IRWIN SCHIFF, Pro Per
444 E. Sahara
Las Vegas, Nevada 89104
Telephone (702) 385-6920
Facsimile (702) 385-6917

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES	)	CRIMINAL INDICTMENT
	)	
Plaintiff	)	CR-S-04-1119-KLD-LRL
	)	
V	)	DEFENDANT'S MEMORANDUM TO DISMISS
	)	ALL COUNTS INVOLVING INCOME
IRWIN SCHIFF, CYNTHIA NEUN	)	TAXES, SINCE THIS COURT HAS NO
And LAWRENCE N. COHEN, a/k/a/	)	JURISDCITION WITH RESPECT TO AN
LARRY COHEN,	)	ALLEGED TAX THAT IS NOT
	)	"TRACEABLE" TO CONGRESS'
Defendants.	)	POWER TO TAX.
_____	)	

COMES NOW defendant Irwin Schiff and submits this Memorandum of Law in support of his Motion that all counts in the indictment involving Title 26 and 18 U.S.C 371 must be dismissed for the following reason.

I
THE INCOME TAX AT ISSUE IS NOT DIRECTLY *TRACEABLE* TO CONGRESS' CONSTITUTIONAL POWER TO "LAY AND COLLECT TAXES"

As the Supreme Court stated in *United States v. Hill*, 123 U.S. 681, 8 S. Ct.308, 31 L.Ed. 275 (1887) "The term 'revenue law' when used in connection with the jurisdiction of the courts of the United States, means …a law which is *directly traceable* to the power granted to Congress by 8, Art. I of the Constitution, 'to lay and collect taxes duties, imposts, and excises.'"[1] (Emphasis added).

The Constitution confers on Congress the power to "lay and collect taxes" in three clauses. Clauses 2 and 4 of Article 1, Sections 2 and 9 confer power on Congress to impose *direct* taxes. While Section 8, Clause 1 of Article 1 mentions the "taxes" authorized in Sections 2 and 9, it goes on to confer power on Congress to impose *indirect* taxes, identified in that clause

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

as "duties, imposts and excises." However, the Constitution provides that all direct taxes must be imposed pursuant to the rule of ***apportionment***, while indirect taxes must be imposed pursuant to the rule of ***geographic uniformity***. In the bedrock decision, *Brushaber v. Union Pacific RR*, 240 U.S.1, which established the character and legality of the 16th Amendment, the Supreme Court repeatedly emphasized that:

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

The *Court* went on to point out (at pages 11-12) that these provisions were not altered or amended by the 16th Amendment because, it held that there *cannot be* a federal tax "lying intermediate between these two great classes and embraced by neither"; therefore, any such proposition:

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

And further, on page 17 the Supreme Court held:

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

Defendants allege that the income tax at issue is imposed *neither* as an *apportioned direct tax,* nor as a geographically, uniform "*duty, impost or excise*," in accordance with the above holdings in *Brushaber*. Therefore, it is the position of defendants that the Federal income tax as contained in Title 26 as that Tile is referred to in the indictment at issue, as well as the income tax referred to in the counts involving 18 U.S.C 371, is not "*directly traceable* to the

powers granted to Congress by Art. I Section 8 of the Constitution, 'to lay and collect taxes duties, imposts, and excises.'" Therefore, this Court cannot have subject matter jurisdiction in connection with an alleged income "tax," as referred to in these counts, since the income tax is not imposed in accordance with the principle referred to in *United States v. Hill,* supra.

If the Government wants to claim that this Court has subject matter jurisdiction to conduct a criminal trial involving income taxes, it is going to have to provide this Court with proof that the above holdings of the *Brushaber* Court were overturned by subsequent Supreme Court decisions. It can not use the *Brushaber* decision to support a claim that, that the 16th Amendment authorized a new tax – such as a direct tax not subject to apportionment – since the *Brushaber* Court *clearly held* that such a proposition "is…wholly without foundation" and" if acceded to … would *create radical and destructive changes* in our constitutional system and *multiply confusion*." So if the United States wants to claim that the 16th Amendment gave Congress a new taxing power - the authority to levy a *direct tax* not subject to apportionment – it will have to base its claim on some *other* Supreme Court decision. It can not use *Brushaber* for that purpose, and any attempt by Justice Department lawyers to do so, would amount to a clear cut violation of Rule 11, since there is no way that anyone, who understands simple English, can misconstrue what the *Brushaber* Court held in the three passages quoted above, and those that will follow.

