IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

JOHN M. COBIN, Plaintiff, vs. UNITED STATES OF AMERICA AND MARK W. EVERSON, COMMISSIONER OF INTERNAL REVENUE Defendant(s).	}	Case No. 6:04CV2455-26BI **Notice Regarding Plaintiff's Underlying Legal Basis**

1. Introduction and Background

1.1 Cobin has contended that this Court has subject matter jurisdiction according to I.R.C. 6330 because Cobin's underlying tax liability for years 1991 and 1992 is in question. The IRS has refused to grant Cobin a face-to-face Collection Due Process Hearing to discuss such issues, leaving only the judicial remedy open to Cobin. Since Defendant has produced a volume of exhibits and has begun to make its case against Cobin, a reply is necessary in order to deny and counter the false, malicious, and erroneous claims of the IRS. This brief provides the detailed legal basis underlying Cobin's actions and his claim that he had no tax liability as alleged. This Notice is specifically related to Cobin's Reply and Rebuttal to Motions of February 9, 2005 against Motions entered by the United States on January 18, 2005.

1.2 Cobin corresponded with the IRS frequently during 1991 through 1994. Cobin asked careful legal questions and received lame or put-off answers in reply. The IRS did not answer Cobin's questions. Cobin disclosed precisely what he was doing and told the IRS his good-faith belief about (and understanding of) the law (*Cheek v. United States*, 498 U.S. 192 (1991)). He

asked the IRS to show him where he was wrong, which they failed to do. On July 23, 2004, Cobin once again corresponded with the IRS in Washington, DC in order to clarify matters of law but received no reply. In *United States v. Tweel*, 550 F.2d 297, 299-300 (1977), the court ruled that "Silence can only be equated with fraud when there is a legal or moral duty to speak, or when an inquiry left unanswered would be intentionally misleading...We cannot condone this shocking conduct...If that is the case we hope our message is clear. This sort of deception will not be tolerated and if this is routine it should be corrected immediately". The IRS has been deliberately silent. Cobin, realizing that he must consult statutes and regulations to find out what duty (if any) he owed with regard to the income tax (*United States v. Mersky*, 361 U.S. 431 (1960)), had sought out the opinions of the IRS. Yet none has been forthcoming.

1.3 The 1040NR tax returns signed by Cobin in 1991 and 1992 clearly state the phrase "with express reservation of all my rights in law and equity, and all other natures of law" above his signature. By thus reserving his rights, Cobin denied any consent to the political and privilege-granting jurisdiction of the United States through the 14th Amendment or otherwise. By this phrase, Cobin also expressed his will under commercial law to sign the forms *without prejudice*. U.C.C. 1-207 provides: "Performance or Acceptance Under Reservation of Rights. (1) A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice', 'under protest' or the like are sufficient." So Cobin utilized the Forms 1040NR under protest, effectively making his signature (for purposes of entering into a binding contract) null and void on these tax forms. This fact cripples the IRS's case.

Beyond the commercial law implications of reserving his rights, Cobin also implied the reservation of other rights. For instance, if there remains any question as to what other rights

Cobin reserved, these rights included (but were not limited to) the following, as indisputably affirmed in the Constitutions of the united States (1787) and all of the states in which Cobin has lived or worked, the Anglo-American system of common law which those documents affirm as their basis, and even the Internal Revenue Code (I.R.C.): (a) the right to contract or not to contract; (b) the right to be secure (i.e., reasonably private and safe) in one's words, papers and possessions; (c) the right to due process of law before deprivation of life, liberty, or property; (d) the right to fair, speedy and substantial justice in any actions brought against him; (e) the presumption of innocence until guilt be proven.

This revocation per I.R.C. 871(d) should also be taken to signify, as is true with or without it being specified, that Cobin is only liable for contracts into which he has (putatively or actually) entered knowingly, willingly, and freely, and whose terms have been spelled out to the full knowledge of both or all parties to them.

Cobin clearly revoked his I.R.C. 871(d) election on the 1040NR forms that were filed. That revocation stated:

> "This is my revocation of my 871(d) election, made expressly or by acquiescence. Revocation of my 871(d) election: I am a nonresident alien individual who at no time during the year was either engaged in or received gross income that was effectively connected with the conduct of a trade or business within the political jurisdiction of the United States and pursuant to the authority of I.R.C. 871(d) and 26 C.F.R. 1.871-10(d)(1)(i) and the controlling underlying substantive law, I hereby revoke without the consent of the Commissioner the previous election made under I.R.C. 871(d). Each of the changes in column B, page 1, is caused by this revocation (1040NRs attached in support thereof). We have arrived at these

> determinations after study of the I.R.C., C.F.R., Constitution, and court cases. If you have reason to believe that we are wrong in our reasons, please inform us in writing at the address given on the reverse side. If we have not received an answer within 30 days, we will assume that you agree with our conclusions; this document serving as a confirmatory writing between merchants [U.C.C. 2-201]."

The specific legal reasoning for this revocation is provided in the ensuing sections.

1.4 It is quite curious that the U.S. Attorney has chosen to raise issues about Cobin's 1991 and 1992 tax liability since they have otherwise (incorrectly) maintained that this Court should dismiss Cobin's complaint for lack of subject matter jurisdiction. The U.S. Attorney says that U.S. District Court is not the proper venue because procedural matters such as pursuing a face-to-face Collections Due Process Hearing, which has been the main issue to be adjudicated before this Court, have their proper venue in U.S. Tax Court. Now Defendant implies its agreement with Cobin (that the Court *does* have subject matter jurisdiction) because they have brought a motion with exhibits indicating why it believes that Cobin had an income tax liability for 1991 and 1992.

Cobin denies this claim and, since the U.S. Attorney has moved to make its case, Cobin will now provide an explanation of why he did not have any such liability and why the government is mistaken. Cobin's legal basis rests on several premises that are explained in this Notice, wherein Cobin challenges the mistaken notions of Defendant. In 1823, Thomas Jefferson wrote to Supreme Court Justice William Johnson that, "On every question of the construction of the Constitution, let us carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed." At no time

does any court ruling or any law exonerate the guilty, in or out of government. This ideal was reemphasized in *Lavin v. Marsh*, 644 F.2d 1378, (9th Circuit, 1981): "Persons dealing with government are charged with knowing government statutes and regulations, and they assume the risk that government agents may exceed their authority and provide misinformation". Accordingly, Cobin has sought relief in this Court to affirm that he has no income tax liability.

Cobin recognizes his duty to not simply accept whatever the government claims without challenge. The government could be in error. "Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority. See, e.g., *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409, 391 (1917), *United States v. Stewart*, 311 U.S. 60, 70, 108 (1940), and see, generally, *In re Floyd Acceptances*, 7 U.S. (Wall.) 666 (1869)."

2. Executive Summary of Cobin's Position

2.1 Cobin is responsible by law to voluntarily assess his own tax liability. He has concluded that his earnings from 1991 and 1992 were not included in the definition of gross income for tax purposes, as defined under I.R.C. 861—or in the term "incomes" as intended by Congress in the 16th Amendment. The words *include* and *including* in the I.R.C. is used in a restrictive or limited sense. Cobin has a thoroughly-researched, logical basis underlying his legal conclusions.

Cobin is considered a "nonresident alien" in the I.R.C., even though the term seems a bit odd according to the common vernacular. Frank Brushaber, a native of New York, was similarly

called a nonresident alien in T.D. 2313 (1916), indicating that it is permissible to describe citizens using such terminology. The federal government has always respected the taxing restrictions of Article I, Section 8, Clauses 1, 4 and 5, and Section 9 of the American Constitution. Although the income tax on its face, and according to popular opinion, provides for a direct, non-apportioned tax on the property of individuals that would violate the Constitution, the reality is quite different. Both the I.R.C. and the 16th Amendment (1913) provide for a means to tax "incomes", which the U.S. Supreme Court has called an indirect excise tax on privilege. Although there are conflicting opinions in the courts, it is clear from the Congressional debate surrounding the 16th Amendment that the term "incomes" referred to bond interest, dividend, and annuity payments received from land and privileged sources like corporation profits (which, as economists have shown, are derived by employing an optimal mixture of capital and labor, along with federal benefits, e.g., limited liability, patents, tariffs). In all cases, the principal is left intact and the resulting benefit or income is taxed as a privileged excise. Cobin had no privileged incomes "derived from" from any taxable source from any "trade or business" during 1991 and 1992.

2.2 The U.S. Supreme Court on many occasions has identified two classes of citizenship in the United States. The first class consists of those white individuals contemplated in the original American Constitution (Article I, Section 2, Clause 2, Article I, Section 3, Clause 3 and Article II, Section 1, Clause 5). The second class consists of the "federal citizens" contemplated in the 14th Amendment (1868), which had the primary purpose of granting citizenship rights to free Negroes and the recently-freed black slaves. Congress was careful to protect the unalienable rights of the first class citizens (called "nonresident aliens" in the I.R.C.) by providing a means by which they could remain unaffected by the provisions of the direct tax. 26 C.F.R. 1.1-1(c) also implies that those who are liable for the income tax in I.R.C. 1 are those who were granted

second class citizenship status and civil rights through the 14th Amendment (which Cobin was not). However, Congress also allowed these nonresident aliens to make an *election* to be treated like second class citizens. In 1991 and 1992, Cobin filed the proper IRS forms for a nonresident alien individual (Form 1040NR), wherein he also revoked his election to be treated as a second class citizen for purposes of the income tax. He had previously elected to treat his earnings, which are his labor and property—also referred to as "real property" in the I.R.C.—as taxable income under I.R.C. 1. However, Cobin chose to revoke that election beginning in 1991 by means of a confirmatory writing between merchants.

3. Cobin's Voluntary Assessment of Tax Liability

3.1 In *United States v. Flora*, 362 U.S. 145, 176 (1960), the U.S. Supreme Court stated: "Our system of taxation is based on voluntary assessment and payment, not upon distraint [compulsion or force]. If a law requires you to do something, your compliance with the law is mandatory, not voluntary. But if a law requires certain other people, to do something, then your compliance with that law is voluntary." The IRS has repeatedly stated that: "The mission of the Internal Revenue Service is to encourage and achieve the highest possible degree of 'VOLUNTARY COMPLIANCE' with the tax laws and regulations..." (*Internal Revenue Manual*, Sec. 1111.1). The *Internal Revenue Manual* (part 5, "Collection Activity", 105.4.1.2, January 27, 1998) states: "Our system of taxation is dependent on taxpayers' belief that the tax laws they follow apply to everyone and that the Internal Revenue Service will respect and protect their rights under the law. These are fundamental principles of voluntary compliance." The notion of voluntary compliance must correspond to a request or a choice, since what is required cannot be voluntary. But one may voluntarily agree to pay a duty in return for the granting of a favor or a privilege. In such cases, the obligation becomes contractual as a result of a voluntary choice.

