331, 334-35 (4th Cir. 1986) (conviction reversed where court failed to exclude one of two case agents during trial). *But see United States v. Jackson*, 60 F.3d 128, 134 (2nd Cir. 1995) (holding that trial court has discretion to exempt from the rule against witnesses more than one witness under each subsection of Rule 615).

40.03[9][c] **Admissibility of IRS Computer Records**

Computer data evidence is often introduced in tax cases to show the defendant's filing history, to prove that the defendant did not file returns as required, or to show that the defendant received notices about his tax liabilities. The introduction of the actual Individual Master File (IMF) transcript of account through a witness can open the witness to cross-examination by the defense about every code and piece of information contained in the transcript. In order to avoid this problem, it may be wiser to simply offer IRS computer records at trial in the form of Certificates of Assessments and Payments, certified documents reflecting tax information kept on file at the IRS.

Protesters often challenge the admissibility of computer records, and courts routinely reject such challenges. These records may be admitted under Federal Rule of Evidence 803(6) as business records or under Rule 803(10) as certificates of lack of official records. *See Hughes v. United States*, 953 F.2d 531, 535 (9th Cir. 1992) (holding that certificate of assessments and payments was proof of fact that federal tax assessments actually were made); *United States v. Spine*, 945 F.2d 143, 149 (6th Cir. 1991) (certificates of assessments and payments, which showed defendant filed no returns, admissible under Rule 803(10)); *United States v. Bowers*, 920 F.2d 220, 223 (4th Cir. 1990) (IRS records admissible as "certificates of lack of official record" under Rule 803(10)); *United States v. Neff*, 615 F.2d 1235, 1241-42 (9th Cir. 1980) (IRS Certificates of Assessments and Payments admissible under Rule 803(10));*United States v. Tarrant*, 798 F. Supp. 1292, 1299 (E.D. Mich. 1992) (IRS certified records of tax assessments and payments properly admitted under Rule 803(8) and Rule 803(10)). Such records may be self-authenticating under Rule 902 if under seal or they may be authenticated by an IRS employee. No showing of the accuracy of the computer system needs to be made to introduce the documents. *See United States v. Ryan*, 969 F.2d 238, 240 (7th Cir. 1992) (certified copies of master file transcripts admissible as self-authenticating documents).

Some courts have admitted IRS computer records under the Rule 803(8) hearsay exception for public records and reports. "[I]n criminal cases matters observed by police officers and other law enforcement personnel" are excluded from the public records hearsay exception. Fed. R. Evid. 803(8)(B). Rule 803(8)(C) prevents the government from using "factual findings resulting from an investigation made pursuant to authority granted by law." Courts that have admitted computer records under Rule 803(8) distinguished between law enforcement reports prepared in routine, non-adversarial settings and those resulting from the more subjective endeavor or on-the-scene type investigations of a crime. The latter are excluded from the public records exception. *United States v. Wiley*, 979 F.2d 365, 369 (5th Cir. 1992); *see also United States v. Wilmer*, 799 F.2d 495, 500-01 (9th Cir. 1987) (calibration report of breathalyser within public records exception to hearsay rule because Rule 803(8)(B) was not intended to applied to "records of routine, nonadversarial materials" made in nonadversarial setting). *But see United States v. Oates, 560 F.2d 45 (2nd Cir. 1977) (holding that police and evaluative reports not satisfying the standards of Rule 803(8)(B) and (C) may not qualify for admission under any other exception to the hearsay rule). The holding in Oates has been widely criticized by several courts.*

See, e.g., United States v. Sokolow, 91 F.3d 396, 405 (3rd Cir. 1996) (listing cases criticizing Oates as unduly broad interpretation of Rule 803(8)); Hayes, 861 F.2d at 1229-30 (discussing criticism of Oates, holding that Oates does not apply when IRS employee who obtained computer documents testifies at trial, and upholding admission of IRS computer records under Rule 803(6)); United States v. Metzger, 778 F.2d 1195, 1200-02 (6th Cir. 1985) (criticizing Oates and holding that the restriction of Rule 803(8)(C) does not apply to Rule 803(10)); United States v. Quezada, 754 F.2d 1190, 1193-94 (5th Cir. 1985) (refusing to follow Oates' inflexible application of Rule 803(8)(B)).

40.03[10] ***Use of Pseudonyms by IRS Revenue Agents and Officers***

Criminal prosecutors should be aware that IRS Revenue Agents and Officers are permitted to use officially-issued pseudonyms in their dealings with the public. The use of official pseudonyms was first permitted in 1992 pursuant to a decision of the Federal Service Impasse Panel (FSIP) [FN8]. Department of the Treasury, Internal Revenue Service and National Treasury Employees Union, No. 91 FSIP 229 at 4 (March 10, 1992). As part of the IRS Restructuring Act of 1997, Congress codified the use of pseudonyms with an effective date of July 22, 1998. Pub.L. 105-206, Title III, Section 3706, July 22, 1998, 112 Stat. 778.

Use of pseudonyms is intended to prevent personal harassment of IRS employees by taxpayers and other members of the public, especially tax protesters. Among the problems identified by the Treasury Employees' Union, and upon which the FSIP relied, were assaults, threats, obscene phone calls at work and at home, and filing of false interest and dividend reports (Form 1099), and false liens, against IRS employees. The Union cited a 1988 Federal Bureau of Investigation Report, which found that more IRS enforcement officers suffered more assaults than any other law enforcement group in the Federal Government.

The FSIP held that "employees shall only be required to identify themselves by last name" and "[i]f an employee believes that due to the unique nature of [his/her] last name, and/or the nature of the office locale, that the use of the last name will still identify [him/her] [s/he] may 'register' a pseudonym with his or her supervisor." The IRS Restructuring and Reform Act of 1997 requires that an employee give "adequate justification. . . including protection of personal safety" and obtain prior approval from his or her supervisor before using a pseudonym.

The pseudonym may be issued only in place of the employee's last name; the real first name must be used. Once a pseudonym is issued, it is used by that employee at all times while on duty, whether working in the field or in the office. All history sheets, liens, levies and summonses are signed using the pseudonym. Pocket commissions (credentials) are issued in the pseudonym only. However, the IRS-issued identification, which allows access to IRS facilities, may only be issued in the employee's real name.

*There has been very little litigation concerning the use of pseudonyms and what has occurred involves summons enforcement. Generally, courts have not found fault with the practice. See, e.g., Sanders v. United States, No. 94-1497, 1995 WL 257812 (10th Cir. May 2, 1995); Springer v. Internal Revenue Service, Nos. S-97-0091 WBS GGH, S-97-0092 WBS GGH, S-97-0093 WBS GGH, 1997 WL 732526 (E.D. Cal. Sept. 12, 1997); United States v. Wirenius, No. CV 93-6786 JGD, 1994 WL 142394, at *n.2 (C.D. Cal. Feb. 11, 1994); Dvorak v. Hammond, No. CIV 3-94-601, 1994 WL 762194, at *n.1 (D. Minn. Dec. 5, 1994). But see United States v. Nolen, 4:96-CV-934-A (N.D. Texas, 1997) (refusal of District Court to allow a Revenue Agent to use a pseudonym to testify and stating that it would not allow such practice in the future). In Nolen, the AUSA called the Revenue Agent to the stand, asked him to state his name for the record and then immediately had the RA identify that name as his pseudonym. The Court took issue with the fact that the RA gave his pseudonym as his name, despite previous disclosure of the pseudonym to the court in the declaration signed by the RA.*

Obviously, as officers of the court, government attorneys should not submit declarations or affidavits signed by an IRS employee using a pseudonym without informing the court that a pseudonym is being used. Likewise, caution should be exercised when tendering any witness who is using a pseudonym. Particular care should be taken if your summary witness/IRS expert witness has used a pseudonym; in those instances the witness should either relinquish the pseudonym or not be used as a witness. In that regard, the IRS recognizes that the court must be informed about the use of a pseudonym and that the employee's legal name may ultimately have to be disclosed, depending on the circumstances of the case. Minimally, consultation with your supervisor and with the IRS about how best to proceed in these instances is advised.

40.03[11] ***Jury Nullification***

"Jury nullification" is the concept that a jury has the right to ignore a judge's instructions on the law in a trial, if it feels the law is unjust, and acquit the defendant even if the government has proven guilt beyond a reasonable doubt. Protesters often argue that the authors of the Bill of Rights intended the Sixth Amendment to incorporate such a right. There is, however, no constitutional right to a jury nullification instruction. United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1992); United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988) (upholding court's response to jury's inquiry about meaning of "jury nullification" that "[t]here is no such thing as valid jury nullification. Your obligation is to follow the instructions of the court as to the law given to you."); United States v. Drefke, 707 F.2d 978, 982 (8th Cir. 1983); United States v. Buttorff, 572 F.2d 619, 627 (8th Cir. 1978). See also United States v. Dougherty, 473 F.2d 1113, 1130-1137 (D.C. Cir. 1972), for a thorough discussion of the issue of jury nullification and its historical origins.

40.04 ***WILLFULNESS***

Willfulness, the voluntary, intentional violation of a known legal duty (Cheek v. United States, 498 U.S. 192, 201 (1991)), may be proved entirely by circumstantial evidence. United States v. McCaffrey, 181 F.3d 854, 856 (7th Cir. 1999); United States v. Threadgill, 172 F.3d 357, 367 (5th Cir.1999); United States v. Tucker, 133 F.3d 1208, 1218 (9th Cir. 1998); United States v. King, 126 F.3d 987, 993 (7th Cir. 1997); United States v. Rosario, 118 F.3d 160, 164 (3d Cir. 1997); United States v. Klausner, 80 F.3d 55, 62 (2d Cir. 1996); United States v. Wynn, 61 F.3d 921, 925 (D.C.Cir. 1995); United States v. Daniel, 956 F.2d 540, 543 (6th Cir. 1992); United States v. Fingado, 934 F.2d 1163, 1167 (10th Cir. 1991); United States v. Grumka, 728 F.2d 794, 797 (6th Cir. 1984); United States v. Gleason, 726 F.2d 385, 388 (8th Cir. 1984); United States v. Schiff, 612 F.2d 73, 77-78 (2d Cir. 1979); Hellman v. United States, 339 F.2d 36, 38 (5th Cir. 1964).

> *[T]rial courts should follow a liberal policy in admitting evidence directed towards establishing the defendant's state of mind. No evidence which bears on this issue should be excluded unless it interjects tangential and confusing elements which clearly outweigh its relevance.*

United States v. Collorafi, 876 F.2d 303, 305 (2d Cir. 1989).

In protester cases, admissible evidence of willfulness includes:

1. *Tax protest activities and philosophies. United States v. Eargle, 921 F.2d 56, 58 (5th Cir. 1991); United States v. Grosshans, 821 F.2d 1247, 1252 (6th Cir. 1987); United States v. Bergman, 813 F.2d 1027, 1029 (9th Cir. 1987); United States v. Turano, 802 F.2d 10, 11-12*

(lst Cir. 1986); United States v. Marchini, 797 F.2d 759, 766 (9th Cir. 1986). [FN9] But see United States v. Knapp, 25 F.3d 451, 456 n.1 (7th Cir. 1994) (declining to review propriety of court's instruction that tax protester status could be considered in determining willfulness because issue not raised below).