Defendants further claim that if the United States seeks to allege that this Court has subject matter jurisdiction to prosecute defendants for alleged income tax violations, it will have to identify for this Court, 1) into which of the Constitution's three taxing clauses it claims the income tax falls, while 2) also identifying for this court on what basis the income tax at issue is imposed; is it imposed on the basis of "apportionment" or is it imposed on the basis of "geographic uniformity"? The Constitution guarantees to all Americans that they cannot be subject to a Federal tax, which is not imposed pursuant to either one rule or the other. Therefore defendants demand that the Government identify for this Court into which of the two great classes of taxes authorized by the Constitution it claims the income tax falls, since in order for this Court to have subject matter jurisdiction the tax must be "directly traceable" to one class or the other, and be imposed in accordance with either the rule of "apportionment" or the rule of "uniformity."

II
THE 16TH AMENDMENT CONFERRED NO NEW TAXING POWER ON CONGRESS, NOR DID IT ELIMINATE OR MODIFY IN ANY WAY THE CONSTITUTIONAL RESTRICTIONS PLACED ON CONGRESS' TAXING POWER

Despite the widespread but mistaken belief on the part of the American public, the 16th Amendment did not "amend" the Constitution, nor did it give Congress any new taxing power. The only power Congress has "to lay and collect taxes" are those powers given it by the three clauses (as identified above) in the *original* Constitution.

As stated by the Supreme Court in the *Brushaber* decision, supra:

> It is clear on the face of this text (the 16th Amendment) that it does not purport to confer power to levy income taxes in a generic sense – *an authority already possessed* and never questioned – or to limit and distinguish between one kind of income taxes and another, but that the *whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the sources whence the income was derived. (Emphasis added, Brushaber, p.17 supra)*

So "the whole purpose" of the 16th Amendment was not to amend the Constitution or give Congress a new taxing power "an authority already possessed," but its "whole purpose" was to "relieve" an income tax from the requirement of "apportionment" by taxing "income" itself, rather than by imposing the tax directly on those sources that produced the income – i.e. from "whence the income was derived." Obviously, when an income tax is imposed *directly* on wages, dividends, interest, rents etc etc. etc., the *sources* of ones income are being "considered" and are thus being *directly taxed* in violation of the above principle. If, on the other hand, an income tax is imposed on corporate profit, the "sources" that produced that profit are not "considered" and are thus not *directly* taxed. If the "sources" of a corporation's "income" do not produce a profit, those sources themselves (i.e. dividends, interest capital gains, etc. etc. etc.) are not "considered" and are thus excluded from taxation. Therefore "income" in the "constitutional" and "16th Amendment" sense must mean corporate profit – since no other form of "income" is separated from the sources that produced the "income." Therefore, an income tax on corporate profit would not be a direct tax on the sources that produced the profit. And in holding that "income" as used in the 16th Amendment meant "income" *separated* from its sources, the court *also held* (contrary to what the *Pollock* Court held in 1895) that such a tax was an *excise tax* – and since excise taxes are not required to be

apportioned, an income tax imposed as an excise tax would automatically conform to the Amendment. However, the income tax is not imposed as the excise tax the *Brushaber* Court ruled it to be. Obviously, therefore, it is being imposed as a direct tax which requires the tax be apportioned to each State in accordance with their population. if the tax is to be imposed in conformity with the Constitution.

In the 1895 Supreme Court decision, *Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429, 158 U.S. 601,* the Supreme Court held (contrary to what the *Brushaber* Court later held) that an income tax was a ***direct tax*** and, therefore, subject to the rule of apportionment. Consequently it held the Income Tax Act of 1894 unconstitutional, because it was not based on apportionment.

The *Brushaber* Court, as shown below, ruled that the 16th Amendment did not amend or overrule *Pollock*. "The Amendment contains nothing repudiating or challenging the ruling in the Pollock case."(at page 19). Thus the *Pollock* decision is still binding on this Court, and, therefore, this Court is being put on ***judicial notice*** that, pursuant to that decision, any ***direct tax*** imposed on defendants alleged "income," which is not apportioned, is manifestly unconstitutional as held in the never reversed, *Pollock* decision.

III

FURTHER ARGUMENT THAT SUPPORTS ALL OF THE ABOVE

The fact that the *Brushaber* court held that at tax on "income" was an excise tax (and not a direct tax) is clearly shown in the following additional passages from that decision (at pages 16 & 17):

> The fact that taxation on income was *in its nature an excise entitled to be enforced* as such…that taxes on such income had been sustained as excise taxes in the past. (Emphasis added)

Here the Brushaber Court was referring to the income tax imposed during the Civil War and which was imposed as an excise tax, as shown in the following passage from that decision:

> Again the situation is aptly illustrated by the various acts taxing income derived from property of every kind and nature, which were enacted beginning in 1861 and lasting during what may be termed the Civil War period. It is not disputable that these latter taxing laws ***were classed under the head of excises duties and imposts*** because it was assumed that they were of ***that character***. …And this *practical construction* came in theory to be the *accepted one* since it was adopted without dissent by the most eminent of text writers (*Brushaber* at page 14, emphasis added).