3.2 Cobin does not assert that filing a tax return is optional or voluntary when one is required by law to do so. Cobin is arguing that the self-assessment nature of the American tax system is voluntary and that one is required to file the proper tax return if he has determined that he owes a tax and is thus legally obligated to do so. The requirement to file an income tax return is not voluntary, if a tax is owed (I.R.C. 6011(a), 6012(a), et seq., and 6072(a), *Treas. Reg.* § 1.6011-1(a)). As the U.S. Supreme Court has held, "In assessing income taxes, the Government relies primarily upon the disclosure by the taxpayer of the relevant facts (*Helvering v. Mitchell*, 303 U.S. 391, 399 (1938)). For the ensuing reasons, and after careful consideration of the law, Cobin determined that he had no filing requirements or that (in the case of 1991 and 1992) the proper tax return forms to file were the 1040NR. Cobin has not chosen to ignore his duty to file any required return (*United States v. Drefke*, 707 F.2d 978, 981 (8th Circuit, 1983)).

4. Cobin Had No "Incomes" Liable to Tax Under the 16th Amendment

4.1 Cobin had no "incomes" as stated in the 16th Amendment (used in its plural form in the Amendment), since the term *incomes* did not (and does not) include personal earnings from labor. This fact is evident in reading the 1909 *Congressional Record* leading up to that Amendment (1913). Congress clearly used the term "incomes" to refer to bond interest, dividend, and annuity payments received from privileged sources like corporations (which employ an optimal mixture of capital and labor in order to earn a profit). In doing so, Congress understanding of "incomes" was in line with the definition that was being developed for the then upcoming edition of *Black's Law Dictionary* (2nd edition, 1910, page 612).

> "Income. The return in money from one's business, labor, or capital invested; gains, profit, or private revenue. *Braun's Appeal*, 105 Pa. 415 [1884]; *People v. Davenport*, 30 Hun. (N.Y.) 177 [1890]; *In re Slocum*, 169 N.Y. 153, 62 N.E. 130 [1901];

> *Waring v. Savannah*, 60 Ga. 93 [1878]. 'Income' means that which comes in or is received from any business or investment of capital, without reference to the outgoing expenditures; while 'profits' generally means the gain which is made upon any business or investment when both receipts and payments are taken into account. 'Income,' when applied to the affairs of individuals, expresses the same idea that 'revenue' does when applied to the affairs of a state or nation. *People v. Niagara County*, 4 Hill (N.Y.) 20 [1842]; *Bates v. Porter*, 74 Cal. 224, 15 P. 732 [1887]".

Evidently, this definition had been common usage for decades prior to that Congressional debate. According to *U.S. v. Ballard*, 535 F.2d 400, cert denied, 429 U.S. 918, 50 L.Ed.2d 283, 97 S.Ct. 310 (1976), "The general term 'income' is not defined in the Internal Revenue Code." Conformably, in *Bollow v. Federal Reserve Bank of San Francisco,* 650 F.2d 1093, 9th Circuit (1981), the court ruled that: "All persons in the United States are chargeable with knowledge of the Statutes-at-Large.. It is well established that anyone who deals with the government assumes the risk that the agent acting in the government's behalf has exceeded the bounds of his authority". In the following subsections, Cobin shows further why he had no privileged income and thus no requirement to file a Form 1040 Tax Return as Defendant wrongly and maliciously alleges.

4.2 Although there still seems to be some judicial confusion over the matter, courts have ruled that "income is not a wage or compensation from any type of labor" (*Staples v. United States*, 21 F.Supp 737, 739 (1937)). In *Central Illinois Public Service Co. v. United States*, 435 U.S. 21 (1978), the U.S. Supreme Court ruled that established that wages and income are *not* equivalent as far as taxes on income are concerned. "Decided cases have made the distinction between wages and income and have refused to equate the two in withholding or similar controversies. *People's Life Ins. Co. v. United States*, 179 Ct.Cl. 318, 332; 373 F.2d 924, 932 (1967);

Humble Pipe Line Co. v. United States, 194 Ct.Cl. 944, 950, 442 F.2d 1353, 1356 (1971); *Humble Oil & Refining Co. v. United States*, 194 Ct.Cl. 920, 442 F.2d 1362 (1971); *Stubbs, Overbeck & Associates v. United States*, 445 F.2d 1142 (CA5 1971); Royster Co. v. United States, 479 F.2d 390; *Acacia Mutual Life Ins. Co. v. United States*, 272 F.Supp. 188 (Md. 1967)."

Moreover, "there is a clear distinction between 'profit' and 'wages' or compensation for labor. Compensation for labor cannot be regarded as profit within the meaning of the law. The word 'profit', as ordinarily used, means the gain made upon any business or investment—a different thing altogether from the mere compensation for labor" (*Oliver v. Halstead*, 86 S.E.2d 859 (1955)). This doctrine runs contrary to U.S. Tax Court decision *Peth v. Breitzmann*, 85-1 USTC P. 9321, 611 F.Supp. 50 (E.D. Wis. 1985), which held that "no court has ever accepted this argument [that Peth's earnings were not "income"] for the purpose of determining taxable income. Indeed, it has always been rejected. For once and for all, wages are taxable income." In saying "no court", the *Peth* judges were evidently unaware of *Staples* and *Oliver*. Since judges do not legislate, it is improper for them to redefine the clear intention of Congress when setting down the law. Regrettably, Tax Court judges are often subject to the ideological fads of the day.

While such sentiment from the U.S. Tax Court might not be surprising, one might wonder from where it came. The now widespread political ideology in America has not been dominant historically. Indeed, there is a fundamental difference in the philosophy of freedom in the Hamilton–Clay–Daniel Webster–Lincoln–Teddy Roosevelt thread versus that of Jefferson–Jackson–Johnson–Cleveland. Yet the former has triumphed over the latter. Privilege-promoting policies and "strong government" now trump individual liberty and hands-off governance whenever the two come into conflict. Recent trends in tax case rulings exemplify this tendency. Judges seem little willing to consider that there might be a "back door" means of preserving un-

alienable rights against the intrusions of the federal government. Instead, the ideals of Jefferson have succumbed to the collectivist and statist ones of Hamilton. Support for a big, strong central "merchant state' that can effectively "help business" has become the order of the day. Unfortunately, this sentiment has infected the minds of many judges (especially in U.S. Tax Court) who have ruled against precedent from other eras that would better provide protection for individual rights and liberties. Nowhere has this ideological battle been seen more clearly than in the rulings applications of the 16th Amendment or in decisions such as *Peth*.

4.3 There is much confusion and many incongruent or contradictory rulings regarding the taxation of incomes in the Federal Circuit Courts. It is difficult to know what the law is by reading the cases since each court seems to understand the meaning of *Brushaber* differently, including the nature of the income tax as an excise, and whether direct or indirect (see *United States v. Turano*, 802 F.2d 10, 12 (1st Circuit 1986), *United States v. Sitka*, 845 F.2d 43, 46 (2nd Circuit 1988), *Keasbey & Mattison Co. v. Rothensies*, 133 F.2nd 894, 897 (3rd Circuit 1943)), *White Packing Co. v. Robertson*, 89 F.2d 775, 779 (4th Circuit 1937), *Parker v. Commissioner*, 724 F. 2d 469, 471 (5th Circuit 1984), *United States v. Gaumer*, 972 F.2d 723, 725 (6th Circuit 1992), *Commissioner v. Obear-Nester Glass Co.*, 217 F.2d 56, 58 (7th Circuit 1954), *United States v. Francisco*, 614 F.2d 614, 619 (8th Circuit 1980), *United States v. Buras*, 833 F.2d 1356, 1361 (9th Circuit, 1980), *Fairbanks v. Commissioner*, 191 F.2d 680, 681 (9th Circuit 1951), *United States v. Collins*, 920 F.2d 619, 629 (10th Circuit 1990), *Bank of America National Trust & Savings Association v. United States*, 459 F.2d 513, 517 (11th Circuit Court of Claims 1972), and *Abrams v. Commissioner*, 82 T.C. 403, 406-407 (1984)). As Frank W. Hackett once said: "No question is ever settled, until it is settled right" (25 *Yale Law J.* 427, 442 (1916)).

Cobin has sought to understand and comply with the law. Accordingly, he has undertaken a careful study of the relevant statutes and case law. Sometimes this task is daunting. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law" (*Connally v General Construction Co.*, 269 U.S. 385, 391 (1926)). On the one hand, public sources, like the IRS website (http://www.irs.gov/businesses/small/article/0,,id=106503,00.html) and the "quatloos" website (http://www.quatloos.com) are keen to definitively "debunk" the idea that "wages are not income".

Conformably, the California State Board of Equalization state: "Romero's proclaimed belief that he was not a "person" and that the wages he earned as a carpenter were not "income" is fatuous as well as obviously incorrect…Compensation for labor or services, paid in the form of wages or salary, has been universally held by the courts of this republic to be income, subject to the income tax laws…" (*Eric A. Rowley v. Franchise Tax Board*, Case No. 33384 83 (2000)). In *Lonsdale v. Commissioner*, 661 F.2d 71, 72 (5th Circuit, 1981), the court rejected as "meritless" the taxpayer's contention that the "exchange of services for money is a zero-sum transaction…" In *United States v. Connor*, 898 F.2d 942, 943-944 (3rd Circuit), cert. denied, 497 U.S. 1029 (1990), the court stated that "[e]very court which has ever considered the issue has unequivocally rejected the argument that wages are not income". In *McCoy v. United States*, 88 A.F.T.R.2d (RIA) 7116, 2001 U.S. Dist. LEXIS 18986 (N.D. Tex. Nov. 16, 2001), the court rejected the taxpayer's argument that wages received were not income and described this position as meritless (also see *United States v. Richards*, 723 F.2d 646, 648 (8th Circuit, 1983). In *Reading v. Commissioner*, 70 T.C. 730 (1978), affirmed, 614 F.2d 159 (8th Circuit, 1980), the court said the entire

amount received from the sale of one's services constitutes income within the meaning of the 16th Amendment.

On the other hand, many rulings indicate that earnings are not considered income under the 16th Amendment. "Income within the meaning of the 16th Amendment and the Revenue Act means, gain...and, in such connection, gain means profit...proceeding from property severed from capital, however invested or employed and coming in, received or drawn by the taxpayer for his separate use, benefit and disposal" and "Income is not a wage or compensation for any type of labor" (*Staples v. United States*, 21 F.Supp 737, 739 U.S. Dist. Ct. ED Penn., (1937)). Moreover, "...whatever may constitute income, therefore, must have the essential feature of gain to the recipient. This was true when the 16th Amendment became effective, it was true at the time of *Eisner v. Macomber* Supra, it was true under Section 22(a) of the Internal Revenue Code of 1938, and it is likewise true under Section 61(a) of the IRS Code of 1954. If there is not gain, there is not income...Congress has taxed income not compensation" (*Conner v. United States*, 303 F.Supp. 1187 (1969)).