2. *Filing blatantly false IRS Forms W-4. United States v. Johnson, 893 F.2d 451, 453 (1st Cir. 1990). See also United States v. Brooks, 174 F.3d 950, 955 (8th Cir. 1999); United States v. Kassouf, 144 F.3d 952, 955 (6th Cir. 1998); Hanson v. Commissioner, 975 F.2d 1150, 1153 (5th Cir. 1993); United States v. Mal, 942 F.2d 682, 685 & n.3 (9th Cir. 1991); United States v. Sloan, 939 F.2d 499, 502 (7th Cir. 1991); United States v. Pabisz, 936 F.2d 80, 81 (2d Cir. 1991); United States v. Williams, 928 F.2d 145, 148-49 (5th Cir. 1991); United States v. Connor, 898 F.2d 942, 945 (3rd Cir. 1990); United States v. Johnson, 893 F.2d 451, 453 (1st Cir. 1990); United States v. Schmitt, 794 F.2d 555, 560 (10th Cir. 1986); United States v. Ferguson, 793 F.2d 828, 831 (7th Cir. 1986); Granado v. Commissioner, 792 F.2d 91, 93-94 (7th Cir. 1986); United States v. Shivers, 788 F.2d 1046, 1048 (5th Cir. 1986); United States v. Carpenter, 776 F.2d 1291, 1295 (5th Cir. 1985); Zell v. Commissioner, 763 F.2d 1139, 1146 (10th Cir. 1985); United States v. Williams, 644 F.2d 696, 701 (8th Cir. 1981).*

3. *Prior taxpaying history, such as the prior filing of valid tax returns followed by the filing of a protest return and receipt of a letter from the Internal Revenue Service telling the defendant that his return "did not comply with tax laws and might subject him to criminal penalties." United States v. Shivers, 788 F.2d 1046, 1048 (5th Cir. 1986). See also United States v. Daniel, 956 F.2d 540, 543 (6th Cir. 1992); United States v. Fingado, 934 F.2d 1163 (10th Cir. 1991); United States v. DeClue, 899 F.2d 1465 (6th Cir. 1990); United States v. Poschwatta, 829 F.2d 1477, 1483 (9th Cir. 1987); United States v. Upton, 799 F.2d 432, 433 (8th Cir. 1986); United States v. Green, 757 F.2d 116, 123-24 (7th Cir. 1985); United States v. Grumka, 728 F.2d 794, 796 (6th Cir. 1984); United States v. Moore, 627 F.2d 830, 832 (7th Cir. 1980); Hayward v. Day, 619 F.2d 716, 717 (8th Cir. 1980); United States v. Francisco, 614 F.2d 617, 618 (8th Cir. 1980); United States v. Karsky, 610 F.2d 548, 551 (8th Cir. 1979).*

4. *Subsequent taxpaying conduct. Fed. R. Evid. 404(b); United States v. Bank of New England, N.A., 821 F.2d 844, 858 (1st. Cir. 1987); United States v. Upton, 799 F.2d 432, 433 (8th Cir. 1986); United States v. Sempos, 772 F.2d 1, 2 (1st Cir. 1985); United States v. Richards, 723 F.2d 646, 649 (8th Cir. 1983); United States v. Serlin, 707 F.2d 953, 959 (7th Cir. 1983); United States v. McCorkle, 511 F.2d 477, 479 (7th Cir. 1974).*

5. *The amount of a defendant's gross income. Fingado, 934 F.2d at 1168; United States v. Bohrer, 807 F.2d 159, 161-62 (10th Cir. 1987); United States v. Payne, 800 F.2d 227 (10th Cir. 1986). The higher the defendant's gross income, the less likely the defendant was unaware of the filing requirement and the more likely the defendant's failure was intentional rather than inadvertent.*

6. *Proof that knowledgeable persons warned the defendant of tax improprieties. United States v. Dack, 987 F.2d 1282,*

1285 (7th Cir. 1993); Fingado, 934 F.2d at 1168; United States v. Collorafi, 876 F.2d 303, 305 (2d Cir. 1989); United States v. Sempos, 772 F.2d 1, 2 (1st Cir. 1985); United States v. Grumka, 728 F.2d 794, 797 (6th Cir. 1984).

40.05 ***DEFENSES***

40.05[1] ***Good Faith***

A defendant's conduct is not willful if the jury finds it resulted from "ignorance of the law or a claim that because of a misunderstanding of the law, he had a good faith belief that he was not violating any of the provisions of the tax laws." Cheek v. United States, 498 U.S. 192, 202 (1991). Cheek claimed that he did not file tax returns because he believed that: (1) he was not a taxpayer within the tax laws, (2) wages are not income, (3) the Sixteenth Amendment did not authorize the taxation of individuals, and (4) the Sixteenth Amendment was unenforceable. Cheek, 498 U.S. at 195. The Court explained that:

> *In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief is objectively reasonable.*

Cheek, 498 U.S. at 202 (emphasis added). The Supreme Court held the trial court's jury instructions that Cheek's good faith beliefs or misunderstanding of the law would have to be objectively reasonable to negate willfulness were erroneous, stating:

> *It was therefore error to instruct the jury to disregard evidence of Cheek's understanding that, within the meaning of the tax laws, he was not a person required to file a return or pay income taxes and that wages are not taxable income, as incredible as such misunderstandings of and beliefs about the law might be.*

Cheek, 498 U.S. at 203.

The trial court did not err, however, in instructing the jury not to consider Cheek's claims that tax laws are unconstitutional:

> *We thus hold that in a case like this, a defendant's views about the validity of the tax statutes are irrelevant to the issue of willfulness, need not be heard by the jury, and if they are, an instruction to disregard them would be proper. For this purpose, it makes no difference whether the claims of invalidity are frivolous or have substance.*

Cheek, 498 U.S. at 206. See also United States v. Saussy, 802 F.2d 849, 853 (6th Cir. 1986); United States v. Payne, 800 F.2d 227, 229 (10th Cir. 1986); United States v. Mueller, 778 F.2d 539, 541 (9th Cir. 1985); United States v. Latham, 754 F.2d 747, 751 (7th Cir. 1985); United States v. Burton, 737 F.2d 439, 442 (5th Cir. 1984); United States v. Kraeger, 711 F.2d 6, 7 (2d Cir. 1983); United States v. Pilcher, 672 F.2d 875, 877 (11th Cir. 1982); United States v. Moore, 627 F.2d 830, 833 n.l (7th Cir. 1980); United States v. Karsky, 610 F.2d 548, 550 (8th Cir. 1979).

The Cheek Court stated that a jury considering a good faith belief claim:

> *would be free to consider any admissible evidence from any source showing that . . . [the taxpayer] was aware of his . . . [duties under the tax laws], including evidence showing his awareness of the Code or*

> *regulations, of court decisions rejecting his interpretations of the tax law, of authoritative rulings of the Internal Revenue Service, or any contents of the personal income tax return forms and accompanying instructions . . . .*

Cheek, 498 U.S. at 202.

In determining whether a subjective good faith belief was held, a jury should not be precluded from considering the reasonableness of the taxpayer's interpretation of the law.

> *[T]he more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge.*

Cheek, 498 U.S. at 203-04. After remand and retrial, the Seventh Circuit upheld Cheek's conviction, United States v. Cheek, 3 F.3d 1057 (7th Cir. 1993), finding that the trial court's instruction that the jury could "consider whether the defendant's stated belief about the tax statutes was reasonable as a factor in deciding whether he held that belief in good-faith" was proper. Cheek, 3 F.3d at 1063. See also United States v. Becker, 965 F.2d 383, 388 (7th Cir. 1992); United States v. Powell, 955 F.2d 1206, 1212 (9th Cir. 1992) (jury may consider "the reasonableness of the interpretation of the law in weighing the credibility" of defendants' subjective belief that they were not required to file tax returns).

Tax protesters often claim to believe, allegedly based on a careful study of legal decisions, statutes, legal treatises, and the like, that they are not required to file returns or pay taxes, and attempt to introduce such materials into evidence. See, e.g., United States v. Bonneau, 970 F.2d 929, 931 (1st Cir. 1992); United States v. Willie, 941 F.2d 1384, 1391 (10th Cir. 1991). In order to introduce such materials into evidence, the taxpayer must lay a sufficient foundation of reliance. Even if he lays such a foundation, the materials may not be admitted into evidence because of competing interests. For example, such material may: (1) confuse the jury as to the law (see United States v. Stafford, 983 F.2d 25, 28 n.14 (5th Cir. 1993); United States v. Payne, 978 F.2d 1177, 1181-82 (10th Cir. 1992); United States v. Barnett, 945 F.2d 1296, 1301 (5th Cir. 1991); Willie, 941 F.2d at 1395-97; United States v. Gleason, 726 F.2d 385, 388 (8th Cir. 1984); United States v. Kraeger, 711 F.2d 6, 7-8 (2d Cir. 1983)), (2) assist a defendant who wishes to undermine the authority of the court, and (3) turn the trial into a tax protester circus (see Willie, 941 F.2d at 1395 & n.8).

If such materials are not admitted into evidence, the defendant can still convey his core defense to the jury through testimony about his beliefs and how he arrived at them. See Barnett, 945 F.2d at 1301; United States v. Hairston, 819 F.2d 971, 973 (10th Cir. 1987). It is for the district court to weigh the various competing interests and determine, in its discretion, whether, to what extent, and in what form, legal materials upon which a defendant claims to have relied should be admitted in any given case. See Willie, 941 F.2d at 1398; Fed. R. Evid. 403. [FN10]

A prosecutor should not seek to exclude such evidence in all situations. See United States v. Gaumer, 972 F.2d 723, 725 (6th Cir. 1992) (error not to allow defendant to read relevant excerpts of court opinions and Congressional Record upon which he assertedly relied in determining that he was not required to file tax returns); United States v. Powell, 955 F.2d 1206, 1214 (9th Cir. 1992) ("In section 7203 prosecutions, statutes or case law upon which the defendant claims to have actually relied are admissible to disprove that element [willfulness] if the defendant lays a proper foundation which demonstrates such reliance."

(emphasis in original)). Restraint should be exercised where appropriate so as not to jeopardize convictions on appeal. This is particularly true where the defendant has made a specific claim of reliance on a relatively limited amount of material. See Barnett, 945 F.2d at 1301 n.3 (noting that exclusion of specific proffer of one or two sentences from an IRS handbook may have been error, albeit harmless, and contrasting this specific proffer with the "voluminous,' cover the waterfront' exhibits" that defendant had originally offered). In such a situation, the prosecutor should consider requesting a limiting instruction rather than opposing the admission of such evidence. [FN11]

For examples of jury instructions on willfulness and the good faith defense that have been upheld, see United States v. Dykstra, 991 F.2d 450, 452-53 (8th Cir. 1993); United States v. Dack, 987 F.2d 1282, 1285 (7th Cir. 1993); Stafford, 983 F.2d at 27; United States v. Becker, 965 F.2d 383, 388 (7th Cir. 1992); United States v. Droge, 961 F.2d 1030, 1037-38 (2d Cir. 1992); United States v. Masat, 948 F.2d 923, 931-32 (5th Cir. 1991); United States v. Fingado, 934 F.2d 1163, 1166-67 (10th Cir. 1991); United States v. Collins, 920 F.2d 619, 622-23 (10th Cir. 1990).

40.05[1][a] ***Reliance on Return Preparer/Accountant***

"Reliance on a qualified tax preparer is an affirmative defense to a charge of willful filing of a false tax return." United States v. Charroux, 3 F.3d 827, 831 (5th Cir. 1993) (citation omitted).

Reliance on the advice of third parties, such as preparers or accountants, may negate the element of willfulness in prosecutions for: (1) tax evasion in violation of 26 U.S.C. § 7201 (United States v. Fawaz, 881 F.2d 259, 265 (6th Cir. 1989)); (2) willful failure to pay, keep records, or supply required information, in violation of 26 U.S.C. § 7203 (United States v. Civella, 666 F.2d 1122, 1126 (8th Cir. 1981); United States v. Wilson, 550 F.2d 259, 260 (5th Cir. 1977)); (3) tax perjury, in violation of 26 U.S.C. § 7206(1) (United States v. Brimberry, 961 F.2d 1286, 1290 (7th Cir. 1992)).

In order to claim successfully third-party reliance, a defendant must show that he truthfully and completely: (1) disclosed all relevant facts to the preparer or accountant, and (2) in good faith relied on the preparer's or accountant's advice. United States v. Masat, 948 F.2d 923, 930 (5th Cir. 1991); United States v. Wilson, 887 F.2d 69, 73 (5th Cir. 1989); United States v. Michaud, 860 F.2d 495, 500 (1st Cir. 1988); United States v. Meyer, 808 F.2d 1304, 1306 (8th Cir. 1987); United States v. Whyte, 699 F.2d 375, 379 (7th Cir. 1983); United States v. Samara, 643 F.2d 701, 703-704 (10th Cir. 1981); United States v. Pomponio, 563 F.2d 659, 662 (4th Cir. 1977); United States v. Lisowski, 504 F.2d 1268, 1272 (7th Cir. 1974); United States v. Stone, 431 F.2d 1286, 1289 (5th Cir. 1970). In other words, "to avail himself of the defense, a defendant must demonstrate that he provided full information to the preparer and then filed the return without having reason to believe it was incorrect." Charroux, 3 F.3d at 831 (citation omitted).

"In a tax evasion case in which the defendants assert that blind reliance on their accountant, not criminal intent, caused an under reporting, the critical datum is not whether the defendants ordered the accountant to falsify the return, but, rather, whether the defendants knew when they signed the return that it understated their income." United States v. Olbres, 61 F.3d 967, 971 (1st Cir. 1995). A defendant who knew the return's contents and knews that the income figure reported on the return was understated, cannot claim to have blindly relied on a preparer. Id. "A jury may permissibly infer that a taxpayer read his return and knew its contents from the bare fact that he signed it." Id.

Good faith reliance on third parties is an issue to be determined by the jury. Meyer, 808 F.2d at 1306. Therefore, a jury instruction on

this issue should be submitted if credible evidence of third-party reliance is presented at trial. A defendant who demonstrates that he (1) made full disclosure of all pertinent facts, and (2) relied in good faith on this advice is entitled to a reliance-on-advice-of-accountant jury instruction. United States v. Ford, 184 F.3d 566, 579 (6th Cir. 1999), cert. denied, 528 U.S. 1161 (2000). A reliance-on-advice-of-accountant instruction may be warranted "even without per se testimony that the defendant relied on the accountant's advice, so long as the circumstances support an inference that he did so rely." Id. See also United States v. Duncan, 850 F.2d 1104, 1115-19 (6th Cir. 1988).