The *Brushaber* Court continually claimed that a tax on income (separated from its source) was an excise tax. It pointed out "such taxes were removed from the great class of excises, duties and imposts subject to the rule of uniformity and were placed (incorrectly) under the other or direct class."

And further the *Brushaber* Court noted, in *again* identifying an income tax as *an excise tax*:

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

Additional proof that the *Brushaber* court held that: 1) the 16th Amendment gave the Government no new taxing power, and that, 2) an income tax had to be imposed as an *excise tax* is furnished by, *Stanton v. Baltic Mining*, 240 US 103 (1915) which held, in pertinent part:

> The provisions of the 16th Amendment conferred no new power of taxation but simply prohibited (a tax on income) from being taken out of the category of indirect taxation to which it inherently belonged and being placed in the category of direct taxation subject to apportionment by a consideration of the sources from which the income was derived" (at page 112) (Emphasis added)

Further proof that the 16th Amendment gave the Government no new taxing power is further furnished by the authoritative decision, Eisner v. Macomber 252 US 189 (1920), which held:

> The Sixteenth Amendment must be construed in connection with the taxing clauses in the original Constitution and the effect attributed to them before the Amendment was adopted. (At page 205, emphasis added)
>
> A proper regard for its genesis…require that the (16th) Amendment shall not be extended by loose construction…so as to repeal or modify…those provisions of the Constitution that require an apportionment…for direct taxes upon property, real and personal. (And wages and dividends are personal property) This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts. (Page 206, emphasis added)

Thus this Court cannot "disregard" the limitations placed on Congress' taxing power by the original Constitution, the 16th Amendment not withstanding. And any attempt by this Court

to do so would amount to a "disregard" by this Court of the Constitution, as held in Eisner as quoted above.

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

Therefore based on all of the above, this Court can not hold that the 16th Amendment gave Congress a new taxing power: the power to impose an income tax not subject to either the rule of apportionment nor the rule of uniformity. Such a holding would not only contradict all of the court cases as quoted above, but would also contradict the research conducted by the Congressional Research Service as shown above.

Despite all of the above, the 9th Circuit held in In re Becraft, 885 F. 2d 547 that:

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

Such a claim by the 9th Circuit is obviously incorrect since it directly contradicts each and every quotation reproduced above, and each one of the Supreme Court decisions in which those quotations appear. One can hardly imagine a legal opinion, which could be more incorrect in light of all of the Supreme Court holdings, quoted above. In order for the 9th Circuit to reach the conclusion it did in In re Becraft it would have had to close its eyes and simply refuse to be informed. It could be that the 9th Circuit was led into error because it was not supplied with the research furnished to this Court in this Memorandum; if it had, it would obviously have reached a contrary conclusion. In addition, it should also be noted that the Defendant/Appellant in that case raised other issues not raised here. It could be that these other issues were largely responsible for the 9th Circuit being led into error. It should also be noted that the only Supreme Court case mentioned in In re Becraft was the Brushaber decision, and certainly that decision does not support, in any way, the conclusion reached in In re Becraft. On the contrary, the Brushaber Court clearly held in no uncertain terms that the conclusion reached by the 9th

Circuit in that decision "is ….wholly without foundation" and "if acceded to … would create radical and destructive changes in our constitutional system and multiply confusion." In any case, this Court took an oath "to support the Constitution" as interpreted by the Supreme Court in such decisions as quoted and cited above. It did not take an oath to support clearly erroneous, lower court decisions which obviously contradict the Supreme Court as does In re Becraft.

III
JURISDICTION CANNOT BE ASSUMED

As the Supreme Court stated in McNutt v. General Motors, 56 S.Ct. 780.

> If (an) allegation of jurisdiction facts are challenged by his adversary in an appropriate manner, he must support them with competent proof…the party alleging jurisdiction (must) justify his allegation by a preponderance of the evidence.

And, as the Supreme Court held in The State of Rhode Island v. The State of Massachusetts, 37 U.S. 709, once the question of jurisdiction is raised: "It must be considered and decided, before any court can move one step further"

In addition, "Jurisdiction cannot be assumed by a District Court… but it is incumbent upon plaintiff to allege in clear terms, the necessary facts showing jurisdiction which must be proved by convincing evidence" Harris v. American Legion, 162 F. Supp.700 (citations omitted)

Therefore, before this Court can move "one step further" the United States must supply this Court with competent proof that the income tax at issue is "directly traceable to the power granted to Congress …'to lay and collect taxes, duties, imposts and excises,'" as conferred upon Congress in the original Constitution, the 16th Amendment not withstanding.

Pursuant to 28 U.S.C. 1746, I certify under penalty of perjury that the foregoing is true and correct.

Executed: March 30, 2004

_____
Irwin A. Schiff, pro per