"There is a clear distinction between 'profit' and 'wages', or a compensation for labor. Compensation for labor (wages) cannot be regarded as profit within the meaning of the law. The word 'profit', as ordinarily used, means the gain made upon any business or investment—a different thing altogether from the mere compensation for labor" (*Oliver v. Halstead*, 86 S.E.2d 85e9 (1955)). Or, "...one does not derive income by rendering services and charging for them" (*Edwards v. Keith*, 231 F. 111 (1916)). "It is to be noted that, by the language of the Act, it is not salaries, wages, or compensation for personal services that are to be included in gross income. That which is to be included is gains, profits, and income derived from salaries, wages, or compensation for personal services" (*Lucas v. Earl*, 281 U.S. 111 (1930)).

Note that state court rulings coincide with the Federal court rulings: "...reasonable compensation for labor or services rendered is not profit" (*Lauderdale Cemetery Assoc. v. Mathews,* 345 Pa. 239; 47 A.2d 277, 280 (1946)). "There is a clear distinction between profit and wages, or compensation for labor. Compensation for labor cannot be regarded as profit within the meaning of the law" (*Oliver v. Halstead,* 196 Va. 992; 86 S.E.2d 858 (1955)). A wider variety of other courts (generally higher courts than those used to support the defendant's case) have ruled the same way. "One does not derive income by rendering services and charging for them" (*Edwards v. Keith,* 231 F 111 (1916)). "If there is no gain there is no income...Congress has taxed income not compensation" (*Conner v. United States,* 303 F.Supp. 1187, 1191 (1969)).

Therefore, lower courts—the U.S. Tax Court and State Tax Courts in particular—are either (1) blatantly not following the rulings of higher courts or (2) referring to "earning", "wages", "profits", etc. that are "derived from" privileged sources of "incomes" and are thus taxable. If the latter is true, then the IRS and quatloos websites fail to highlight the crucial distinction, leading people to be confused by their portrayal of case law. Moreover, one is thus left with the imperative to look to intent of Congress in the *Congressional Record* if one is to understand and apply the law correctly.

4.4 It certainly was not the intention of state legislatures around the time of the debates surrounding the 16th Amendment to levy a tax upon honest toil and labor that was not associated with privileged capital investments. "We cannot asset to the proposition that it was the intention of the Legislature to impose so large an occupation [privilege] tax upon labor, on the right which a man has by his brawn and muscle, without any other capital being invested, to earn his daily bread by the sweat of his brow…Liberty, in its broad sense, must consist in the right to follow any of the ordinary callings of life without being trammeled…The right to follow any of the

common occupations in life is an inalienable right" (*Wilby v. Mississippi*, 47 S. 465, 466, 93 Miss. 767 (1908)) "Reasonable compensation for labor or services rendered is not profit" (*Laureldale Cemetery Assoc. v. Matthews*, 345 A. 239, and 47 A.2d 277 (1946)). The Tennessee Supreme Court said, "The right to receive income or earnings is a right belonging to every person, and realization and receipt of income is therefore not a "privilege that can be taxed" (*Jack Cole v. Commissioner MacFarland*, 337 S.W.2d 453 (1960)), also noting that the "Legislature...cannot name something to be a taxable privilege unless it is first a privilege."

In *Spring Valley Water Works v. Barber*, 33 P. 735, 99 Cal. 36 (1893), the court said, "A right common in every citizen such as the right to own property or to engage in business of a character not requiring regulation CANNOT, however, be taxed as a special franchise by first prohibiting its exercise and then permitting its enjoyment upon the payment of a certain sum of money." The U.S. Supreme Court ruled that, "If it could be said that the state had the power to tax a right, this would enable the state to destroy rights guaranteed by the constitutions through the use of oppressive taxation...The power to tax involves the power to destroy" (*McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)). The U.S. Supreme Court stated that, "The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable...to hinder his employing this strength and dexterity in what manner he thinks proper without injury to his neighbor, is a plain violation of this most sacred property" (*Butcher's Union v. Crescent City*, 111 U.S. 746 (1884)).

The main rule from *Pollock v. Farmers' Loan and Trust*, 157 U.S. 429 (1895), was that only property or persons which exist on account of some government privilege could be taxed indirectly as an excise. Property that existed as a matter of right, including a man's labor, could only be taxed directly. Capital gains were not considered income by the courts, unless perhaps

they are earned by a corporation, and income is always considered to be something produced by property or labor "without impairing that capital and which leaves the property intact" (*Sargent Land Co. v. Von Baumbach*, 207 F. 423, 430 (1913), *Eisner v. Macomber*, 252 U.S. 189 (1919)). "There can be no tax upon a man's right to live and earn his bread by the sweat of his brow" (*O'Connell v. State Board of Equalization*, 25 P.2d 114, 125; 95 Mont. 91 (1933)) and "the individual, unlike the [state-privileged] corporation, cannot be taxed for the mere privilege of existing" (*Redfield v. Fisher*, 292 P. 813, 819; 135 Or. 180, 294 P.461, 73 A.L.R. 721 (1931)). Liberty and property, as well as earning a living, are unalienable rights that cannot be taxed as if they were privileges (*Coppage v. Kansas*, 236 U.S. 1, 14 (1915), *Jack Cole Company v. Alfred T. MacFarland, Commissioner*, 337 S.W.2d 453, 456, 206 Tenn. 694 (S.Ct. Tenn. 1960), *Simms v. Ahrens*, 271 S.W. 720 (1925)). However, if an individual volunteers to participate in a privileged program like Social Security, then his inalienable right to property may be subjected to the corresponding excise tax on privilege (*Chas. C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 580-581 (1937)).

An excise tax is "A tax laid upon the happening of an event, as distinguished from its tangible fruit, is an Indirect Tax which Congress undoubtedly may impose." (*Tyler* et al, *Administrators v. United States*, 281 U.S. 497, 502 (1930)). Rather than affecting wages or earnings from work, "Excises are 'taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges' Cooley, Const. Lim. 7th ed. 680" (*Flint v. Stone Tracy*, 220 U.S. 107 (1911)). In other words, an excise taxes privileged income (*United States v. Whitridge*, 231 U.S. 144, 147 (1913). "An examination of these and other provisions of the Act [The 16th Amendment] make it plain that the legislative purpose was not to tax property as such, or the mere conversion of property, but to tax

the conduct of the business of corporations organized for profit upon the gainful returns from their business operations" (*Doyle v. Mitchell Bros.*, 247 U.S. 179, 183 (1918)).

The U.S. Supreme Court said, "The power to tax the exercise of a [right]...is the power to control or suppress its enjoyment" (*Magnano Co. v. Hamilton*, 292 U.S. 40 (1934)). Indeed, "That the right to conduct a lawful business, and thereby acquire pecuniary profits, is property, is indisputable" (*Truax v. Corrigan*, 257 U.S. 312, 348 (1921)). Thus, "A state may not...impose a charge for the enjoyment of a right granted by the Federal Constitution" (*Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943)) and "the citizen is exempt from taxation unless the same is imposed by clear and unequivocal language" (*Spreckels Sugar Refining Co. v. Mclain*, 192 U.S. 397, 24 S.Ct. 382 (1904)). The Oregon Supreme Court concurred: "The individual, unlike the corporation, cannot be taxed for the mere privilege of existing. The corporation is an artificial entity which owes its existence and charter powers to the state: but the individual's rights to live and own property are natural rights for the enjoyment of which an excise cannot be imposed" (*Redfield v. Fisher*, 292 P 813, 819 (1930)). Similarly, President Thomas Jefferson, in concluding his first inaugural address (March 4, 1801) said: "...a wise and frugal government, which shall restrain men from injuring one another, which shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. This is the sum of good government…"

"The terms 'excise tax' and 'privilege tax' are synonymous. The two are often used interchangeably" (*American Airways v. Wallace*, 57 F.2d 877, 880 (1932)). "Excises are taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations and upon corporate privileges; the requirement to pay such taxes involves the exercise of privilege" (*Flint vs. Stone Tracy Co.*, 220 U.S. 107 (1911)) and "…taxation

on income was in its nature an excise…" (*Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1916)). As F. Morse Hubbard, Treasury Department legislative draftsman, said: "The income tax is, therefore, not a tax on income as such. It is an excise tax with respect to certain activities and privileges which is measured by reference to the income which they produce. The income is not the subject of the tax: it is the basis for determining the amount of tax" (*House Congressional Record*, March 27th 1943, page 2580).

4.5 "Income has been taken to mean the same thing as used in the Corporation Excise Tax Act of 1909, in the 16th Amendment, and in the various revenue acts subsequently passed" (*Bowers v. Kerbaugh-Empire*, 271 U.S. 170 (1926)). "The Treasury cannot by interpretive regulation make income of that which is not income within the meaning of the revenue acts of Congress, nor can Congress, without apportionment, tax that which is not income within the meaning of the 16th Amendment" (*Helvering v. Edison Brothers' Stores*, 133 F2d 575 (8th Circuit, 1943)). "Nothing can be clearer than that what the constitution intended to guard against was the exercise by the general government of the power of directly taxing persons and property within any state through a majority made up from the other states" (*Pollock vs. Farmers' Loan and Trust Co.*, 157 U.S. 429, 582 (1895)). "We must reject in this case, as we have rejected in cases arising under the Corporation Excise Tax Act of 1909, the broad contention submitted on behalf of the government that all receipts, everything that comes in, are income within the proper definition of the term 'gross income'. Certainly the term 'income' has no broader meaning in the Income Tax Act of 1913 than in that of 1909, and for the present purpose we assume there is no difference in its meaning as used in the two acts" (*Southern Pacific Co. v. Lowe*, 247 U.S. 330 (1918)).

The 16th Amendment (1913) only expanded the power of Congress to indirectly tax "net incomes" of the property or persons that exist by right if the principal was not diminished, i.e.,

on the "incomes" from dividends, bond interest, etc. that leave intact the underlying stock or bond (*Brushaber vs. Union Pacific Railroad Co.,* 240 U.S. 1, 6 (1916). *Brushaber* construed the 16th Amendment to mean that income taxes were *indirect*, removing the grounds by which the Supreme Court in *Pollock v. Farmers' Loan and Trust Co.* had previously construed them to be direct on account of their source (29 *Harv. Law Rev.* 536 (1915-1916) and 1 *Corn. Law Quar.* 298, 301 (1915-1916)). Taxing the wages or salaries of the common man was not envisioned by Congress and was still considered to be a violation of the rights of American citizens. The 16th Amendment did not extend the taxing power of Congress to new persons, "but merely removed the necessity which otherwise might exist for an apportionment among the States of taxes laid on income" (*Brushaber vs. Union Pacific Railroad,* 240 U.S. 1, 17-19 (1916), *Stanton v. Baltic Mining Co.,* 240 U.S. 103, 112-113 (1916), *Peck & Co. v. Lowe,* 247 U.S. 165, 172-173 (1918), 45 *Cong. Rec.* 1698 (1910), 44 *Cong. Rec.* 1568-1569 (1909)).