Where there is no evidentiary basis for a reliance defense, however, a defendant is not entitled to a jury instruction. United States v. Evangelista, 122 F.3d 112, 118 (2d Cir. 1997).

The defendant's education, sophistication, and degree of reliance are relevant to a reliance defense. See United States v. Estate Preservation Services, 202 F.3d 1093, 1103 (9th Cir. 2000) (defense unavailable to a physicist who received training in taxation at the University of Southern California Law School). A defendant who seeks advice, but chooses to: (1) ignore advisors skeptical as to the legality of his statements, and (2) follow the advice of others who "unquestioningly agree[d] to further his scheme" will not succeed in asserting third-party reliance. Estate Preservation Services, 202 F.3d at 1103.

Furthermore, a taxpayer may not successfully assert this defense when certain information -- such as filing deadlines -- is common knowledge. United States v. Boyle, 469 U.S. 241, 251-52 (1985).

40.05[1][b] ***Reliance on Advice of Counsel***

Reliance on the advice of an attorney in the preparation of incomplete or "Fifth Amendment" returns is a defense raised by some protesters. If the evidence presented at trial is sufficient to warrant it, the court should instruct the jury that the defendant's conduct is not "willful" if he acted with a good faith misunderstanding based on the advice of counsel. See United States v. Becker, 965 F.2d 383, 387-88 (7th Cir. 1992) (upholding refusal to give reliance instruction where there was no testimony that: (1) defendant told lawyer everything about his situation, (2) attorney gave defendant specific advice in response, and (3) defendant followed that advice); United States v. Benson, 941 F.2d 598, 615 (7th Cir. 1991) (proper to instruct jury that reliance on counsel was a "circumstance" to consider in determining willfulness); United States v. Snyder, 766 F.2d 167, 169 (4th Cir. 1985) (testimony not sufficient to justify instruction concerning good faith reliance).

The Seventh Circuit, in United States v. Cheek, 3 F.3d 1057 (7th Cir. 1993), used the following test to determine whether Cheek was entitled to a reliance on counsel defense instruction:

> *In order to establish an advice of counsel defense, a defendant must establish that: " (1) before taking action, (2) he in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5) and acted strictly in accordance with the advice of his attorney who had been given a full report."*

Cheek, 3 F.3d at 1061 (citing Liss v. United States, 915 F.2d 287, 291 (7th Cir. 1990)). The Seventh Circuit held that Cheek was not entitled to the instruction because he did not seek advice on possible future conduct, but "merely continued on a course of illegal conduct begun prior to contacting counsel". Cheek, 3 F.3d at 1062. Cheek did not make a full disclosure to his attorney nor follow his attorney's advice that he should obey the tax laws until told by a court that the laws were not valid. Cheek, 3 F.3d at 1062.

40.05[1][c] ***No Defense in Non-Tax Cases***

In Cheek v. United States, 498 U.S. 192 (1991), the Supreme Court carefully limited the "good faith" defense to tax cases, emphasizing "the complexity" of the Internal Revenue Code, 498 U.S. at 200, the "average citizen's" difficulty in comprehending duties it imposes, 498 U.S. at 199, and the construction of "willfulness" in the tax context, 498 U.S. at 201.

Various appellate courts have confirmed Cheek's limited application. See United States v. Boots, 80 F.3d 580, 594 (1st. Cir. 1996) ("defendant's initially weak contention [that Cheek defense is available in wire fraud case] is not even arguably tenable"); In re Air Disaster at Lockerbie Scotland, 37 F.3d 804, 818 (2d Cir. 1994) ("our subsequent decisions and those of other courts acknowledge Cheek's limited application"); United States v. Gay, 967 F.2d 322 (9th Cir. 1992) (mail and property fraud); United States v. Chaney, 964 F.2d 437, 453-54 (5th Cir. 1992) (false statements on bank records). But see Ratzlaf v. United States, 507 U.S. 1060 (1993) (The word "willfully" in 31 U.S.C. § 5322(a) requires that the government prove in a prosecution for structuring cash transactions that the defendant knew that structuring is unlawful). [FN12]

40.05[2] ***Constitutional Challenges***

40.05[2][a] ***Fourth Amendment -- Unreasonable Search and Seizure***

The statutory requirement to file tax returns does not violate the Fourth Amendment. Flint v. Stone Tracy Co., 220 U.S. 107, 177 (1911).

Likewise, the government's use at trial of a defendant's filed income tax returns or Forms W-4 does not violate the Fourth Amendment right against unreasonable searches and seizures. United States v. Amon, 669 F.2d 1351, 1358 (10th Cir. 1981); United States v. Warinner, 607 F.2d 210, 212-13 (8th Cir. 1979).

The IRS has authority to obtain evidence through the execution of search warrants. United States v. Rosnow, 977 F.2d 399, 409 (8th Cir. 1992). In Rosnow, the court noted that "Congress gave the IRS wide authority to conduct criminal investigations, including the execution of search warrants, regarding those individuals suspected of violating the tax laws." Rosnow, 977 F.2d at 399. See also Donaldson v. United States, 400 U.S. 517, 522, 537 (1971) (IRS third-party summons do not violate Fourth Amendment); United States v. Scott, 975 F.2d 927, 928 (1st Cir. 1992) (IRS systematic search, seizure, and reconstruction of shredded documents from garbage bag in front of defendant's home did not violate Fourth Amendment); United States v. Dunkel, 900 F.2d 105, 106 (7th Cir. 1990), vacated on other grounds, 111 S.Ct. 747 (1991) (use of financial records obtained from taxpayer's dumpster does not violate Fourth Amendment).

40.05[2][b] ***Fifth Amendment -- Due Process; Freedom from Self-incrimination***

Tax protesters sometimes claim that taxes constitute a "taking" of property without due process of law, in violation of the Fifth Amendment. Schiff v. United States, 919 F.2d 830, 832 (D.Conn. 1989); Irwin Schiff, The Federal Mafia: How It Illegally Imposes and Unlawfully Collects Income Taxes 21, 26 (1992). But the Supreme Court held that the government's need for revenues justifies use of summary procedures to collect taxes. Phillips v. Commissioner, 283 U.S. 589, 595 (1931). The Internal Revenue Code itself provides methods to ensure due process to taxpayers: (1) "the refund method," set forth in 26 U.S.C. § 7422(e) and 28 U.S.C. §§ 1341,

1346(a), whereby a taxpayer must pay the full amount of the tax and then sue in district court or in the Federal Court of Claims for a refund, and (2) "the deficiency method," set forth in 26 U.S.C. § 6213(a), whereby a taxpayer need not pay the contested tax if he immediately petitions U.S. Tax Court to redetermine the deficiency. Courts have found both methods to provide due process. Flora v. United States, 362 U.S. 145 (1960); Schiff, 919 F.2d at 832.

To similar effect, tax protesters often submit tax returns on which they refuse to provide any financial information, asserting their Fifth Amendment right against self-incrimination. U.S. Const. amend. V. However, the Supreme Court has long held that the statutory requirement to file tax returns does not violate the Fifth Amendment. Flint v. Stone Tracy Co., 220 U.S. 107, 177 (1911).

Section 6702 of Title 26 of the United States Code ("Frivolous Income Tax Returns") imposes a civil penalty against any individual who, motivated by "a position which is frivolous" or "a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws," files an incomplete return. Courts repeatedly have found Fifth Amendment privilege claims on incomplete forms frivolous. See Sochia v. Commissioner, 23 F.3d 941 (5th Cir. 1994) (return frivolous where defendant supplied only names and claimed Fifth Amendment privilege by inserting phrase: "Object -- Fifth Amendment"); Mosher v. IRS, 775 F.2d 1292 (5th Cir. 1985) (taxpayer struck jurat from return); Eicher v. United States, 774 F.2d 27 (1st Cir. 1985) (blanket claim of privilege on return frivolous); Ricket v. United States, 773 F.2d 1214 (11th Cir. 1985) (return containing only signature and date, and invoking privilege was "frivolous"); Peeples v. Commissioner, 771 F.2d 77 (4th Cir. 1984) (words "refused" and Fifth Amendment claim rendered return frivolous); Hudson v. United States, 766 F.2d 1288 (9th Cir. 1985) (taxpayer's statement that complete return could be used to prosecute false claims action insufficient to invoke Fifth Amendment protection).

Return forms containing little or no financial information from which a tax can be computed are sometimes referred to as "Fifth Amendment returns." The filing of a so-called Fifth Amendment return may constitute an affirmative act for the purpose of proving evasion. See United States v. Waldeck, 909 F.2d 555, 559 (1st Cir. 1990) ("filing of returns containing only name, a signature, a figure for federal income tax withheld, asterisks at numbered lines in lieu of information and the statement '[t]his means specific exception is made under the Fifth Amendment, U.S. Constitution,'" is an affirmative act of evasion); United States v. DeClue, 899 F.2d 1465, 1471 (6th Cir. 1990) (filing of return with no financial information, on which was typed, "object: self-incrimination," is affirmative act of evasion).

In United States v. Sullivan, 274 U.S. 259 (1927), the Court held that the privilege against compulsory self- incrimination is not a defense to prosecution for failing to file. The Court indicated, however, that the privilege could be claimed against specific disclosures sought on a return, saying (274 U.S. at 263):

> *If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all.*

See also Garner v. United States, 424 U.S. 648, 650 (1976).

Sullivan is frequently cited for the proposition that a taxpayer may not use the Fifth Amendment to justify the failure to file any return at all. See, e.g., Garner, 424 U.S. at 650; United States v. Dack, 987 F.2d 1282, 1284 (7th Cir. 1993); United States v. Wunder, 919 F.2d 34, 37 (6th Cir. 1990); United States v. Poschwatta, 829 F.2d 1477, 1482 n. 3 (9th Cir. 1987); United States v. Leidendeker, 779 F.2d 1417, 1418 (9th Cir. 1986); United States v. Stillhammer,

706 F.2d 1072, 1076-77 (10th Cir. 1983); United States v. Pilcher, 672 F.2d 875, 877 (11th Cir. 1982); United States v. Lawson, 670 F.2d 923, 927 (10th Cir. 1982) (cases cited); United States v. Reed, 670 F.2d 622, 623-24 (5th Cir. 1982); United States v. Booher, 641 F.2d 218, 219 (5th Cir. 1981); United States v. Edelson, 604 F.2d 232, 234 (3d Cir. 1979).

A taxpayer may refuse to answer specific questions or disclose specific information if such disclosure would be incriminating. The courts have uniformly held, however, that disclosure of routine financial information on a tax return ordinarily does not, in itself, incriminate an individual, and does not violate one's Fifth Amendment right against self-incrimination. Garner, 424 U.S. at 651; California v. Byers, 402 U.S. 424, 428, 430 (1971) ("the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure"); United States v. Warner, 830 F.2d 651, 653-54 (7th Cir. 1987); United States v. Heise, 709 F.2d 449, 451 (6th Cir. 1983); United States v. Drefke, 707 F.2d 978, 982-83 (8th Cir. 1983); Lawson, 670 F.2d at 927; Reed, 670 F.2d at 623-24; United States v. Carlson, 617 F.2d 518 (9th Cir. 1980) (no valid Fifth Amendment privilege excusing failure to file Form 1040 to cover up false Form W-4 previously filed by defendant); United States v. Neff, 615 F.2d 1235, 1238-41 (9th Cir. 1980); United States v. Schiff, 612 F.2d 73, 77-83 (2d Cir. 1979); Edelson, 604 F.2d at 234; United States v. Irwin, 561 F.2d 198, 201 (10th Cir. 1977). See also United States v. Saussy, 802 F.2d 849, 854-55 (6th Cir. 1986); United States v. Green, 757 F.2d 116 n.7 (7th Cir. 1985) (affirming use of jury instruction that reporting income from legitimate activities would not fall within the Fifth Amendment privilege).

In appropriate situations, a Fifth Amendment claim may be asserted as to specific line items on tax forms. Sullivan, 274 U.S. at 263; United States v. Harting, 879 F.2d 765, 770 (10th Cir. 1989); United States v. Flitcraft, 863 F.2d 342, 344 (5th Cir. 1988); United States v. Shivers, 788 F.2d 1046, 1049 (5th Cir. 1986) (amount of taxpayer's income not privileged though source may be); Heise, 709 F.2d at 450-51; United States v. Turk, 722 F.2d 1439, 1441 (9th Cir. 1983); United States v. Verkuilen, 690 F.2d 648, 654 (7th Cir. 1982); Edelson, 604 F.2d at 234.

In order to assert validly a Fifth Amendment privilege against self-incrimination, a defendant must:

- *Claim the privilege on his return (Garner v. United States, 424 U.S. at 665; Sullivan, 274 U.S. at 263-64);*
- *As an objection to a specific question (Heligman v. United States, 407 F.2d 448, 450-51 (8th Cir. 1969));*
- *Demonstrate a real and substantial danger of self-incrimination (Daly v. United States, 393 F.2d 873, 878 (8th Cir. 1968));*
- *Submit to the reviewing court's arbitration of the claim (Heligman, 407 F.2d at 450-51).*

A court's determination that the defendant's claim of the Fifth Amendment privilege against self-incrimination is invalid does not, however, prohibit the defendant from offering evidence to the effect that he believed in good faith he could properly assert the privilege. Such a good faith claim, even if erroneous, is a valid defense to the element of willfulness, if believed by the jury. Saussy, 802 F.2d at 854-855; Poschwatta, 829 F.2d at 1482 n.3; Shivers, 788 F.2d at 1048 n.1; United States v. Goetz, 746 F.2d 705, 710 (11th Cir. 1982).

Whether the defendant validly exercised the privilege against

self-incrimination is a question of law for the court. Turk, 722 F.2d at 1440. On the other hand, whether the defendant asserted the privilege in good faith, thereby entitling the defendant to acquittal, is a question of fact for the jury to resolve. United States v. Smith, 735 F.2d 1196, 1198 (9th Cir. 1984); Turk, 722 F.2d at 1440;.

40.05[2][c] ***Tax Laws Are Unconstitutionally Vague***

Sections 7203, 7205 and 7206 have withstood challenges that they are unconstitutionally vague. United States v. Cochrane, 985 F.2d 1027, 1031 (9th Cir. 1993) (section 7206) ("The void-for-vagueness doctrine requires [only] that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited") (citation omitted)); United States v. Dunkel, 900 F.2d 105, 107 (7th Cir. 1990) ("it is enough that a reasonable person can see what Congress is driving at"), vacated on other grounds, 498 U.S. 1043 (1991) (section 7203); United States v. Price, 798 F.2d 111, 113 (5th Cir. 1986) (section 7205); United States v. Pederson, 784 F.2d 1462, 1463-64 (9th Cir. 1986) (section 7203); United States v. Parshall, 757 F.2d 211, 215 (8th Cir. 1985) (section 7203); United States v. Damon, 676 F.2d 1060, 1062 (5th Cir. 1982) (section 7206(2)); United States v. Annunziato, 643 F.2d 676, 677-78 (9th Cir. 1981) (section 7205); United States v. Russell, 585 F.2d 368, 370 (8th Cir. 1978) (section 7203); United States v. Buttorff, 572 F.2d 619, 624-25 (8th Cir. 1978) (section 7205); United States v. Lachmann, 469 F.2d 1043, 1046 (lst Cir. 1972) (section 7203).

40.05[2][d] ***Sixteenth Amendment Never Ratified***

Using various arguments, tax protesters claim that the Sixteenth Amendment, which grants Congress the power to collect taxes without consideration to apportionment, is not part of the United States Constitution. See Christopher S. Jackson, The Inane Gospel of Tax Protest: Resist Rendering Unto Caesar -- Whatever His Demands, 32 Gonz. L. Rev. 291, 301-302 (1997) (reciting litany of tax protester arguments).

The Supreme Court has stated that such assertions are political questions beyond federal court jurisdiction. Coleman v. Miller, 307 U.S. 433, 450-56 (1939) (Black, J., concurring); see also Baker v. Carr, 369 U.S. 186, 214-15 (1962).

Lower courts, however, have repeatedly rejected the contention that the Sixteenth Amendment was never properly ratified, and that the federal government therefore lacks the authority to collect an income tax. Socia v. Commissioner, 23 F.3d 941 (5th Cir. 1994); United States v. Benson, 941 F.2d 598, 607 (7th Cir. 1991) (rejecting argument based on clerical errors and state protocols); United States v. Collins, 920 F.2d 619, 629 (10th Cir. 1990); In re Becraft, 885 F.2d 547, 549 (9th Cir. 1989); Miller v. United States, 868 F.2d 236, 239-41 (7th Cir. 1989); United States v. Sitka, 845 F.2d 43, 44-47 (2d Cir. 1988) (rejecting clerical errors argument); United States v. Ward, 833 F.2d 1538, 1539 (11th Cir. 1987); United States v. Dube, 820 F.2d 886, 891 (7th Cir. 1986); Pollard v. Commissioner, 816 F.2d 603, 604-05(11th Cir. 1987); United States v. Stahl, 792 F.2d 1438, 1439 (9th Cir. 1986); Coleman v. Commissioner, 791 F.2d 68, 70-71 (7th Cir. 1986); Sisk v. Commissioner, 791 F.2d 58, 61 (6th Cir. 1986) (rejecting clerical errors and "Ohio not a State" arguments); United States v. Thomas, 788 F.2d 1250, 1253 (7th Cir. 1986) (rejecting view that literal text is essential to proper adoption); Biermann v. Commissioner, 769 F.2d 707 (11th Cir. 1985); Knoblauch v. Commissioner, 749 F.2d 200, 201-202 (5th Cir. 1984) (variant wording in state ratification resolution without consequence; "Ohio not a State" argument rejected).

As stated in United States v. House, 617 F.Supp. 237, 240 (W.D. Mich. 1985):

The sixteenth amendment and the tax laws passed pursuant to it have been followed by the courts for over half a century. They represent the recognized law of the land.

40.05[3] Selective Prosecution and Freedom of Speech

40.05[3][a] ***Generally***

Tax protesters have asserted that their prosecution violates their First Amendment right of freedom of speech. Protesters commonly argue that they are being prosecuted merely because they are outspoken, prominent critics of the Internal Revenue Code. This is actually a selective prosecution defense, not a First Amendment defense. There is consensus among the circuits that liability for a false or fraudulent tax return cannot be avoided by invoking the First Amendment. United States v. Rowlee, 899 F.2d 1275, 1279 (2d Cir. 1990).

On the other hand, where the protester is prosecuted under an aiding or abetting charge, e.g., 18 U.S.C. § 2 or 26 U.S.C. § 7206(2), or a conspiracy charge, the protester may claim that his or her counseling or advice to others was limited to speech, not action and is, therefore, protected by the First Amendment. In certain limited instances, a First Amendment freedom of speech may be presented. See Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969); United States v. Fleschner, 98 F.3d 155, 158-59 (4th Cir. 1996); United States v. Kelley, 769 F.2d 215, 217 (4th Cir. 1985) (construing Brandenburg).

In Brandenburg, 395 U.S. at 448-49, the Supreme Court held that speech that advocates law-breaking, but incites no imminent unlawful activity, is protected. Brandenburg, 395 U.S. at 448-49. If, however, an advisor willfully assists the preparation of a actual false return, in violation of 26 U.S.C. § 7206(2), by advising a tax return preparer to claim a deduction on the return of the taxpayers, which the advisor knew the taxpayers were not entitled to take, the advisor cannot successfully argue that this conduct was protected speech. United States v. Knapp, 25 F.3d 451, 457 (7th Cir. 1994). Nor can a tax shelter promoter who advises others to prepare actual false returns successfully claim First Amendment protection. See Fleschner, 98 F.3d at 158-59; Kelley, 769 F.2d at 217; United States v. Kelley, 864 F.2d 569, 576-77 (7th Cir. 1989).

40.05[3][b] Selective Prosecution Defense

"A selective prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." United States v. Armstrong, 517 U.S. 456, 464 (1996).

The test for selective prosecution is rigorous. In order to overcome the presumption of prosecutorial regularity, a defendant must prove, "by clear evidence," that the decision to prosecute was based on "an unjustifiable standard, such as race, religion, or other arbitrary classification . . . directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive" that prosecution amounts to a "practical denial" of equal protection. Armstrong, 517 U.S. at 464 (citations omitted). The defense that protesters are being selectively prosecuted because they are outspoken opponents of the Internal Revenue Code rarely succeeds.

The defendant who asserts selective prosecution carries a heavy burden. In United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974), the Second Circuit defined the defendant's burden:

To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the

type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

Other circuits have adopted this rigorous standard. United States v. Aguilar, 883 F.2d 662, 705 (9th Cir. 1989); United States v. Michaud, 860 F.2d 495, 499-500 (lst Cir. 1988); United States v. McMullen, 755 F.2d 65, 66 (6th Cir. 1984); United States v. Dack, 747 F.2d 1172, 1176 n.5 (7th Cir. 1984); United States v. Holecek, 739 F.2d 331, 333-34 (8th Cir. 1984); United States v. Mangieri, 694 F.2d 1270, 1273 (D.C. Cir. 1982); United States v. Damon, 676 F.2d 1060, 1064 (5th Cir. 1982); United States v. Amon, 669 F.2d 1351, 1356 n.6 (10th Cir. 1981); United States v. Rice, 659 F.2d 524, 527 (5th Cir. 1981).

The defendant must overcome the presumption that the prosecution has been legitimately undertaken prior to being entitled to discovery or a hearing on the issue of selective prosecution. United States v. Bennett, 539 F.2d 45, 54 (10th Cir. 1976). The IRS is not required to treat similarly all who engage in roughly the same conduct. Michaud, 860 F.2d at 499. Vigorous prosecution is not selective prosecution. United States v. Brewer, 681 F.2d 973, 974 (5th Cir. 1982).

The defendant has the initial burden of establishing the two parts of a prima facie case of selective prosecution. He must present "some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements." Berrios, 501 F.2d at 1211-12. See also United States v. Bohrer, 807 F.2d 159, 161 (10th Cir. 1986); United States v. Moon, 718 F.2d 1210, 1229 (2d Cir. 1983).

The Sixth, Seventh, and Eighth Circuits have held that the defendant must "raise a reasonable doubt about the prosecutor's purpose" to be entitled to a hearing. United States v. Hazel, 696 F.2d 473, 475 (6th Cir. 1983); United States v. Catlett, 584 F.2d 864, 866 (8th Cir. 1978); United States v. Falk, 479 F.2d 616, 623 (7th Cir. 1973).

The Third, Fifth, Sixth, and Ninth Circuits have used such phrases as "colorable entitlement" to the defense, "some credible evidence," and enough facts "to take the question past the frivolous stage" in setting the threshold for requiring discovery or a hearing. United States v. Hazel, 696 F.2d 473, 475 (6th Cir. 1983); Damon, 676 F.2d at 1064-65; United States v. Torquato, 602 F.2d 564, 569-70 (3d Cir. 1979); United States v. Oaks, 508 F.2d 1403, 1404 (9th Cir. 1974) United States v. Berrigan, 482 F.2d 171, 181 (3d Cir. 1973).

If the defendant makes such a showing, the burden shifts to the government to show that there was no selective prosecution.

As a practical matter, the government should resist discovery or a hearing on this issue until the defendant has made the requisite showing of selective prosecution: defendants may use frivolous claims of selective prosecution to obtain documents -- such as internal government memoranda -- they otherwise would not be entitled to under Fed. R. Crim. P. 16.

Generally, courts have upheld government targeting of vocal tax protesters for prosecution against defendants' selective prosecution attacks. United States v. Johnson, 577 F.2d 1304, 1309 (5th Cir. 1978); United States v. Pottorf, 769 F. Supp. 1176, 1184 (D. Kan. 1991). The government's initiation of prosecution because of a defendant's "great notoriety" as a protester would not, as a matter of law, be an impermissible basis for prosecution. United States v. Hazel, 696 F.2d 473, 475 (6th Cir. 1983). See also United States v. Kelley, 769 F.2d 215, 217 (4th Cir. 1985).

The fact that some tax evaders and protesters elude prosecution is insufficient to establish selective prosecution. Brewer, 681 F.2d at 974. The defendant must show that others similarly situated were not prosecuted and that the prosecution was based on some impermissible consideration, such as race or religion. United States v. Amon, 669 F.2d 1351, 1356-57 (10th Cir. 1981). See also United States v. Rice, 659 F.2d 524, 527 (5th Cir. 1981) ("selection for prosecution based in part upon the potential deterrent effect on others serves a legitimate interest in prompting more general compliance with the tax laws").

As the Fourth Circuit stated in Kelley, 769 F.2d at 218:

> *There is no impermissible selectivity in a prosecutorial decision to prosecute the ringleader and instigator, without prosecuting his foolish followers, when a prosecution of the instigator can be expected to bring the whole affair to an end.*

"Unless one can show that the tax laws are deployed against protesters in retaliation for the exercise of their rights, a selective prosecution argument will fail." United States v. Wilson, 639 F.2d 500, 505 (9th Cir. 1981).

40.05[3][c] ***Freedom of Speech***

In Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), the Supreme Court held that "the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Thus, the Court created an exception to First Amendment protection for speech that incites imminent lawless activity, as opposed to speech that merely advocates violation of law, which may still be constitutionally protected.