Taxing net income is no longer considered a direct tax on the source of the income (*Tyee Realty Co. v. Anderson,* 240 U.S. 115 (1916) and *South Carolina v. Baker,* 485 U.S. 505 (1988)). "The effect of the Sixteenth Amendment was not to change the nature of this tax or to take it out of the class of excises to which it belonged, but merely to make it impossible by any sort of reasoning thereafter to treat it as a direct tax because of the sources from which the income was derived" (Government's brief pp. 14-15, *Peck & Co. v. Lowe,* 247 U.S. 165 (1918). "It is not, in view of recent decisions, contended that this amendment rendered anything taxable as income that was not so taxable before" (*Evans v. Gore,* 253 U.S. 245 (1920)).

Courts have upheld other important aspects of taxing one's earnings versus taxing incomes. "The Sixteenth Amendment conferred no new power of taxation" (*Stanton V. Baltic Mining Co.,* 240 U.S. 103, 112 (1916)). "The individual, unlike the corporation, cannot be taxed

for the mere privilege of existing. The corporation is an artificial entity which owes its existence in charter powers to the State, but the individual's right to live and own property are natural Rights for which an excise cannot be imposed" (*Redfield v Fisher*, 292 P. 813, 819 (1930)). "Neither can the tax be sustained on the [natural] person, measured by income. Such a tax would be, by nature, a capitation rather than an excise" (*Peck v Lowe*, 247 U.S. 165 (1918)). "Income has been taken to mean the same thing as used in the Corporate excise Tax of 1909 (36 Stat.112). The individual worker does not receive a profit or gain from his/her labors—merely an equal exchange of funds for services" (*Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 17 (1916)). "Excises are taxes laid upon: the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges;... the requirement to pay such taxes involves the exercise of the privilege and if business is not done in the manner described no tax is payable...it is the privilege which is the subject of the tax and not the mere buying, selling or handling of goods" (*Flint v. Stone Tracy Co.*, 220 U.S. 110 (1911)).

4.6 In *Long v. Ramussen* (281 F 236, 238 (1922)), the court ruled that, "The revenue laws are a code or system in regulation of tax assessment and collection. They relate to taxpayers, and not to non-taxpayers. The later are without their scope. No procedure is prescribed for non-taxpayers, and no attempt is made to annul any of their rights and remedies in due course of law. With them Congress does not assume to deal, and they are neither of the subject nor of the object of the revenue law" (reaffirmed in *Gerth v. United States*, 132 F. Supp. 894 (1955) and *Economy Heating Co. v. United States*, 470 F.2d 585 (1972)).

The debate leading up to the ratification of the 16th Amendment is crucial to understanding the purpose and extent of the proposed tax on incomes. Clearly, many people were outraged that a few industrialists were able to garner monopoly profits through using tariff legislation to

their favor and then not have to pay any taxes on the annuities, land rents, corporate dividends, corporate bond interest, and emoluments gained through use of their privileged status (44 *Cong. Rec.* 1423, 1569-1570, 1702, 1953, 3945, 3951, 4424 (1909)). The 16th Amendment was aimed at forcing these individuals to pay something, albeit only 2%, on such privileged incomes, instead of having the disproportionate majority of the tax burden fall upon the common man via his purchases (44 *Cong. Rec.* 1429, 1569, 1681-1683, 1701, 1962, 2103, 2335, 2447, 3761, 3987, 3996-3999, 4398, 4415-4416, 4420-4421 (1909) and also see the Message from President Taft, *Senate Document* No. 98, 61st Congress, 1st Session (June 16, 1909)). Rather than being a direct tax and subject to the restrictions of Article I, Section 8, Clauses 1, 4 and 5, and Section 9 of the American Constitution, corporation taxes were viewed as "excise[s] on the privilege of doing business in the corporate capacity" (*Flint v. Stone Tracy Company*, 220 U.S. 107, 108 (1911) and 44 *Cong. Rec.* 3344 (1909)).

Many rulings concur with the thesis that income refers to privileged net income. For instance, in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 429-30 (1955), referring to the statute's words "income derived from any source whatever, the Supreme Court stated, "this language was used by Congress to exert in this field 'the full measure of its taxing power…And the Court has given a liberal construction to this broad phraseology in recognition of the intention of Congress to tax all gains except those specifically exempted. And in *Commissioner v. Kowalski*, 434 U.S. 77 (1977), the U.S. Supreme Court found that payments are considered income where the payments are undeniably accessions to wealth, clearly realized, and over which a taxpayer has complete dominion.

In *Eisner v. Macomber*, 40 S.Ct. 192, 252 U.S. 189 (1920) and subsequently reaffirmed in *Goodrich v. Edwards*, 255 U.S. 527 (1921), the Supreme Court held that "...it becomes essen-

tial to distinguish between what is, and what is not 'income'." The U.S. Tax Court adds: "that which is not income in fact manifestly cannot be made such by the legislative expedient of calling it income...." (*Penn Mutual Indemnity Co. v. Commissioner*, 32 T.C. 681, also 32 T.C. 653, 659 (1959)). The word income is restricted to certain types of gains: "'income' as used in the statute should be given a meaning so as not to include everything that comes in. The true function of the words 'gains' and 'profits' is to limit the meaning of the word 'income'" (*So. Pacific v. Lowe*, 238 F.Supp. 736, 247 U.S. 330 (1918)).

During the 1909 Congressional debates, Alabama Congressman James Heflin summed it up: "An income tax seeks to reach the unearned wealth of the country and to make it pay its share" (45 *Cong. Rec.* 4420 (1909)). It is very clear in legal history that "incomes" were distinguished from personal earnings or wages gained by working or laboring and that wages and salaries were not the focus in the Congressional debate surrounding the 16th Amendment (44 *Cong. Rec.* 1680, 4415 (1909)). Even though a wage might represent the conversion of one's property or labor into money, it is far different than the incomes that were received by the rich on their principal, and the latter incomes were the focus of the 16th Amendment (see "Income Tax Voted in Alabama House", *New York Times*, page 1, August 3, 1909). In the vernacular of the day, the common man's wage or salary was not regarded as "an income" ("[Kentucky] Gov. A.E. Wilson on the Income Tax Amendment", *New York Times*, page 13, February 26, 1911; also see "[New Jersey] Gov. [John] Fort Upholds the Income tax, Relieving Burden on Poor", *New York Times*, February 8, 1910). Moreover, Congress clearly desired to prevent the taxation of stockholders with only a few shares, and thus set the privileges tax on items like dividends so that it would apply only on the very wealthy (44 *Cong. Rec.* 3975 (1909)).

Trading one's labor for "income" was very different from receiving "incomes" from the various investments a wealthy man held that still left his principal intact—unlike the laborer who has to trade his labor for an income (44 *Cong. Rec.* 4007, 4038 (1909)). The Supreme Court has acknowledged that the unalienable rights specified in the Declaration of Independence guarantees Americans the free pursuit of the "common business and callings of life, the ordinary trades and pursuits…without let or hindrance…and an essential element of that freedom which they claim as their birthright. It has been well said that 'the property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property'" (*Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 757-758 (1884)). In law, therefore, a man's labor is his property by right and may not be taxed without apportionment as a direct tax among the several states.

4.7 The U.S. Attorney seems to be denying this fact by claiming that "incomes" do in fact include earnings from one's labor, in spite of the legal history to the contrary, as if the term "incomes" has been transformed dramatically from its original meaning much like the word "gay" has undergone. However, the U.S. Attorney provides no proof of such metamorphosis. The U.S. Supreme Court stated: "Income may be defined as the gain derived from capital, from labor, or from both combined" (*Eisner v. Macomber*, 252 U.S. 189, 206 (1919), citing *Stratton's Independence v. Howbert*, 231 U.S. 399 (1913) and *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179 (1918)). Economists have long viewed the output of a firm as the result of the optimal mixture of two key inputs: labor and capital (although land is sometimes broken out of the capital component to form a separate, third category). It is precisely this formula that the Supreme Court re-

iterated in these three cases related to corporate incomes and profits. Congress also demonstrated this intent and understanding that labor itself was not the focus of the tax but rather its employment in industry that in turn produced profits for the firm (50 *Cong. Rec.* 3776 (1913)). The words "from labor" in the preceding quotation in no way indicated that incomes included a laborer's wages or salary. In the minds of those debating the 16th Amendment, "income" was defined as the income for the year resulting from the effective combination of capital and labor in the firm coupled with careful and prudent managerial decision making (*Wilcox v. County Commissioners*, 103 Mass. 544, 546 (1870)) rather than a worker's wages or salary.

Cobin is not liable for the tax that has been imposed on him by the IRS and he has sought relief from this Court. The fact that the IRS claims that such a liability exists does not prove that liability. "The taxpayer must be liable for the tax. Tax liability is a condition precedent to the demand. Merely demanding payment, even repeatedly, does not cause liability" (*Bothke v. Terry*, 713 F.2d 1405, 1414 (1983)). Plus, "the Treasury Department cannot, by interpretive regulations, make income of that which is not income within the meaning of the revenue acts of Congress, nor can Congress, without apportionment, tax as income that which is not income within the meaning of the Sixteenth Amendment" (*Helvering v. Edison Bros. Stores*, 133 F.2d 575 (8th Circuit 1943)). Cobin has demonstrated by the intention of Congress and many court cases in this section that he did not have any "income" to report on a Form 1040 tax return in 1991–1992.

5. Cobin's Earnings Not "Gross Income" per the I.R.C.

5.1 An individual must have received taxable income from sources "within or without the United States", as defined within the Internal Revenue Code, in order for an individual to have liability for federal income tax. I.R.C. 1 ("Tax Imposed") is an applicable federal statute in determining what, if any, taxable income an individual may have received during the year. 26

C.F.R. 1.1-1(b) states, "In general, all citizens of the United States, wherever resident, and all resident alien individuals are liable to the income taxes imposed by the Code whether the income is received from sources within or without the United States."

5.2 Moreover, I.R.C. 61, 63 and 861 ("Gross Income Defined", "Taxable Income Defined", and "Taxable Income Defined") are applicable federal statute in determining what, if any, taxable income an individual may have received during the year. 26 C.F.R. 1.861-8 begins by stating that Sections 861(b) and 863(a) assert in general terms "how to determine taxable income of a taxpayer from sources within the United States" after gross income from the U.S. has been determined. I.R.C. 1.861-1(a)(1) confirms that "taxable income from sources within the United States" is to be determined in accordance with the rules of I.R.C. 861(b) and 26 C.F.R. 1.861-8 (see also 26 C.F.R. 1.862-1(b), 1.863-1(c)).[1]

5.3 Furthermore, the statutory predecessor of I.R.C. 61, Section 213 of the Revenue Act of 1921, contained a subsection that directed the reader to refer to Section 217 of the same Act (the statutory predecessor of I.R.C. 861-865) to determine income from sources within or without the United States. Following this basis, I.R.C. 861 and 26 C.F.R. 1.861-8 do *not* show an individual's earnings to be taxable. Section 217 of the Revenue Act of 1921 (predecessor to I.R.C. 861 and following) stated that income from the United States was taxable for foreigners, and for United States corporations and citizens deriving most of their income from federal possessions, but it did not say the same about the domestic income of other Americans.