Where a defendant's speech is combined with action, e.g., where a protester both encourages and is actually involved in the preparation of protest returns for others, the defendant has gone beyond the protection of the First Amendment and may be subject to criminal prosecution. United States v. Fleschner, 98 F.3d 155, 158-59 (4th Cir. 1996); United States v. Knapp, 25 F.3d 451, 456-57 (7th Cir. 1994) (conduct beyond mere advocacy exists where defendant knowingly advised clients to claim deductions to which they were not entitled); United States v. Citrowske, 951 F.2d 899, 901 (8th Cir. 1991) ("freedom of speech is not so absolute as to protect speech or conduct which otherwise violates or incites a violation of the tax law"); United States v. Rowlee, 899 F.2d 1275, 1279-80 (2d Cir. 1990); United States v. Kelley, 769 F.2d 215, 217 (4th Cir. 1985); United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985); United States v. Damon, 676 F.2d 1060, 1062 (5th Cir. 1982).

A taxpayer cannot claim protection under the First Amendment simply by characterizing his filing of false information and tax returns as "petitions for redress." United States v. Kuball, 976 F.2d 529, 532 (9th Cir. 1992). Yet, where the protester's activity is arguably limited to the mere giving of advice or counsel and there is no involvement in the actual preparation of tax returns or causing returns to be prepared, there may be a viable First Amendment defense. But see United States v. Barnett, 667 F.2d 835, 842 (9th Cir. 1982) ("The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose.").

There are a few tax protester cases that address the issue of when providing advice or counsel steps beyond the protection of the First Amendment. In United States v. Buttorff, 572 F.2d 619, 624 (8th Cir. 1978), the Eighth Circuit held that the defendant's activities went beyond the scope of protection of the First Amendment, stating:

> *Although the speeches here do not incite the type of imminent lawless activity referred to in criminal syndicalism cases, the defendants did go beyond mere advocacy of tax reform. They explained how to avoid withholding and their speeches and explanations incited several individuals to activity that violated federal law and had the potential of substantially hindering the administration of the revenue. This speech is not entitled to first amendment protection and, as discussed above, was sufficient action to constitute aiding and abetting the filing of false or fraudulent withholding forms.*

See also United States v. Moss, 604 F.2d 569, 571 (8th Cir. 1979); Freeman, 761 F.2d at 551 (section 7206(2) charges based on Freeman's instructional seminars reversed due to trial court's failure to instruct that First Amendment defense was a question of fact for the jury).

"Counseling is but a variant of the crime of solicitation, and the First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself." Freeman, 761 F.2d at 552. See also Kelley, 769 F.2d at 217.

In United States v. Turano, 802 F.2d 10, 12 (1st Cir. 1986), the defendant in a section 7203 failure-to-file case claimed that his First Amendment rights had been violated by the introduction of evidence of his "tax protest" activities and instructions to the jury about "tax protesters." The court rejected this argument, explaining that the defendant (802 F.2d at 12):

> *. . . was not convicted of speaking out against taxation or for encouraging others not to file but rather for willfully failing to file his own returns. In order to determine his state of mind, the jury was entitled to know what he said and did regarding federal income taxation. The First Amendment protects the appellant's right to express beliefs and opinions; it does not give him the right to exclude beliefs and opinions from a jury properly concerned with his motivations for failing to file.*

40.05[4] District Court Lacks Jurisdiction of Title 26 Offenses

40.05[4][a] Generally

Despite protesters' claims to the contrary, it is clear that United States District Courts have jurisdiction over criminal offenses enumerated in the Internal Revenue Code, notwithstanding want of a statute within Title 26 conferring such jurisdiction. Section 3231 of Title 18 of the United States Code gives the district courts original jurisdiction over "all offenses against the laws of the United States" and the Internal Revenue Code defines offenses against the laws of the United States. United States v. Rosnow, 977 F.2d 399, 412 (8th Cir. 1992); Salberg v. United States, 969 F.2d 379, 384 (7th Cir. 1992); United States v. Huguenin, 950 F.2d 23, 25 n.2 (1st Cir. 1991); United States v. Masat, 948 F.2d 923, 934 (5th Cir. 1991); United States v. Collins, 920 F.2d 619, 629 (10th Cir. 1990) (citing cases) ("it defines credulity to argue that the district court lacked jurisdiction to adjudicate" 26 U.S.C. § 7201 action); United States v. Ward, 833 F.2d 1538, 1539 (11th Cir. 1987); United States v. Bressler, 772 F.2d 287, 293 n.5 (7th Cir. 1985); United States v. Isenhower, 754 F.2d 489, 490 (3d Cir. 1985); United States v. Przybyla, 737 F.2d 828, 829 (9th Cir. 1984); United States v. Eilertson, 707 F.2d 108, 109 (4th Cir. 1983). See also United States v. McMullen, 755 F.2d 65, 67 (6th Cir. 1984).

The argument that the United States has jurisdiction only over the District of Columbia, federal enclaves and territories, and possessions of the United States has also been rejected. See 26 U.S.C. §§ 7701(a)(9) ("The term 'United States' when used in a geographical sense includes only the States and the District of Columbia") and 7701(c) ("The term 'includes' . . . when used in a definition contained in this title shall not

be deemed to exclude other things otherwise within the meaning of the term defined"); District of Columbia v. John R. Thompson Co., 346 U.S. 100, 109 (1953); United States v. Mundt, 29 F.3d 233, 237 (6th Cir. 1994) (argument that district court lacks jurisdiction over Michigan resident "completely without merit and patently frivolous"); United States v. Steiner, 963 F.2d 381, (9th Cir. 1992); Collins, 920 F.2d at 629; Lonsdale v. United States, 919 F.2d 1440, 1448 (10th Cir. 1990); Ward, 833 F.2d at 1539.

40.05[4][b] ***The Gold-Fringed Flag ("The American Maritime Flag of War")*** *[FN13]*

Various litigants, including tax protesters, argue that the placement in a court room of a gold-fringed American flag denotes: (1) admiralty jurisdiction; (2) suspension of constitutional governmental functions; and/or (3) martial law. Litigants call the gold-fringed American flag the "maritime flag of war," and claim its display signifies "[d]eprivation of rights under color of law." McCann v. Greenway, 952 F.Supp. 647, 649 (W.D.Mo. 1997). They maintain that a court that flies a gold-fringed flag: (1) lacks jurisdiction over those coming before it; and (2) deprives the litigant of due process rights.

*Not surprisingly, courts uniformly reject such claims. See Salman v. Nevada, 104 F.Supp.2d 1262, 1266 (D.Nev. 2000) ("Plaintiff's argument that the gold fringe around an American flag in a courtroom designates admiralty jurisdiction is . . . wholly frivolous"); Schneider v. Schlaefer, 975 F.Supp. 1160, 1161-64 (E.D.Wis. 1997) (contention that court proceedings were conducted unconstitutionally because of flag form rejected; claims or defenses based upon preeminence of American "flag of peace" over all other flags frivolous and sanctionable); Hovind v. Kelly, No. 3:96CV579/RV, 1997 WL 327100 (N.D.Fla. Mar. 17, 1997); Jones v. Watson, No. 5:96CV0640, 1997 WL 162990 (N.D.Ohio Feb. 4, 1997); Goode v. Foster, No. 96-1348-WEB, 1996 WL 740707 (D.Kan. Sept. 30, 1996); Leverenz v. Torluemlu, No. 96 C 2886, 1996 WL 341468, at *1 & n.3 (N.D.Ill. June 17, 1996); United States v. Greenstreet, 912 F.Supp. 224, 229 (N.D.Tex. 1996) (rejecting argument that display of fringed flag limits federal court to admiralty jurisdiction); Moeller v. D'Arrigo, 163 F.R.D. 489, 491 & n.1 (E.D.Va. 1995); Vella v. McCammon, 671 F.Supp. 1128, 1129 (S.D.Tex. 1987) (rejecting contention that federal court flying fringed flag lacks jurisdiction to impose penalty for criminal contempt).*

"[I]n the interests of killing this argument for good, and to facilitate appellate review," Judge Whipple of the United States District Court for the Western District of Missouri has provided a history of the flag, and concluded that the litigant's claims of constitutional deprivation:

> *. . . must be dismissed because his factual predicate is incorrect as a matter of law. Even if the Army or Navy do display United States flags surrounded by yellow fringe, the presence of yellow fringe does not necessarily turn every such flag into a flag of war. Far from it: in the words of the Adjutant General of the Army, "[i]n flag manufacture a fringe is not considered to be a part of the flag, and it is without heraldic significance." . . . If fringe attached to the flag is of no heraldic significance, the same is true a fortiori of an eagle gracing the flagpole. Nor are the fringe or eagle of any legal significance. . . . Jurisdiction is a matter of law, not a child's game wherein one's power is magnified or diminished by the display of some magic talisman.*

McCann v. Greenway, 952 F.Supp. at 650-651 (citations omitted).

Trial attorneys responding to a motion to dismiss based on a gold-fringed flag jurisdictional argument should utilize Judge Whipple's history and arguments.

40.05[5] ***Filing Income Tax Returns Is Voluntary, Not Mandatory***

In Flora v. United States, 362 U.S. 145, 175 (1960), a case in which the Supreme Court held that the government could, if it so desired, collect taxes by distraint, the Court noted that "[o]ur tax system is based upon voluntary assessment and payment and not upon distraint."

Protesters, taking the Court's observation out of context, often argue that the filing of income tax returns is voluntary. United States v. Gerads, 999 F.2d 1255, 1256 (8th Cir. 1993) ("Any assertion that the payment of income taxes is voluntary is without merit"); Lonsdale v. United States, 919 F.2d 1440, 1448 (10th Cir. 1990); Wilcox v. Commissioner, 848 F.2d 1007, 1008 (9th Cir. 1988); Newman v. Schiff, 778 F.2d 460, 467 (8th Cir. 1985); United States v. Witvoet, 767 F.2d 338, 339 (7th Cir. 1985).

To the contrary, the filing of tax returns is not voluntary. Section 6012(a)(1)(A) of Title 26 of the United States Code requires that "every individual who earns a threshold level of income must file a tax return." If the taxpayer received more than the statutory amount of gross income, then he or she is obligated to file a return. United States v. Tedder, 787 F.2d 540, 542 (10th Cir. 1986); United States v. Richards, 723 F.2d 646, 648 (8th Cir. 1983). See also United States v. Pilcher, 672 F.2d 875, 877 (11th Cir. 1982) ("Every income earner is required to file an income tax return"); United States v. Hurd, 549 F.2d 118 (9th Cir. 1977).

A taxpayer who does not file faces both civil and criminal penalties:

> *In assessing income taxes, the Government relies primarily upon the disclosure by the taxpayer of the relevant facts . . . in his annual return. To ensure full and honest disclosure, to discourage fraudulent attempts to evade the tax, Congress imposes sanctions . . . . criminal or civil.*

Helvering v. Mitchell, 303 U.S. 391, 399 (1938).

Under Cheek v. United States, 498 U.S. 192 (1991), a protester could, of course, present evidence that he holds a good faith belief that the payment of taxes is "voluntary." See United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991).

40.05[6] ***Wages Are Not Income***

A common defense raised by protesters is that salaries and wages are not "income" within the meaning of the Sixteenth Amendment, which grants Congress the power "to lay and collect taxes on incomes, from whatever source derived . . ."

The Supreme Court has defined income as "the gain derived from capital, from labor, or from both combined." Eisner v. Macomber, 252 U.S. 189, 207 (1920). Section 61(a) of Title 26 of the United States Code defines gross income as "all income from whatever source derived, including . . . (1) Compensation for services." Wages or salaries received in exchange for services rendered are income that must be reported on a tax return. Metcalf & Eddy v. Mitchell, 269 U.S. 514, 519 (1926); Davis v. United States, 742 F.2d 171, 172 (5th Cir. 1984); United States v. Moore, 692 F.2d 95, 97 (10th Cir. 1979); Funk v. Commissioner, 687 F.2d 264, 265 (8th Cir. 1982); United States v. Lawson, 670 F.2d 923, 925 (10th Cir. 1982); United States v. Romero, 640 F.2d 1014, 1016 (9th Cir. 1981); United States v. Buras, 633 F.2d 1356, 1359-61 (9th Cir. 1980); Wilson v. United States, 412 F.2d 694, 695 (1st Cir. 1969).

Courts uniformly interpret "income" to include wages and salaries. United States v. Becker, 965 F.2d 383, 389 (7th Cir. 1992); United States v. Sloan, 939 F.2d 499, 500 (7th Cir. 1991); United States v. Connor, 898 F.2d 942, 943-44 (3d Cir. 1990); United States v. Sassak, 881 F.2d 276, 281 (6th Cir. 1989); United States v. Tedder, 787 F.2d 540, 542 n.3 (10th Cir.

1986); United States v. Burton, 737 F.2d 439, 441 (5th Cir. 1984); United States v. Richards, 723 F.2d 646, 648 (8th Cir. 1983); Buras, 633 F.2d at 1361. See also Jones v. United States, 551 F. Supp. 578, 580 (N.D.N.Y. 1982), for a list of cases holding that wages are included in gross income.

40.05[7] ***Defendant Not A "Person" or "Citizen"; District Court Lacks Jurisdiction Over Non-Persons and State Citizens***

40.05[7][a] ***Generally***

Protesters have often argued that they are not liable for federal income taxes because they are not "persons" subject to taxation under the Internal Revenue Code. A citizen or resident of the United States is included in the Internal Revenue Code definition of a United States person. 26 U.S.C. §7701(a)(30)(A). The "not a person" argument has been dismissed by the courts as "frivolous," "patently frivolous," "fatuous," and "obviously incorrect." See Lonsdale v. United States, 919 F.2d 1440, 1448 (10th Cir. 1990); United States v. Karlin, 785 F.2d 90, 91 (3d Cir. 1986); Biermann v. Commissioner of Internal Revenue, 769 F.2d 707, 708 (11th Cir. 1985); United States v. Rice, 659 F.2d 524, 528 (5th Cir. Unit A 1981); United States v. Romero, 640 F.2d 1014, 1016 (9th Cir. 1981);. Similar arguments asserting that the defendant was an "individual" and therefore not a "taxpayer" have also been rejected. See United States v. Collins, 920 F.2d 619, 629 (10th Cir. 1990); Lonsdale, 919 F.2d at 1448; United States v. Ward, 833 F.2d 1538, 1539 (11th Cir. 1987); United States v. Studley, 783 F.2d 934, 937 (9th Cir. 1986). "All individuals, natural or unnatural, must pay federal income tax on their wages." Lovell v. United States, 755 F.2d 517, 519 (7th Cir. 1984).

Another popular protester argument is the contention that the protester is not subject to federal law because he or she is not a citizen of the United States, but a citizen of a particular "sovereign" state. This argument seems to be based on an erroneous interpretation of 26 U.S.C. §3121(e)(2), which states in part: "The term 'United States' when used in a geographical sense includes the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa." The "not a citizen" assertion directly contradicts the Fourteenth Amendment, which states "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." The argument has been rejected time and again by the courts. See United States v. Cooper, 170 F.3d 691, 691(7th Cir. 1999) (imposed sanctions on tax protester defendant making "frivolous squared" argument that only residents of Washington, D.C. and other federal enclaves are citizens of United States and subject to federal tax laws); United States v. Mundt, 29 F.3d 233, 237 (6th Cir. 1994) (rejected "patently frivolous" argument that defendant was not a resident of any "federal zone" and therefore not subject to federal income tax laws); United States v. Hilgeford, 7 F.3d 1340, 1342 (7th Cir. 1993) (rejected "shop worn" argument that defendant is a citizen of the "Indiana State Republic" and therefore an alien beyond the jurisdictional reach of the federal courts); United States v. Gerads, 999 F.2d 1255, 1256-57 (8th Cir. 1993) (imposed $1500 sanction for frivolous appeal based on argument that defendants were not citizens of the United States but instead "Free Citizens of the Republic of Minnesota" not subject to taxation); United States v. Silevan, 985 F.2d 962, 970 (8th Cir. 1993) (rejected as "plainly frivolous" defendant's argument that he is not a "federal citizen"); United States v. Jagim, 978 F.2d 1032, 1036 (9th Cir. 1992) (rejected "imaginative" argument that defendant cannot be punished under the tax laws of the United States because he is a citizen of the "Republic" of Idaho currently claiming "asylum" in the "Republic" of Colorado) United States v. Masat, 948 F.2d 923, 934 (5th Cir. 1991); United States v. Sloan, 939 F.2d 499, 500-01 (7th Cir. 1991) ("strange argument" that defendant is not subject to jurisdiction of the laws of the United States because he is a "freeborn natural individual" citizen of the State of Indiana rejected); United States v. Price, 798 F.2d 111, 113 (5th Cir. 1986) (citizens of the State of Texas are subject to the provisions of the Internal Revenue Code).

40.05[7][b] Filing U.S. Nonresident Alien Income Tax Return (Form 1040NR)

Some protesters who argue that they are citizens of a "sovereign state" also claim to be exempt from federal taxes because they are nonresident aliens. This argument is flawed because (1) persons who were born in a state within the United States are citizens of the United States, not nonresident aliens (U.S. Const., Amend. XIV, §1; 26 U.S.C. §7701(b)(1)(B)); and (2) nonresident alien individuals are taxed on income from sources within the United States and on sources outside the United States effectively connected with a trade or business in the United States (26 U.S.C. § 871; Treas. Reg. §1.871-1(b)). See also Hofstetter v. Commissioner of Internal Revenue, 98 T.C. 695, 697 (1992). Courts have ruled the non-resident alien arguments put forth by individuals born in the United States to be frivolous. See United States v. Hilgeford, 7 F.3d 1340, 1342 (7th Cir. 1993); Betz v. United States, 40 Fed. Cl. 286, 294-95 (1998); United States v. LaRue, 959 F. Supp. 959, 961 (C.D. Ill. 1997); In re Weatherley, 169 B.R. 555, 558-559 (1994).

Sometimes protesters file false Forms 1040NR (U. S. Nonresident Alien Income Tax Return) claiming to be exempt from federal income taxation. See, e.g., United States v. Ambort, 193 F.3d 1169, 1170 (10th Cir. 1999) (dismissal of denial of interlocutory appeal of motion to dismiss indictment charging defendants with violations of 18 U.S.C. §371 and 26 U.S.C. §7206(2) for teaching seminar attendees how to complete false Forms 1040NR), cert. denied, 528 U.S. 1190 (2000). One way to prove the protester's bad motive is to show that he or she did not file state tax returns or pay state or local taxes. Another way is to show the protester's U.S. citizenship through a birth certificate, passport application, military record, job application, federal voting record, or receipt of social security or other federal benefits.

Depending on what information is included on the form, the filing of a false Form 1040NR may be charged as a false claim for refund (18 U.S.C. §287), a false income tax return (26 U.S.C. §7206(1)), or a false statement (18 U.S.C. §1001). For further guidance on whether the Form 1040NR filed in a particular case can be charged as a false return, See Chapter 40.03, supra, for a discussion of what constitutes a return. A violation of 18 U.S.C. § 1001 can be an appropriate charge for a false Form 1040NR when it either lacks the required signature or does not include enough information to be regarded as a tax return. For a discussion of section 1001, see Chapter 24.00, supra.

40.05[8] IRS Has Duty to Prepare Returns for Taxpayer (26 U.S.C. § 6020(b))

Protesters have argued that 26 U.S.C. § 6020(b)(1) [FN14] obligates the Internal Revenue Service to prepare a tax return for an individual who does not file. There is no merit to this claim. This provision merely provides the Internal Revenue Service with a civil mechanism for assessing the tax liability of a taxpayer who has failed to file a return. The civil mechanism is often referred to as the preparation of a "substitute for return" or "SFR." Section 6020(b) does not require the Internal Revenue Service to prepare tax returns for individuals who fail to file, nor does it excuse the taxpayer from criminal liability for that failure. See United States v. Cheek, 3 F.3d 1057, 1063 (7th Cir. 1993); In re Bergstrom, 949 F.2d 341, 343 (10th Cir. 1991); United States v. Barnett, 945 F.2d 1296, 1300 (5th Cir. 1991); United States v. Schiff, 919 F.2d 830, 832 (2nd Cir. 1990); United States v. Poschwatta, 829 F.2d 1477, 1483 (9th Cir. 1987); United States v. Verkuilen, 690 F.2d 648, 657 (7th Cir. 1982); United States v. Millican, 600 F.2d 273, 278 (5th Cir. 1979); United States v. Tarrant, 798 F. Supp. 1292, 1302-03 (E.D. Mich. 1992).

When a defendant raises this argument during trial, the court may properly instruct the jury that while section 6020(b) "authorizes the Secretary to file for a taxpayer, the statute does not require such a filing, nor does it relieve

the taxpayer of the duty to file." United States v. Stafford, 983 F.2d 25, 27 (5th Cir. 1993); accord United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1992). However, an instruction pertaining to section 6020(b) "must not be framed in a way that distracts the jury from its duty to consider a defendant's good-faith defense." Powell, 955 F.2d at 1213. It may be wise to request that an instruction on the meaning of section 6020(b) be coupled with a reminder to the jury that the issue in a criminal tax case is not the validity of the defendant's interpretation of §6020(b), but whether the defendant had a good faith belief that his or her actions were in compliance with the tax laws. Powell, 955 F.2d at 1213.

40.05[9] ***Violation of the Privacy Act***

Courts have also rejected Privacy Act (Title 5, U.S.C. § 552(a)) challenges to the IRS Form 1040 instruction booklet and to Forms W-4. United States v. Bressler, 772 F.2d 287, 292 (7th Cir. 1985) ("the IRS notice . . . adequately and clearly informs taxpayers that filing is mandatory"); United States v. Dack, 747 F.2d 1172, 1176 n.5 (7th Cir. 1984) (not error to refuse to dismiss for failure to publish, pursuant to Privacy Act, notice of specific criminal penalty which might be imposed); United States v. Bell, 734 F.2d 1315, 1318 (8th Cir. 1984) (Privacy Act does not require IRS to inform taxpayer of specific penalties for failure to file); United States v. Wilber, 696 F.2d 79, 80 (8th Cir. 1982) ("the Privacy Act does not require notice of a specific criminal penalty which might be imposed on the errant taxpayer"); United States v. Amon, 669 F.2d 1351, 1358 (10th Cir. 1982); United States v. Annunziato, 643 F.2d 676, 678 (9th Cir. 1981) (notice in Form W-4 instructions adequate); United States v. Rickman, 638 F.2d 182, 183 (10th Cir. 1980) (Form 1040 instructions adequate); Field v. Brown, 610 F.2d 981, 987-88 (D.C. Cir. 1079).

40.05[10] ***Federal Reserve Notes Are Not Legal Tender***

Some protesters have argued that because their wages were paid in Federal Reserve Notes, i.e., U.S. currency, they need not pay tax on those wages. Schiff v. United States, 919 F.2d 830, 831 (2d Cir. 1990); United States v. Davenport, 824 F.2d 1511, 1521 (7th Cir. 1987); United States v. Ware, 608 F.2d 400, 402 (10th Cir. 1979); United States v. Edelson, 604 F.2d 232, 233 (3d Cir. 1979); United States v. Rifen, 577 F.2d 1111, 1115 (8th Cir. 1978); Mathes v. Commissioner, 576 F.2d 70, 71 (5th Cir. 1978); United States v. Gardiner, 531 F.2d 953, 955 (9th Cir. 1976); United States v. Whitesel, 543 F.2d 1176, 1180 (6th Cir. 1976); Milam v. United States, 524 F.2d 629 (9th Cir. 1974); United States v. Scott, 521 F.2d 1188, 1192 (9th Cir. 1975); United States v. Daly, 481 F.2d 28, 30 (8th Cir. 1973); United States v. Porth, 426 F.2d 519, 523 (10th Cir. 1970).

They argue that the Constitution requires coins in gold and silver, and that Federal Reserve Notes are therefore not valid currency or legal tender. Thus, reason the protesters, those who possess Federal Reserve Notes cannot be subject to a tax on them. United States v. Ellsworth, 547 F.2d 1096, 1097 (9th Cir. 1976). This argument has been uniformly rejected. See cases, supra, and Sanders v. Freeman, 221 F.3d 846, 849, 855 (6th Cir. 2000); Miller v. United States, 868 F.2d 236, 239-41 (7th Cir. 1989); United States v. Brodie, 858 F.2d 492, 498 (9th Cir. 1988); United States v. Buckner, 830 F.2d 102, 103 (7th Cir. 1987); United States v. Dube, 820 F.2d 886, 891 (7th Cir. 1987); United States v. Martin, 790 F.2d 1215, 1217 (5th Cir. 1986); United States v. Condo, 741 F.2d 238, 239 (9th Cir. 1984); United States v. Moore, 627 F.2d 830, 832 (7th Cir. 1980).

Congress is empowered "[t]o coin Money, regulate the value thereof, and of foreign coins, and fix the Standard of weights and measures" (U.S. Const. art.

I, § 8, cl. 5), and 12 U.S.C. § 411 and 32 U.S.C. § 5103 state that Federal Reserve Notes are legal tender.

The Supreme Court long ago held that "[t]he constitutional authority of Congress to provide a currency for the whole country is . . . firmly established." The Legal Tender Cases (Julliard v. Greenman), 110 U.S. 421, 446 (1884). See also The Legal Tender Cases (Knox v. Lee), 79 U.S. 457, 462 (1871); United States v. Anderson, 584 F.2d 369, 374 (10th Cir. 1978); Rifen, 577 F.2d at 1112, 1120.