The regulations under the 1939 I.R.C. (e.g., § 29.119-1, 29.119-2, 29.119-9, 29.119-10 (1945)) showed the same thing. The current regulations at 1.861-8, combined with the appropriate "operative sections" still show income to be taxable only when derived from certain "specific

[1] Cross-references under I.R.C. 61, as well as entries in the U.S.C. Index under the heading "Income Tax," also refer to Section 861 regarding income ("gross" and "taxable") from "sources within U.S." As stated earlier, the regulation under the section that imposes the tax (26 C.F.R. 1.1-1(b)) states, "In general, all citizens of the United States, wherever resident, and all resident alien individuals are liable to the income taxes imposed by the Code whether the income is received from sources within or without the United States."

sources and activities," which still relate only to certain types of international trade (see 26 C.F.R. 1.861-8(a)(1), 1.861-8(a)(4), 1.861-8(f)(1)), not an individual's earnings. Thus, I.R.C. 861 appears to support and conform to the *Brushaber* and related decisions, as well as the Congressional record showing the intention of Congress for the 16th Amendment.

26 C.F.R. 1.861-8T(d)(2) indicates whether "items" of *income* (e.g. compensation, interest, rents, dividends, etc.) are excluded for federal income tax purposes. 26 C.F.R. 1.861-8(a)(3)) states that a "class of gross income" consists of such items. 26 C.F.R. 1.861-8(b)(1)) then directs the reader to "paragraph (d)(2)" of the same section, which provides that such "classes of gross income" may include some income which is excluded for federal income tax purposes. The list of non-exempt types of income in 26 C.F.R. 1.861-8T(d)(2)(iii) describes what income is taxable. It is especially notable that earnings from work are not included on that list. The list is mirrored by the list of "operative sections" under 26 C.F.R. 1.861-8(f)(1), which are represented legislatively throughout Parts II-IV of Subchapter N, Chapter 1, Subtitle A of 26 U.S.C. (I.R.C.).

After defining "exempt income" to mean income which is excluded for federal income tax purposes, 26 C.F.R. 1.861-8T (d)(2)(iii)) lists the types of income which are not exempt (i.e., which are subject to tax), including the domestic income of foreigners, certain foreign income of Americans, income of certain possessions corporations, and income of international and foreign sales corporations; but the list does not include the domestic income of the typical American (see 26 C.F.R. 1.861-8T(d)(2)(iii)).

5.4 Some types of income are not exempted from taxation by any statute, but are nonetheless "excluded by law" (i.e., not subject to the income tax) because they are, under the Constitution, not taxable by the federal government. In particular, the remuneration of the average American whose earnings all come from within the several States, as well as the earnings of citi-

zens of foreign countries, or perhaps even "nonresident aliens" outlined in I.R.C. 871, who live and work exclusively in their home country. Older income tax regulations defining "gross income" and "net income" said that neither income exempted by statute "nor fundamental law" were subject to the tax (26 C.F.R. 39.21-1 (1956)), and said that in addition to the types of income exempted by statute, other types of income were excluded because they were, "under the Constitution, not taxable by the Federal Government" (26 C.F.R. 39.22(b)-1 (1956)). This sentiment is also reflected in the current 26 C.F.R. 1.312-6.

Thus, there is no "operative section" of the Internal Revenue Code, as described in 26 C.F.R. 1.861-8(f)(1) that identifies an individual's earnings as taxable under I.R.C. 1. There are multiple federal regulations (as shown above) which are binding on the IRS and state that I.R.C. 861(b) is to be used to determine taxable income from sources within the United States. "The rules contained in this section apply in determining taxable income of the taxpayer from specific sources and activities under other sections of the Code, referred to in this section as operative sections. See paragraph (f)(1) of this section for a list and description of operative sections" (26 C.F.R. 1.861-8(a)(1)).

5.5 For example, I.R.C. 871 ("Tax on nonresident alien individuals") in paragraph (b)(1) ("imposition of tax")—which is listed under 26 C.F.R. 1.861-8(f)(1) as an operative section—states: "A nonresident alien individual engaged in trade or business within the United States during the taxable year shall be taxable as provided in section 1." This section is *the* "operative section" for nonresident alien individuals engaged in a trade or business within the United States. There is no similar "operative section" identifying "citizens of the United States or of the several states engaged in a trade or business within the United States during the taxable year" as being taxable as provided for in I.R.C. 1.

Furthermore, the current regulation dealing with "U.S. source income effectively connected with a U.S. Business" states that it ONLY applies to a "non-resident alien individual" or a foreign corporation that is engaged in a trade or business in the United States (26 C.F.R. 1.864-4(a)). Hence, Cobin finds that he has no such "effectively connected" income which would have led him to file a Form 1040 in either 1991 or 1992.

6. The Duality of American Citizenship and its Effects

6.1 The government claims that Cobin is liable for the payment of income taxes in 1991 and 1992. Yet this assertion rests on the law of Congress—which is ambiguous. The law does not expressly declare who is liable to pay the tax. In order to remedy this problem, 26 C.F.R 1.1-1(c) states that: "Every person born or naturalized in the United States and subject to its jurisdiction is a citizen." Notice that this language parrots the language of the 14th Amendment to the U.S. Constitution: "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". By thus nearly quoting the 14th Amendment, the government implied its definition. But, according to Cobin's understanding of the law, the 14th Amendment does not apply to him since it was designed to grant citizenship rights and personhood to free Negroes and the former Negro slaves.

6.2 As Cobin studied the law and legal history, it became apparent to him that the appalling institution of slavery has left a legacy of a duality of citizenship in America. The first class of citizens includes those white persons who were recognized to have received their rights from the "Creator" in an "inalienable" manner antecedent to the Constitution and the creation of the American government. Since this group, of which Cobin avers he is a member, did not receive any rights to life, liberty, and property from the federal government, it has no special corresponding obligation or duty to the government for exercising these rights. This class originates in the

qualifications clauses in the American Constitution (Article I, Section 2, Clause 2, Article I, Section 3, Clause 3 and Article II, Section 1, Clause 5), where the term "Citizen of the United States" is used. The full term means "Citizen of one of the States United" (*People v. De La Guerra*, 40 Cal. 311, 337 (1870), cf. American Constitution, Article III, Section 2, Clause 1 and Article IV, Section 2, Clause 1). Prior to the 14th Amendment, there was only one class of citizen under American law (*Pannill v. Roanoke*, 252 F. 910, 914-915 (1918)).

The second class of citizen is comprised of the hapless—if not wretched—class of human beings that were not recognized as persons by the Founders.[2] These people included Negroes primarily, but also seems to have extended to other races, including the coeval Chinese (e.g., Coolies) and Native Americans (i.e., Indians), *State v. Clairborne*, 19 Tenn. (1 Meig's Rep.) 331, 335 (1838). Although such people were born in America, and were recognized as human beings rather than mere animals, they had no standing in law as persons who held unalienable rights from their Creator. The 14th Amendment changed all of that for such people.

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[2] As noted in the famous *Dred Scott* decision: "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them (*Dred Scott v. Sandford*, 60 U.S. (How.) 393, 405-406 (1856)).

"It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted. In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character" (*Dred Scott v. Sandford*, 60 U.S. (How.) 393, 406 (1856)).

The basis for the second class first originated in the 1866 Civil Rights Act, where the term "citizen of the United States" is used (note: this Act was later codified in 42 U.S.C. 1983), but the class fully came into being with the adoption of the 14th Amendment. The government of the United States granted them political rights as citizens and personal rights as persons. Thus, unlike white persons whose rights were acknowledged at birth, they owed the federal government a corresponding duty for the privileges granted to them, both by freeing them from involuntary servitude and by granting them civil rights under the 14th Amendment.

This duality of citizenship in America is plainly seen in many U.S. Supreme Court rulings, especially the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1873), where the court held: "It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual." Also see similar rulings in *Strauder v. West Virginia*, 100 U.S. 303 (1879), 306; *Ex parte Virginia*, 100 U.S. 339, 345 (1880); *Neal v. Delaware*, 103 U.S. 370, 386 (1880); *Elk v. Wilkins*, 112 U.S. 94, 101, 5 S.Ct. 41 (1884). "Thus, the dual character of our citizenship is made plainly apparent. That is to say, a citizen of the United States is *ipso facto* and at the same time a citizen of the state in which he resides. And while the 14th Amendment does not create a national citizenship, it has the effect of making that citizenship 'paramount and dominant' instead of 'derivative and dependant' upon State Citizenship" (*Colgage v. Harvey*, 296 U.S. 404, 427, 80 L.Ed. 299 (1935)).

In *Pannill*, the court held that such "federal citizens" had no standing to sue under the Diversity Clause of the U.S. Constitution, because they were not even contemplated when Article III in the American Constitution was first being drafted (c. 1787). Correspondingly, in *Ex parte Knowles*, 5 Cal. 300 (1855), the California Supreme Court ruled that there was no such

thing as a "citizen of the United States" in 1855. Federal (second class) citizens have standing to invoke 42 U.S.C. 1983 while first class ones do not (*Wadleigh v. Newhall,* 136 F. 941 (C.C. Cal., 1905) and *USA v. Gilbertson*, 97-2099-MNST, USCA 8th Circuit, 1997). Several courts have recognized the standing of the "first class" kinds of citizen without also becoming federal citizens (*State v. Fowler*, 41 La. Ann. 380, 6 S. 602 (1889) and *Gardina v. Board of Registrars*, 160 Ala. 155, 48 S. 788, 791 (1909)). Furthermore, following the doctrine set forth in the *Slaughter-House Cases*, the first class of citizens is also known as a 'State Citizen'.

6.3 According to The U.S. Supreme Court, the main purpose of the 14th Amendment "was, as has been often recognized by this court, to establish the citizenship of free Negroes, which had been denied in the opinion delivered by Chief Justice Taney in *Dred Scott v. Sandford*, 19 U.S. (How.) 393 (1857); and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1873); *Strauder v. West Virginia*, 100 U.S. 303 (1879), 306; *Ex parte Virginia*, 100 U.S. 339, 345 (1880); *Neal v. Delaware*, 103 U.S. 370, 386 (1880); *Elk v. Wilkins*, 112 U.S. 94, 101, 5 S.Ct. 41 (1884). But the opening words, 'All persons born,' are general, not to say universal, restricted only by place and jurisdiction, and not by color or race, as was clearly recognized in all the opinions delivered in the *Slaughter-House Cases*" (*United States v. Wong Kim Ark*, 169 U.S. 649, 675-676 (1898)).