40.05[11] ***Form W-2 As Substitute for Form 1040***

*Some protesters have relied on a 1946 Federal Register regulation, allowing the filing of a Form W-2 in lieu of a Form 1040 tax return, to argue that they were not required to file a return because their employer sent the IRS a copy of their W-2 form. See United States v. Lussier, 929 F.2d 25, 31 (1st Cir. 1991); United States v. Birkenstock, 823 F.2d 1026, 1030 (7th Cir. 1987); Manka v. United States, No. CIV.A.89N49, 1993 WL 268386, at *4 (D.Colo. Apr. 6, 1993) ("merely allowing one's employer to file a W-2 form does not fulfill the requirements set forth by the treasury regulations. See Treas. Reg. § 1.6011-1(b) . . .").*

The court in Birkenstock noted two problems with this argument: (1) that particular 1946 Federal Register regulation was eliminated when the Federal Register was codified in the 1949 CFR; and, (2) even if the 1946 regulation survived the CFR codification, the regulation provides that the employee's original Form W-2 can substitute for a Form 1040; therefore, the employer's filing of a copy of the W-2 would not suffice. Birkenstock, 823 F.2d at 1030.

However, the defendant could testify regarding his good faith reliance on the regulation in deciding not to file a return. The 1946 regulation itself could not be admitted as an exhibit. Lussier, 929 F.2d at 31.

40.05[12] ***Paperwork Reduction Act ("PRA") Defense***

The Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 et seq. ("PRA"), was enacted to limit federal agencies' information requests that burden the public. The "Public Protection" provision of the PRA states that no person "shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved does not display a current control number assigned by the Office of Management and Budget [OMB] Director." 44 U.S.C. § 3512.

Protesters claim that they cannot be penalized for failing to file Form 1040 because the instructions and regulations associated with the Form 1040 do not display any OMB control number. Courts uniformly reject this argument on different theories. Some courts have simply noted that the PRA applies to the forms themselves, not to the instruction booklets, and because the Form 1040 does have a control number, there is no PRA violation. See Salberg v. United States, 969 F.2d 379, 383-84 (7th Cir. 1992); United States v. Holden, 963 F.2d 1114, 1116 (8th Cir. 1992); United States v. Dawes, 951 F.2d 1189, 1191-93 (10th Cir. 1991); United States v. Wunder, 919 F.2d 34, 38 (6th Cir. 1990). Other courts have held that Congress created the duty to file returns in 26 U.S.C. § 6012(a) and "Congress did not enact the PRA's public protection provision to allow OMB to abrogate any duty imposed by Congress." United States v. Neff, 954 F.2d 698, 699 (11th Cir. 1992). See also United States v. James, 970 F.2d 750, 753 n.6 (10th Cir. 1992) (lack of OMB number does not violate PRA); Salberg v. United States, 965 F.2d 379, 383-84 (7th Cir. 1992); United States v. Hicks, 947 F.2d 1356, 1359 (9th Cir. 1991) (failure to display OMB number on tax form is not PRA violation and does not render governmental action void); United States v. Bentson, 947 F.2d 1353, 1355 (9th Cir. 1991) (defendant convicted of

violating a statute requiring him to file, not a regulation lacking OMB number); United States v. Kerwin, 945 F.2d 92 (5th Cir. 1991) (per curiam) (defendant was convicted under statutory requirement that he file return and since statute is not an information request, there is no violation of the PRA); Lonsdale v. United States, 919 F.2d 1440, 1443-45 (10th Cir. 1990) ("PRA" not enacted "to create loophole in the tax code").

40.05[13] ***Lack of Publication in the Federal Register***

Protesters have occasionally argued that Form 1040 and its instructions constitute a "rule" for purposes of the Administrative Procedure Act (APA) and therefore must be published in the Federal Register. This defense has been deemed "meritless." United States v. Bentson, 947 F.2d 1353, 1360 (9th Cir. 1991).

The tax code itself, a statute and not a regulation, imposes the duty to file a return. See 26 U.S.C. 6012. See also United States v. Bowers, 920 F.2d 220, 221-23 (4th Cir. 1990) (APA protects only those with no notice: to reverse conviction, court would need to find that: (1) the statutes provided no notice of obligation to pay taxes, (2) the IRS forms and offices were secret -- although 200 million Americans know about them, and (3) the defendants, who had previously filed returns, had forgotten about the required forms and the IRS offices); United States v. Kahn, 753 F.2d 1208, 1222 (3d Cir. 1985) (claim that IRS failure to publish interpretive guidelines in Federal Register violates Title 5, U.S.C. § 552(a)(1)(D), "totally devoid of merit").

40.05[14] ***Taxpayer's Name in Capital Letters or Misspelled***

A tax protester will sometimes argue that he is not the individual named in the indictment or in court proceedings because his name is therein capitalized. To similar effect, the protester will sometimes add strange punctuation to his name, again claiming that the individual named in the documents is not he.

In United States v. Lindsay, 184 F.3d 1138, 1144 (10th Cir.), cert. denied, 528 U.S. 981 (1999), the reviewing court affirmed a district court's decision not to accord such a protester a sentencing reduction for acceptance of responsibility, where he refused to: (1) comply with court procedures; (2) review court documents; and (3) respond to questions the court posed, because he claimed not to be the named party. See also Wilcox v. Commissioner, 848 F.2d 1007, 1008 (9th Cir. 1988) (calling "baseless" defendant's contention that the indictment must be dismissed because his name, spelled in capital letters, "is a fictitious name used by the government to tax him improperly as a business"); United States v. Washington, 947 F.Supp. 87, 92 (S.D.N.Y. 1996); United States v. Feinstein, 717 F.Supp. 1552, 1557 (S.D.Fla. 1989).

As a practical matter, the prosecutor should have at the ready certified copies of public documents, such as the defendant's birth certificate, passport application, or driver's license, to rebut assertions that the defendant is not the person named in the proceedings.

40.05[15] ***Tax Protest Against Government Spending***

Courts have long held that a taxpayer's convictions do not entitle him to refuse to file or to pay. United States v. Lee, 455 U.S. 252, 260 (1982) ("[t]he tax system could not function if denominations were allowed to challenge the tax systems because tax payments were spent in a way that violates their religious beliefs"); United States v. Neff, 615 F.2d 1235, 1237, 1240 (9th Cir. 1980); Packard v. United States, 7 F.Supp.2d 143, 144 (D.Conn. 1998), aff'd, 198 F.3d 234 (2d Cir. 1999).

Failure to furnish information on income tax returns cannot be justified

by an asserted disagreement with tax laws or in protest against government policies. United States v. Pilcher, 672 F.2d 875, 877 (11th Cir. 1982). A taxpayer who contends that paying taxes would require him to violate his pacifist religious beliefs cannot take refuge in the First Amendment. A taxpayer "has no First Amendment right to avoid federal income taxes on religious grounds." United States v. Ramsey, 992 F.2d 831, 833 (8th Cir. 1993).

A protester who contends that his refusal to pay taxes or file returns is justified by his disagreement with government policies or spending plans is not entitled to a jury instruction on his theories. In fact, arguments challenging "the constitutionality of or validity of the tax laws are precluded because they are necessarily premised on a defendant's full knowledge of the law . . . and therefore make irrelevant the issue of willfulness." Cheek v. United States, 498 U.S. 192, 203 (1991).

APPENDIX

SAMPLE MOTION IN LIMINE

Motion In Limine Regarding Anticipated Defense "Evidence" and Argument

The government respectfully requests that the Court preclude the defendant from presenting at trial "evidence" and/or legal arguments, as described below, which are irrelevant and/or would invade the Court's province in instructing the jury with regard to the law.

It is anticipated, from documents the defendant has submitted to the government both prior to and subsequent to indictment, that the defendant will attempt to present "evidence" and/or legal arguments regarding the following defenses:

[Here, any frivolous arguments the defendant has put forth may be listed, along with cases discrediting such arguments.]

Defendant Should Be Precluded from Offering "Evidence" and/or Argument Which is Irrelevant and Which Would Invade The Court's Province of Instructuring The Jury Regarding The Law

Under the Federal Rules of Evidence, the jury should not be exposed to inadmissible evidence. Fed. R. Evid. 103(c). It is fundamental that "evidence which is not relevant is not admissible." Fed. R. Evid. 402. "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Even if evidence is arguably "relevant," the court should still exclude the evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403; United States v. Johnson, 820 F.2d 1065, 1069 (9th Cir. 1987); United States v. Willie, 941 F.2d 1384, 1395-96 (10th Cir. 1991); United States v. Buckner, 830 F.2d 102 (7th Cir. 1987).

It is also well established that "[t]he court acts as a jury's sole source of the law." United States v. Poschwatta, 829 F.2d 1477, 1483 n. 4 (9th Cir. 1987) (citation omitted). As the court said in Cooley v. United States, 501 F.2d 1249, 1253-54 (9th Cir. 1974):

> *The law is given to the jury by the court and not introduced as evidence. . . . Obviously, it would be most confusing to a jury to have legal material introduced as evidence and then argued as to what the law is or ought to be.*

Accord Willie, 941 F.2d at 1396.

A. The defense should be precluded from presenting "evidence" or argument relating to what the law should be

Federal trial courts have struggled over precisely how to allow a criminal tax defendant to present a good faith defense to the element of willfulness. Perhaps the best discussion of the line between permissible and impermissible evidence of good faith was offered by the court in Willie, 941 F.2d 1384, a case involving tax protester defenses. The court noted (941 F.2d at 1392-93):

> *'Willfulness' is defined as the "voluntary, intentional violation of a known legal duty." Cheek v. United States, 111 S. Ct. at 610 (emphasis added). To be a relevant defense to willfulness then, [a defendant] because of his belief or misunderstanding, must not have known he had a legal duty. Id. at 611 (defendant must be "ignorant of his duty") . . . . In Cheek, the Supreme Court stated that "a defendant's views about the validity [or unconstitutionality] of the tax statutes are irrelevant to the issue of willfulness [and] need not be heard by the jury . . . [I]t makes no difference whether the claims of invalidity are frivolous or have substance." Id. at 613 . . . [P]roof of the reasonableness of a belief that he should not have a duty only proves the reasonableness of the defendant's disagreement with the existing law and is, therefore, properly excluded as irrelevant.*

Cheek, as elucidated in Willie, defines the good faith defense to willfulness in tax cases: a mistaken belief by the defendant that the law did not require him or her to file a tax return or pay a tax. See United States v. Dack, 987 F.2d 1282, 1285 (7th Cir. 1993); United States v. Powell, 955 F.2d 1206, 1212 (9th Cir. 1991). Therefore, any testimony by the defendant as to what he or she thinks or previously thought the law should be, as well as his or her current or prior views on the constitutionality and validity of the law, is irrelevant and must be excluded.

B. Defendant Should Be Precluded from Presenting "Evidence" or Argument Relating to the Constitutionality and Validity of the Tax Laws

In criminal tax cases, a defendant should be precluded from presenting evidence or argument regarding the constitutionality or validity of the tax laws. See Powell, 955 F.2d at 1212. A defendant's view regarding the constitutionality and validity of the tax laws is irrelevant because a mere disagreement with the tax laws is no defense to the charged crime. Cheek, 498 U.S. at 202-03; United States v. Dack, 987 F.2d 1282, 1285 (7th Cir. 1993) (holding that "[a]rguments which challenge the constitutionality or validity of the tax laws" should be precluded); Powell, 955 F.2d at 1212. In Cheek, the Supreme Court held that "a defendant's views about the validity of the tax statutes are irrelevant to the issue of willfulness and need not be heard by the jury, and, if they are, an instruction to disregard them would be proper." Cheek, 498 U.S. at 206. The Court affirmed the district court's use of the following instruction (498 U.S. at 204):

> *An opinion that the tax laws violate a person's constitutional rights does not constitute a good-faith misunderstanding of the law.*

Id. at 204. Similarly, in Powell, the Ninth Circuit Court of Appeals affirmed the use of the following instruction (955 F.2d at 1212):

> *Mere disagreement with the law, in and of itself, does not constitute good faith misunderstanding under the requirements of law. Because it is the duty of all persons to obey the law whether or not they [agree with] it.*

In view of the above, a defendant should be precluded from presenting

"evidence" and/or argument regarding defenses which relate to the constitutionality and/or validity of the tax laws. Such defenses are irrelevant and would tend to confuse or mislead the jury. The anticipated defenses are also frivolous and have been repeatedly rejected by the courts. If a defendant in any way interjects into these proceedings his or her disagreement with the law, it will be entirely proper for the Court to instruct the jury as follows:

> *A person's opinion, good faith belief, and/or mistaken belief that the tax laws are invalid or unconstitutional does not constitute a good faith misunderstanding of the law and is not a defense to the crime charged in this case. Thus, defendants' claimed belief that the tax laws are invalid or unconstitutional because the 16th Amendment was allegedly never properly ratified is not a defense. The 16th Amendment was properly ratified and the tax laws are valid, constitutional and allow for the direct taxation of salaries, wages and profit from business. Any evidence that you have heard to the contrary in this regard is irrelevant and should be ignored.*

See Cheek, 498 U.S. at 205; In re Becraft, 885 F.2d 547, 548 (9th Cir. 1989); Stahl, 792 F.2d at 1441. Under these circumstances, this instruction would help abate the potential for jury confusion stemming from the mention of these irrelevant issues.