The California Supreme Court echoed this opinion: "No white person born with the limits of the United States and subject to their jurisdiction...or born without those limits, and subsequently naturalized under their laws, owes his status of citizenship to the recent amendments to the Federal Constitution. The purpose of the 14th Amendment…was to confer the status of citizenship upon a numerous class of persons domiciled with the limits of the United States who

could not be brought within operation of the naturalization laws because native born, and whose birth, though native, at the same time left them without citizenship. Such persons were not white persons but in the main were of African blood, who had been held in slavery in this country..." (*Van Valkenburg v. Brown*, 43 Cal. 43, 47 (1872)). A similar principle was applied in New York: "The 14th Amendment creates and defines citizenship of the United States. It had long been contended, and had been held by many learned authorities, and had never been judicially decided to the contrary, that there was no such thing as a citizen of the United States, except by becoming a citizen of some state" (*United States v. Anthony*, 24 Fed.Cas. 829, 830 (N.D.N.Y., 1873)).

The 14th Amendment was a means by which the government could protect the inhabitants of America that beforehand enjoyed no such protection in law (*United States v. Cruikshank*, 92 U.S. 542 (1875)). The first clause of the so-called 14th Amendment of the Constitution made Negroes "citizens of the United States" and citizens of the State in which they reside, and thereby created two classes of citizens: one of the United States and the other of the State (4 *Dec. Dig.* '06, page 1197; *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738 (1878)); and it distinguishes between federal and State Citizenship (*Frasher v. State*, 3 Tex. App. 263, 30 Am. Rep. 131 (1877)). Accordingly, "The opportunity to become a 'citizen' is a privilege" (*United States v. Shapiro*, 43 F.Supp. 927. 929 (1974)).

6.4 However, not all Negro or federal citizens are also citizens of a state, since "Citizens of the District of Columbia are not Citizens of a state" *Behlert v. James Foundation of N.Y.*, 60 F.Supp. 706, 708 **(**1945)), and thus they do not enjoy the benefits of State Citizenship unless they "reside" in one. "A person may be a citizen of the United States, and not a citizen of any particular state. This is the condition of citizens residing in the District of Columbia and in the territo-

ries of the United States or who have taken up a residence abroad" (*Prentiss v. Brennan*, 9 F.Cas. 1278 (no. 11,385, 2 Blatchf.) 162 (1851)). In like manner, "The government of the United States is a foreign corporation with respect to a state" (*In re Merriam*, 36 N.E. 505, 141 N.Y. 479, affirmed 16 S.Ct. 1073, 163 U.S. 625, 41 L.Ed. 287 **(**1894)). "Under constitutional amendment 14, United States citizenship is paramount and dominant, and not subordinate and derivative from State Citizenship" *Aroer v. United States*, 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349 **(**1918)). Courts have held that "...there is a clear distinction between national and State Citizenship. U. S. citizenship does not entitle citizen of the Privileges and Immunities of the Citizen of the State" (*K. Tashiro v. Jordan*, 256 P. 545, 201 Cal. 239, 53 A.L.R. 1279 (1927), affirmed 49 S. Ct. 47, 278 U.S. 123, 73 L.Ed. 214, 14 C. J. S. § 2, p. 1131, note 75.

The clear, primary purpose of the 13th, 14th and 15th Amendments was to free the Negro from bondage and grant him both civil and political rights previously only enjoyed by and protected for white citizens (*Jones v. Alfred H. Mayer Co.,* 379 F.2d 33, 43 (1967) and *Afroyim v. Rusk*, 18 L.Ed.2d 758, 764 (1967)). "[F]ree Negroes or mulattos", and "free colored persons" did not possess the rights and privileges of American citizens (per Article II, Section 4 of the American Constitution) but were rather "considered and treated as a degraded race of people" and mere "sojourners in the land" who were "not permitted to participate" in the formation of America (*Amy v. Smith*, 1 Litt. (Ky.) 322, 334 (1822); *State v. Clairborne*, 19 Tenn. (1 Meig's Rep.) 331, 335 (1838); *Pendleton v. The State*, 6 Ark. 509, 1846 W.L. 639 (Ark.), 1 Eng. 509 (1846)). The Amendments were for the Negro race rather than for the white one. "There can be no doubt...that the civil rights sometimes described as fundamental and inalienable, which before the war amendments were enjoyed by State Citizenship and protected by state government, were left untouched by this clause of the 14th Amendment" (*Twining v. New Jersey*, 211 U.S. 78, 96 (1908)).

6.5 As a native-born, white individual, Cobin was granted no rights by the 14th Amendment. Just as any white American born prior to 1868, Cobin would have had his rights implicitly recognized by others in society (including the state). Thomas Jefferson, James Madison, Abraham Lincoln, Henry Ford, Alexander Graham Bell, and Thomas Edison were citizens and persons (with all the rights pertaining thereto) simply by virtue of their birth on American soil. "All white persons or persons of European descent who were born in any of the colonies, or resided or had been adopted there, before 1776, and had adhered to the cause of Independence up to July 4, 1776, were by the Declaration [of Independence] invested with privileges of citizenship" (*United States v. Ritchie*, 58 U.S. (17 How.) 525, 539 (1872); *Inglis v. Trustees of Sailor's Snug Harbour*, 28 U.S. (3 Pet.) 99 (1830); *Boyd v. Nebraska, ex rel. Thayer*, 143 U.S. 135, 12 S.Ct. 375, 36 L.Ed. 103 (1892)). Cobin's situation is no different.

Correspondingly, those obligated to pay the income tax in I.R.C. 1 are those who received privileges granted by the 14th Amendment. Cobin is not such a privilege recipient and thus is not liable to pay the corresponding duty. As with all natures of law, absent a privilege granted there can be no duty assigned.

The 14th Amendment phrase in section 1: "born or naturalized in the United States and subject to its jurisdiction" means the exclusive legislative jurisdiction of the federal government within its territories and possessions only (per 48 U.S.C.). Cobin argues that if the phrase was meant to include states of the Union, the text would have said "their jurisdiction" or "the jurisdiction" instead of "its jurisdiction". People born in states of the Union are technically not "citizens and nationals of the United States" under 8 U.S.C. 1401, but instead appear to be "nationals but not citizens of the United States" under 8 U.S.C. 1101(a)(22)(B) and 8 U.S.C. 1452. The term ''national'' means a person owing permanent allegiance to a state" (8 U.S.C. 1101(a)(21)).

There are also "nationals but not citizens of the United States" discussed under 8 U.S.C. 1101(a)(22)(B). It seems that these people owe their permanent *allegiance* to the confederation of states in the Union called the "United States of America" in the U.S. Constitution.

6.6 The issue of American citizenship is crucial in Cobin's position. It is settled in American constitutional law that individual human beings have personal liberties or rights independent of the government. The Constitution neither created nor granted rights to us, but merely recognized that rights emerged antecedent to the state or, as Thomas Jefferson put it, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed…" And this was the understanding that the Founding Fathers carried to the Constitutional Convention in 1787.

For instance, Founder James Wilson, who was a signer of the *Declaration of Independence*, said: "In a state of natural liberty, every one is allowed to act according to his own inclination, provided he transgress not those limits, which are assigned to him by the law of nature: in a state of civil liberty, he is allowed to act according to his inclination, provided he transgress not those limits, which are assigned to him by the municipal law. True it is, that, by the municipal law, some things may be prohibited, which are not prohibited by the law of nature: but equally true it is, that, under a government which is wise and good, every citizen will gain more liberty than he can lose by these prohibitions. He will gain more by the limitation of other men's freedom, than he can lose by the diminution of his own. He will gain more by the enlarged and undisturbed exercise of his natural liberty in innumerable instances, than he can lose by the restriction of it in a few" ("Of the Natural Rights of Individuals", 1790-1791).

6.7 “Congress may not, under the taxing power, assert a power not delegated to it by the Constitution” (*Regal Drug Corp. v. Wardell*, 260 U.S. 386 (1922)) and a “state cannot diminish the rights of the people” (*Hurtado v. California*, 110 U.S. 516 (1884)). Citizens are to be shielded from the workings of the state such that “...there can be no sanction or penalty imposed upon one because of his exercise of constitutional rights” (*Sherar v. Cullen*, 481 F.2d 946 (1973)) and “[t]he claim and exercise of a Constitutional right cannot be converted into a crime” (*Miller v. United States*, 230 F. 489 (1972)). For instance, a citizen’s inalienable right to acquire, possess and protect his property is guaranteed by constitution and cannot be impaired by legislation (*Billings v. Hall*, 7 Cal. 1 (1857)). “Wherever right to own property is recognized in free government, practically all other rights become worthless if government possesses uncontrollable power over property of citizen” (*House v. Los Angeles County Flood Control District*, 25 C.2d 384, 153 P.2d 950 (1944)). “Right of property antedates all constitutions. Every person has the right to enjoy his property and improve it according to his own desires in any way consistent with rights of others” (*People v. Holder*, 53 C.A. 45, 199 P. 832 (1921)).

First class citizens generally “have natural right to do anything which their inclinations may suggest, if it be not evil in itself, and in no way impairs the rights of others” (*In Re Newman*, 9 Cal. 502 (1858)). Indeed, “State Citizenship is a vested substantial property right, and the State has no power to divest or impair these rights” (*Favot v. Kingsbury*, 98 Cal.App. 284, 276 P. 1083 (1929)). The original Constitution of 1787 is perpetual, as is the Citizenship that is recognized by it. See *Texas v. White*, 7 U.S. (Wall.) 700 (1869). If any legislation is repugnant to the Constitution, this Court has the eminent power to declare such enactments null and void *ab initio* (from their inception). See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-180 (1803).

The Supreme Court echoed these ideals: "It must be conceded that there are rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, liberty, and property of its citizens, subject at all times to the disposition and unlimited control of even the most democratic depository of power, is after all a despotism" (*Loan Association v. Topeka*, 87 U.S. (20 Wall.) 655, 665 (1874)). These unalienable rights have been secured to persons by means of the common law, although there have been many non-persons who have not enjoyed such rights even though they were human beings (as was the case with Negro slaves). Persons are natural of artificial beings or entities to which the law ascribes rights or duties. All law pertains to the rights of persons. Things are determinate objects of a person's rights. All human beings are not persons (e.g., black slaves, fetuses), but everyone who is a citizen must be a person. As James Wilson said: "In a free country, every citizen forms a part of the sovereign power" ("Of the Study of the Law in the United States", 1790-1791). Every nation must determine who its citizens are (*United States v. Wong Kim Ark*, 169 U.S. 649 (1898)). And in the United States, evidently, there are two classes of citizenship.

6.8 The U.S. Supreme Court's doctrine in *United States v. Wong Kim Ark* and *Elk v. Wilkins* indicates that the term *resident* pertains to political status. In English common law, being a resident pertains to aliens owing temporary allegiance to the Crown, which seems to have been the same idea followed by the U.S. Supreme Court.[3] The idea of residency in both cases seems to correspond to being a subject under the British Crown and thus goes the citizenship conferred

[3] "The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes" (*United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898)). "The only adjudication that has been made by this court upon the meaning of the clause 'and subject to the jurisdiction thereof,' in the leading provision of the fourteenth amendment, is *Elk v. Wilkins*, 112 U.S. 94, 5 S.Ct. 41, in which it was decided that an Indian born a member of one of the Indian tribes within the United States, which still existed and was recognized as an Indian tribe by the United States, who had voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a state, but who did not appear to have been naturalized or taxed or in any way recognized or treated as a citizen, either by the United States or by the state, was not a citizen of the United States, as a person born in the United States, 'and subject to the jurisdiction thereof,' within the meaning of the clause in question" (*United States v. Wong Kim Ark*, 169 U.S. 649, 680 (1898)).

through the 14th Amendment. To be a *resident* or to "*reside*" in a state within the United States implies an intimate association with the citizenship privileges and rights granted by the federal government.

In sum, under the original Constitution, the term citizen of the United States is used at least four times. It was mediate and derivative of State Citizenship. Each citizen was an equal holder of the sovereignty of the United States and of a state.[4] The 14th Amendment also uses the term citizen of the United States. But it is used with its meaning in English feudal law. Thus, it denotes lord and serf, sovereign and subject, allegiance and obedience. Unlike the American Constitution, which assumes all inhabitants are citizens holding unalienable rights antecedent to the creation of the government, the 14th Amendment grants rights to a class of human beings that previously did not have them (though they were born in America). Thus, this second class of citizenship is one of privilege rather than of natural right. The United States is the lord and sovereign, having jurisdiction ("...and subject to the jurisdiction thereof") over this class of citizen.[5]

The words "citizen of the United States" must have a meaning in the 14th Amendment, just as they must have in 26 C.F.R. 1.1-1(c), which is different than the meaning given to those words in other parts of the Constitution. The same thing must be true of the words "United

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[4] The State Citizen receives no protection from the protection clause of the 14th Amendment but he must "rest for his protection where he rested before", which is the doctrine of the *Slaughter-House* cases. The political status of the State Citizen is one of sovereignty. "The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body, who according to our republican institutions, form the sovereignty and who hold the power and conduct the government through their representatives. They are what we formally call the 'sovereign people,' and every citizen is one of the people and a constituent member of this sovereignty" *Dred Scott v. Sandford*, 19 US (How.) 393, 404 (1857). They are politically free, an equal in the community of sovereigns. They are not politically subject to anyone. They have the free will to form whatever alliances they want (they formed one such alliance with the people of their state and another with the people of the United States) but they always maintain their sovereignty. A State Citizen is a citizen of the United States as contemplated by the Constitution, but that citizenship is derivative and mediate of his State Citizenship.

[5] The personality of inherence in the 14th Amendment is the rights or protections that the 14th Amendment ascribes to citizens of the United States. But they are not political rights (*e.g.* it did not include the right to vote). That is why the 14th Amendment citizen needed the 15th Amendment to ascribe to him the right to vote. The 14th Amendment states the rights it secures: "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws." The *Elk* decision was based upon the grounds that the meaning of those words was "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their jurisdiction, and owing them direct and immediate allegiance" (*Elk v. Wilkins*. 112 US 94, 5 S.Ct. 41). Therefore, being completely subject to the political jurisdiction and owing them direct and immediate allegiance, is the political characteristic or circumstance within the 14th Amendment citizen of the United States. Such a citizen is politically subject by way of servitude of the English variety. The phrase "and subject to the jurisdiction thereof" is a cryptic rendition of the villein's oath of fealty: "and be justified by one in my body and goods" (*cf. Coke*'s *Institutes* and *Comyns Digest* under "copyhold") which indicates utter subjection.

States" and "jurisdiction". The 14th Amendment extended the power of Congress to legislate for the class of "federal citizens" without regard to the limits on Congressional power found in other parts of the Constitution. Indeed, in Cobin's understanding of the law, the 14th Amendment created a new kind of citizenship, and did not merely open the existing definition of "citizen" to include former slaves as well as whites. This class of citizen is also considered to be a "state" citizen, but in a different sense that the first class of citizens, because unlike that first class, the State Citizenship of the second class is a consequence of and dependent upon their first receiving the status as citizen of the United States (*United States v. Cruikshank*, 92 U.S. 542, 549 (1876); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Evans v.Cornman*, 398 U.S. 419 (1970). "[I]n order to be a citizen of a state, it is elementary law that one must first be a citizen of the United States" (*Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1090-1091 (9th Circuit, 1983)).

6.9 Furthermore, the definition of "citizen of the United States" found in 26 C.F.R. 31.3121(e)-1 corroborates these conclusions, keeping in mind that "United States" (within that definition) means the zones or territories over which the federal government enjoys exclusive jurisdiction, instead of the states of the Union (which is what "United States" or "United States of America" means in the Constitution). The U.S. Supreme Court ruled that there are three distinct and separate definitions for the term *United States*. Cobin believes that only the second of the three definitions given by the Court apply to the income tax law, whereby it describes the "federal zone". "The term 'United States' may be used in any one of several senses. It may be merely the name of a sovereign occupying the position analogous to that of other sovereigns in the family of nations. It may designate the territory over which the sovereignty of the United States extends, or it may be the collective name of the states which are united by and under the Constitution" (*Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 671-672 (1945)).

For instance, "(b)…The term 'citizen of the United States' includes [used in a restrictive sense, see section 7.2 below] a citizen of the Commonwealth of Puerto Rico or the Virgin Islands, and, effective January 1, 1961, a citizen of Guam or American Samoa" (26 C.F.R. 31.3121(e)-1). Therefore, Cobin has concluded that these areas are not "states" under the Internal Revenue Code. The proper subjects of Subtitle A of the Internal Revenue Code are only the people who are born in these federal zones (or "states"), and these people are the only people who are in fact "citizens and nationals of the United States" under 8 U.S.C. 1401, or under 26 C.F.R. 1.1-1(c) which makes liable for the income tax those who received benefits from the 14th Amendment and are residents of the United States (defined in I.R.C. 7701(a)(9)). Cobin believes that the only type of "individual" that he can be as a person born in a state of the Union is a "national but not citizen of the United States" (as defined in 8 U.S.C. 1101(a)(22)(B) and 8 U.S.C. 1452 and thus a "nonresident alien" as defined in I.R.C. 7701(b)(1)(B).

6.10 One of the more interesting results of the *Brushaber* ruling was T.D. 2313 (1916), where the U.S. Treasury Department expressly identified Frank Brushaber as a "nonresident alien", even though he lived in Brooklyn. This Treasury Decision has never been modified or repealed. Cobin held that all citizens of the several states are nonresident aliens with respect to the municipal jurisdiction of Congress, which it exercises over all those who received their citizenship privileges on account of the 14th Amendment. In following the doctrine set forth in Brushaber (a native of New York) and the other U.S. Supreme Court cases, Cobin (a native of California) likewise considered himself to be a "nonresident alien."

In her recent Motion, the U.S. Attorney stated her view that such is "obviously" not the case. But Cobin wonders how she can deny the clear implication of case law? Cobin has taken a position based on his good-faith understanding of the law, and a thorough reading of many cases,

that he is *not resident* to the political jurisdiction of the federal government (as the freed slaves were) and that his citizenship is *alien* to the citizenship provided in the 14th Amendment. Thus, Cobin may rightly be considered a nonresident alien, as Brushaber was, for purposes of the tax on incomes. In sum, by virtually quoting the 14th Amendment when answering the question who is liable to pay the income tax, 26 C.F.R. 1.1-1(c) makes clear that only the second class citizens created by that Amendment are the object of the tax obligation. Other citizens, such a Cobin, are classified as nonresident alien individuals.

7. Cobin Is Considered a "Nonresident Alien" in the I.R.C. and Filed the Proper Forms

7.1 Cobin applied this understanding of citizenship and the law to the I.R.C. The definition of a *taxpayer* is "...any person subject to any internal revenue tax" per I.R.C. 7701(a)(14). But I.R.C. 1313(b) says, "Notwithstanding section 7701(a)(14), the term 'taxpayer' means any person subject to a tax under the applicable revenue law." Thus, a taxpayer is a different person depending on the class of tax owed. Section 26 C.F.R. 1.1-1 describes the class of person on whom the tax in section 1 of the I.R.C. is imposed as one who was granted his rights as a citizen through the 14th Amendment. Cobin is not such a person.

I.R.C. section 1 of the code also imposes a tax on the income of citizens and residents of the United States and to the extent of Section 871(b) and 877(b) on the income of nonresident aliens. Thus, for individuals (persons) who are citizens on account of the 14th Amendment, and are of the class identified as "citizens or residents of the United States", the tax is imposed on all of their income. But for individuals (persons) of the class identified as a "nonresident alien individual", such as Brushaber and Cobin, income is taxable only to the extent of I.R.C. sections 871(b) and 877(b). Congress was wise in making this distinction since the income tax of I.R.C. 1 is *graduated* and is thus neither uniform nor apportioned, as the Constitution directs it must be

for State Citizens. The tax is borne by those who have a corresponding duty to the federal government for the privileges granted to them under the 14th Amendment.

Income to the extent of I.R.C. 871(b) is taxable to a nonresident alien individual solely for gross income that is "effectively connected" with the conduct of a trade or business "within the United States" (which must be a legal ellipses for "within the 14th Amendment jurisdiction of the United States"). 26 C.F.R. 1.1-1(c) fixed the meaning of citizen and resident within the I.R.C. as that of the 14th Amendment variety. If there is no 14th Amendment allegiance, loyalty or obedience, there can be no correlative duty (e.g., a tax as an incidence thereto). The United States geographically is comprised of "natural and political divisions". In the *Slaughter-House* cases, the terms "within" and "without" are used in such an interpretive way to imply political geography. That is, within the constitutional and legislative authority of the state, and without that of Congress.