C. Defendant Should Be Precluded from Offering Testimony or Documents Relating to Alternative Interpretations of the Tax Laws if the Offered Evidence Was Not Actually Relied Upon by Defendant or if Admitting such Evidence Would Confuse the Jury Regarding the Law or Undermine the Authority of the Court

Testimony or documents relating to alternative interpretations of the tax laws must be carefully analyzed to determine the purpose for which it is being offered. Although a district court may exclude evidence of "what the law is or should be," as discussed above, it ordinarily cannot exclude evidence relevant to the jury's determination of "what a defendant thought the law was." Powell, 955 F.2d at 1214; Willie, 941 F.2d at 1392-94. It is anticipated that the defendant will attempt to offer the following evidence relating to the issue of "willfulness:" case law, statutes, regulations, treatises, video or audio tapes, pamphlets, brochures and/or other types of documents. This material is potentially problematic because it can have both a proper purpose (i.e., "what a defendant thought the law was") and an improper purpose (i.e., "what the law is or should be"). Willie, 941 F.2d at 1392. Thus, before such material is offered, a defendant must show the trial judge that "the evidence is being offered for a permissible purpose by making a proffer of great specificity regarding the type of belief [he or she] seeks to prove." Id. (emphasis added).

As a threshold matter, in order for material relating to willfulness to be admissible, a defendant must first lay a proper foundation which demonstrates that he or she "actually relied" upon the specific material that is being offered. Powell, 955 F.2d at 1214. In the absence of actual reliance, such materials and testimony have no probative value. Therefore, the Court should not admit this evidence absence a showing of actual reliance. United States v. Bostian, 59 F.3d 474, 480 (4th Cir. 1995); Powell, 955 F.2d at 1214. The danger is that admission of both relevant and irrelevant beliefs "could easily obfuscate the relevant issue and tempt the jury to speculate that the mere existence of documentary support for the defendant's position negates his independent knowledge that he has a legal duty." Willie, 941 F.2d at 1393.

If the proper foundation is established, then the court must determine whether the material should be admitted or excluded because admission of such materials could confuse the jury as to the law or might assist a defendant who wishes to undermine the authority of the court. United States v. Barnett, 945 F.2d 1296, 1301 (5th Cir. 1991); Willie,

941 F.2d at 1395. The exclusion of such material from evidence does not prevent a defendant from conveying the core of his or her defense to the jury because the defendant may still testify as to his or her asserted beliefs and how he or she supposedly arrived at them. See Barnett, 945 F.2d at 1301; United States v. Hairston, 819 F.2d 971, 973 (10th Cir. 1987). It is for the district court to weigh the various competing interests and determine, in its discretion, whether, to what extent, and in what form, legal material upon which a defendant claims to have relied should be admitted in any given case. See Willie, 941 F.2d at 1398; Fed. R. Evid. 403. Among the factors which would be relevant to such a determination would be the following: (1) the centrality of these materials to a defendant's claimed misunderstanding of the tax laws; (2) the materials' length and potential to confuse the jury; (3) the degree to which such materials are merely cumulative to a defendant's testimony or to other evidence; (4) the extent to which a defendant may be attempting to use them to instruct the jury on the law or to propagate tax protestor beliefs; and (5.) the potential utility of limiting instructions. See Powell, 955 F.2d at 1214; Barnett, 945 F.2d at 1301 n.3; Willie, 941 F.2d at 1395.

Among the evidence that should be excluded is expert testimony regarding alternative interpretations of the tax laws, if a defendant did not actually rely on the expressed views of the expert. United States v. Burton, 737 F.2d 439, 443 (5th Cir. 1984). In Burton, the court affirmed the exclusion of a tax professor's proposed "expert" testimony that defendant's theory and belief that wages were not taxable income was not implausible. Id. The district court had excluded the testimony pursuant to Fed. R. Evid. 403 after weighing its "marginal relevance" with regard to the Section 7203 charges to the "potential prejudice and confusion, keeping in mind that the judge remains the jury's source of information regarding the law." Id. The court indicated that "[t]estimony such as that offered by Burton's 'expert' is not admissible as an explication of plausible readings of the statutory language." Id. In so ruling, the court noted that the defendant's proffer did not suggest that he actually relied upon the expressed views of the tax professor in failing to file tax returns. Id. at 444.

Likewise, courts have precluded defense attorneys from raising such issues through their cross-examination of government witnesses regarding their interpretation of the tax laws. In Poschwatta, 829 F.2d at 1483, the Ninth Circuit Court of Appeals upheld the district court's granting of a motion in limine precluding cross-examination of IRS employees, who were government witnesses, regarding the requirements of 26 U.S.C. Section 6020(b). Id. The district court concluded, and Ninth Circuit agreed, that such cross-examination would have invaded the province of the court by having a witness testify as to the meaning of Section 6020(b). Id.

In view of the above, the defendant should be precluded from offering testimony or documents relating to alternative interpretations of the tax laws if the offered evidence was not actually relied upon by the defendant or if admitting such evidence would confuse the jury regarding the law or undermine the authority of the Court. Before any such testimony or documents are allowed to be offered, the defendant should be forced to make a "proffer of great specificity" regarding actual reliance.

Moreover, if such "evidence" or argument is interjected into the proceedings, the Court should immediately instruct the jury regarding the applicable law and remind the jury that legal material admitted at trial is relevant only to the defendant's state of mind and not to the requirements of law. If a defendant interjects into the proceedings his or her argument that salaries and wages are not income, the Court should instruct the jury as follows:

> *Gross income means all income from whatever source derived, including compensation for services, and gross income derived from business, wages and salaries.*

See 26 U.S.C. Section 61. If a defendant interjects into the proceedings the argument that he or she is not a"citizen" within the meaning of the Tax Code, but rather is a "nonresident alien," the Court should instruct the jury as follows:

> *According to the Tax Code, a person is a "nonresident alien" only if he or she is neither a citizen of the United States nor a resident of the United States. A person is a citizen if he or she was born in the United States or naturalized as a United States citizen. A person is a resident of the United States during a tax year if he or she resided in the United States for 31 days during the tax year and at least 183 days during the tax year and previous 2 tax years. Thus, defendants were either citizens or residents of the United States during a tax year, then they were not and could not have been nonresident aliens.*

See 26 U.S.C. Section 7701(b); United States Constitution, 14th Amendment; 8 U.S.C. 1401; INA Sec. 301(a), (b) and (f); 26 U.S.C. Sections 1, 6012(a)(1)(A).

If the foregoing arguments are interjected into the proceedings, these instructions would help clarify the purpose for which the evidence is being admitted and reduce the risk of any improper inference being drawn from the fact that there is documentary support for the defendant's positions.

CONCLUSION

For the foregoing reasons, the defendant should be precluded from presenting "evidence" or argument regarding the following: (1) the constitutionality and validity of the tax laws; (2) alternative interpretations of the tax laws if not actually relied upon or if to allow it would confuse the jury as to the law.

FN 1. The IRS Restructuring Act of 1998, Section 3707, precludes the IRS from labeling a taxpayer as an "illegal tax protester" or using any other similar designation. The Department of Justice is not included in this legislation and, therefore, the preclusion does not apply to it. Government prosecutors, however, should be careful not to solicit the phrase characterizing a person as "tax protester" from an IRS employee.

FN 2. The Tax Division maintains a "Criminal Tax Protest Case Issues List," which tracks recurring issues in these prosecutions. The list is updated annually and contains more than 40 issues. Prosecutors interested in obtaining a copy of the protest list should contact the Criminal Appeals and Tax Enforcement Policy Section of the Tax Division at (202) 514-5396.

FN 3. Typically, perpetrators of the current scheme file these forms in conjunction with filing bogus financial instruments, entitled "sight draft" or "bill of exchange." See Chapter 40.02[1][b], supra.

FN 4. Section 6103(l)(16) authorizes the Secretary of Treasury, upon written request, to disclose to officers and employees of any federal agency, any agency of a State or local government, or any agency of the government of a foreign country, information contained on Forms 8300, on the same basis, and subject to the same conditions, as apply to disclosures of information on reports filed under 31 U.S.C. § 5313; except that no disclosure shall be made for purposes of the administration of any tax law.

FN 5. Section 514 essentially punishes anyone who with the intent to defraud uses a fictitious instrument appearing to be an actual security or financial instrument.

FN 6. See Chapter 17, supra, for a more complete discussion of 26 U.S.C. § 7212(a).

FN 7. The Tax Division and the IRS have taken the position that the repeal applies to cases commenced after August 5, 1997, not to cases

pending on that date. Thus, a defense request for juror audit information should be complied with in cases in which an indictment was returned or an information was filed on or before August 5, 1997, if there are any active cases that fit this criterion. If there are any such cases remaining, the following cases are pertinent and should prove helpful. United States v. Copple, 24 F.3d 535 (3d Cir. 1994); United States v. Nielsen, 1 F.3d 855 (9th Cir. 1993); United States v. Callahan, 981 F.2d 491, 495 (11th Cir. 1993); United States v. Axmear, 964 F.2d 792, 793 (8th Cir. 1992); United States v. Droge, 961 F.2d 1030 (2nd Cir. 1992); United States v. Masat, 948 F.2d 923 (5th Cir. 1991); United States v. Huguenin, 950 F.2d 23 (1st Cir. 1991); United States v. Spine, 945 F.2d 143 (6th Cir. 1991); United States v. Lussier, 929 F.2d 25 (1st Cir. 1991); United States v. Sinigaglio, 925 F.2d 339 (9th Cir. 1991); United States v. Masat, 896 F.2d 88, 95 (5th Cir. 1990); and United States v. Hashimoto, 878 F.2d 1126 (9th Cir. 1989). Obviously, if the previous law does not apply because of the repeal date, the response to a request for juror information is simple.

FN 8. The FSIP was created by Congress pursuant to 5 U.S.C. § 7119, the Federal Service Labor-Management Relations Statute. As detailed therein, the Decision and Order of the FSIP was the result of a negotiation impasse under Section 7119 between the National Treasury Employees Union and the Department of the Treasury, Internal Revenue Service.

FN 9. Note that a protester may rebut a charge of willfulness by testifying about or quoting from materials on which he allegedly based his good faith belief (United States v. Nash, 175 F.3d 429, 435 (6th Cir. 1999) (defendant may briefly mention or quote from documents forming basis for his belief, but court need not admit documents themselves); United States v. Gaumer, 972 F.2d 723, 725 (6th Cir. 1993) (defendant entitled to read into evidence legal materials he claimed support his beliefs). But see United States v. Hauert, 40 F.3d 197, 202 (7th Cir. 1994) ("defendant's beliefs about the propriety of his filing returns and paying taxes ... are ordinarily not a proper subject for lay witness opinion testimony"); United States v. Willie, 941 F.2d 1384, 1392 (10th Cir. 1991) (no error to exclude confusing documents).

FN 10. Among the factors which would be relevant to such a determination would be the centrality of these materials to a defendant's claimed misunderstanding of the tax laws, the materials' length and potential to confuse the jury, see United States v. Barnett, 945 F.2d 1296, 1301 n.3 (5th Cir. 1991), the degree to which such materials are merely cumulative to a defendant's testimony or to other evidence, the extent to which a defendant may be attempting to use them to instruct the jury on the law or to propagate tax protester beliefs, and the potential utility of limiting instructions, see and compare United States v. Powell, 955 F.2d 1206, 1214 (9th Cir. 1992), and Willie, 941 F.2d 1384, 1404 n.4 (10th Cir. 1991) (Ebel, J., dissenting), with Willie, 941 F.2d at 1395 (majority opinion).

FN 11. The prosecutor may be able to utilize the proffered evidence to demonstrate the implausibility of a defendant's claim of good-faith reliance.

FN 12. In 1994, Congress amended 31 U.S.C. § 5322 to omit the willfulness requirement for violations of the structuring statute, 31 U.S.C. § 5324.

FN 13. McCann v. Greenway, 952 F.Supp. 647, 648- 49 (W.D.Mo. 1997).

FN 14. Section 6020(b)(1) of the Code (Title 26) provides that if a person fails to make a return required by law, then the Internal Revenue Service "shall" make a return based on information available to it.