7.2 The definition of *includes* or *including* in the I.R.C., at first glance, might erroneously be construed to carry an expansive sense rather than a limiting sense. However, such an expansive definition does not hold up to further scrutiny.[6] I.R.C. 7701(c) indicates the meaning that Congress intended: "The terms 'includes' and 'including' when used in a definition in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined." Congress knew how to clearly state the meaning of the word *includes* but it evidently did not intend that I.R.C. 7701(c) be crystal-clear. It would have been relatively easy to make the meaning expansive, which could be done in six words rather than seventeen. Interestingly, given that

[6] *Black's Law Dictionary* says: "Include. (Lat. *Inclaudere*, to shut in. keep within.) To confine within, hold as an inclosure. take in, attain, shut up, contain, inclose, comprise, comprehend, embrase, involve. Term may, according to context, express an *enlargement* and have the meaning of *and* or *in addition to*, or merely specify a particular thing already included within general words theretofore used. "Including" within statute is interpreted as a word of enlargement or of illustrative application as well as a word of limitation. *Premier Products Co. v. Cameron, 240 Or. 123, 400 P.2d 227, 228." Bouvier's Law Dictionary* has the following definitions: "INCLUDE (Lat. in claudere to shut in, keep within). In a legacy of 'one hundred dollars including money trusteed' at a bank, it was held that the word 'including' extended only to a gift of one hundred dollars; 132 Mass. 218..." "INCLUDING. The words 'and including' following a description do not necessarily mean 'in addition to,' but may refer to a part of the thing described. 221 U.S. 425."

I.R.C. 7701(c) applies to the whole Title, and that 26 C.F.R. 1.1441-2 is limited, 26 C.F.R. 1.1441-2 must spell out an exception to the general title definition given at I.R.C. 7701(c). Otherwise I.R.C. 7701(c) would apply in 26 C.F.R. 1.1441-2. Therefore, since the exception in 26 C.F.R. 1.1441-2 is expansive, the general definition of "includes" and "including" in I.R.C. 7701(c) must, logically, be restrictive. But there is more evidence that the restrictive sense of *includes* and *including* is correct meaning.

The U.S. Supreme Court held that, "Include or the participle form thereof, is defined 'to comprise within'; 'to hold'; 'to contain'; 'to shut up'; and synonyms are 'contain'; 'enclose'; 'comprehend'; 'embrace'" (*Montillo Salt Co. v. Utah*, 221 U.S. 452, 455, 466 (1911)). For instance, consider the meaning of "gross income" as stated in I.R.C 61(a): "GENERAL DEFINITION. Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including *(but not limited to)* the following items..." (emphasis added). Notice that Congress added the words "but not limited to" since without this qualification the word "including" would by default carry a restrictive or limiting sense. The fact that Congress chose to omit this qualification at other points in the I.R.C. is also instructive. It indicates the intention of Congress was to use the restrictive sense as the I.R.C.'s default sense (see *Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108, 64 L.Ed.2d 766, 100 S.Ct. 2051 (1980); *Federal Trade Commission v. Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 72 [fn6], 71 L.Ed.2d 748, 102 S.Ct. 1534 (1982)).

Suppose that in the glossary of terms at the end of a cookbook one finds: "MEAT: when used in this cookbook, the word *meat* includes fish, pork, and beef." Consider that if no such definition had been supplied, then a reader would have assumed that "meat" would mean those three types plus venison, ostrich, elk, etc. However, by saying that the word *includes* fish, pork,

and beef, the meaning is thereby restricted for purposes of the cookbook to only those types of animal flesh. The word "includes" could *not* be expansive, as to say "the word *meat* includes fish, pork, and beef, as well as all other things commonly falling in the category of meat." If it were expansive, the definition in the glossary would be unnecessary since the ordinary meaning of meat comprises all kinds of animal flesh. Furthermore, if the definition instead consisted in things not normally ascribed to meat, for instance: "the word *meat* includes rice, potatoes, and barley", then the reader would be even less likely to consider the word "meat" to mean those three irregular items *plus* regular items like chicken, beef, pork, fish, etc. The verb "includes" is used in the cookbook's glossary to *limit* the meaning of the word "meat".

Thus, the words "include" and "includes," when used in the I.R.C., *do not* mean that other things can be included, but rather the definition is limited to the items specifically listed in the law. *Treasury Decision* no. 3980 (vol. 29, January-December 1927) and some eighty court cases have adopted the restrictive meaning of these terms. Plus, in everyday life, the meaning of these words is *restrictive* rather than expansive.[7] The U.S. Supreme Court has held: "As in all cases involving statutory construction, 'our starting point must be the language employed by Congress'" *Reiter v. Sonotone Corp*., 442 U.S. 330, 337, 60 L.Ed 931, 99 S.Ct. 2326 (1979). "We assume that the legislative purpose is expressed by the ordinary meaning of the words used" (*Richards v. United States*, 369 U.S. 1, 9, 7 L.Ed.2d 492, 82 S.Ct. 585 (1962). And the *ordinary* sense of the words "include" and "including" is the restrictive one.

The code says that a "trade or business...includes the performance of the functions of a public office" (I.R.C. 7701(a)(26)). Considering that the term "includes" here is not expansive, as "includes but is not limited to" (26 C.F.R. 1.1441-2), but is rather restrictive, as encloses or

[7] *American College Dictionary* provides: "include, v.f.;-cluded, -cluding. 1. to contain, embrace, or comprise, as a whole those parts or any part or element." "Included, adj. 1. enclosed; embraced; comprised. *Roget's Thesaurus* says: "include, v.f. comprise, comprehend, contain, admit, embrace, receive; enclose, circumscribe, compose, incorporate, encompass; recon or number among, count in; refer to, place under, take into account." So including or includes, whether in normal usage or in a Federal Tax Law, must be understood to limit the items listed in the Law.

confines, "trade or business" means "the functions of a public office". These "functions" could refer to "public office" in its broadest sense: i.e., "one who is charged with a public duty" (see *Words and Phrases*: the law ascribes a duty to one to perform). Accordingly, the duty to file a tax return itself is a public office, and the filing of a tax return is the performance of the functions of a public office. The same is also true of making an "election" under I.R.C. 871(d).

7.3 By such an election, individuals (persons) who are themselves nonresident and alien to the 14th Amendment jurisdiction of the United States, may receive income that is "effectively connected" with the conduct of a trade or business within that jurisdiction. Such persons become liable and, therefore, subject to the public charge or office, to the tax imposed in I.R.C. 1. In such cases, they then have the attendant duty to make a return, that is, file the required form and pay the tax due. Such income is *privileged*. For example, a person who works for a corporation may receive income that is effectively connected with the conduct of a trade or business within the 14th Amendment jurisdiction of the United States, because the 16th Amendment authorized an excise tax on privileged income without apportionment. Similarly, stock dividends and corporate bond interest are income effectively connected with the conduct of a trade or business within the United States. It is within the power of the United States under the 14th Amendment to lay a tax on that profit and gain. But this rule does not apply to gain from the sale of one's property, including shares of stock, or the sale of one's labor to a corporation.

The person with whom Section 871 of the code deals is an individual who is nonresident and alien to the condition of privilege granted by the 14th Amendment citizenship and residency. Congress has always had the power to tax State Citizens but it had to be done by *direct taxes* subject to the rule of apportionment per the American Constitution Article I, Section 2, Clause 3, or by *indirect taxes* (excises on privileges, duties and imposts), subject to the rule of uniformity

per the American Constitution Article I, Section 8, Clause 1. The first rule of government states that the government grants protection (i.e., personality of inherence) for loyalty (i.e., personality of incidence). If there is no protection, there can be no duty. Therefore, the tax imposed on those of the first class status of State Citizen, that is, individuals like Cobin or Brushaber who are non-resident to federal jurisdiction and alien to the 14th Amendment citizenship, is of a different class of tax. A person that has a liability thereto is of a different class of taxpayer. I.R.C. 1313(b) indicates that one is only a taxpayer with respect to an *applicable* internal revenue law. Therefore, Congress imposes a different income tax on a State Citizen in I.R.C. 871(a): a flat tax of 30%, according to the rule of uniformity, on a nonresident alien individual (person).

26 C.F.R. 1.871-1 identifies three classes of nonresident alien individuals and 26 C.F.R. 1.871-2 and 26 C.F.R. 1.871-4 state how nonresident aliens may be identified: (1) one who at no time during the year was engaged in a trade or business within the United States (cross reference to 26 C.F.R. 1.871-7), (2) one who at any time during the year was engaged in a trade or business within the United States (cross reference to 26 C.F.R. 1.871-8), and (3) one who was a *bona fide* resident of Puerto Rico during the entire taxable year (cross reference to I.R.C. 1441(e) and 26 C.F.R. 1.1441-5).

26 C.F.R. 1.871-2 indicates how one determines residence: "...whether an alien living in the United States is a resident is determined by his intentions with regard to the...nature of his stay." 26 C.F.R. 1.871-4 says that the nonresidence of an alien is presumed by his alienage and the burden is on the party asserting his residency to prove it. A nonresident alien individual may have income that is not taxable under either I.R.C. 1 or 871.

26 C.F.R. 1.871.1 defines three classes of nonresident alien, the first class being a non-resident alien who at no time during the year was engaged in a trade or business within the

United States. 26 C.F.R. 1.871-7(a) provides that this class of nonresident alien, "...except as otherwise provide by 26 C.F.R. 1.871-12 [treaty income]...is not subject to the tax imposed by I.R.C. 1 or 1201(b), but pursuant to the provisions of I.R.C. 871(a) is subject to a flat tax of 30 percent on..." privileged incomes. I.R.C. 1441 requires a paying agent to withhold I.R.C. 871(a) tax on nonresident aliens and pay it to the IRS. "The gross amount of fixed and determinable annual or periodical income is subject to withholding...." 26 C.F.R. 1.1441-2(a)(1) states, "The term "fixed and determinable annual or periodical income" is merely descriptive of a certain class of income." Therefore, fixed and determinable annual or periodical income is the only class of income taxable under I.R.C. 871(a) and on which the paying agent must withhold. 26 C.F.R. 1.1441-2(a)(3) provides, with respect to a nonresident alien individual, that "income derived from the sale in the United States of property, whether real or personal, is not fixed and determinable annual or periodical income." One's labor and one's house and so forth are one's property. Consequently, this system and understanding recognizes property rights, that is, ownership by a nonresident alien individual. It recognizes that the State Citizen has the right to the possession and use, to the exclusion of all others (including the state and federal governments), of any object in which he has a property or ownership interest.

7.4 Thus a nonresident alien individual who has no income that is effectively connected with the conduct of a trade or business within the United States, pursuant to C.F.R. 1.871-7(a) "is not subject to the tax imposed by Section 1 or Section 1201(b)" of the code. And pursuant to 26 C.F.R. 1.1441-2, the income from the sale of property (such as his labor and house), is not subject to the tax imposed by I.R.C. 871(a).[8] A nonresident alien would report such income on page

[8] The language "fixed and determinable annual or periodical income that is not effectively connected with a trade or business within the United States" under I.R.C. 871 is another clause which lacks a crystal clear definition. (*Fixed* means to set or establish, while *determinable* signifies to end.)

4 of Form 1040NR, where there is a list of privileged income items: e.g., from benefits derived from patents, copyrights, trademarks, and distributions or payments from corporations.

Congress imposed two classes of tax liability. On the State Citizen, a person of the status described as a sovereign in the *Dred Scott*, *Slaughter-House Cases*, and *Wong Kim Ark* decisions, it imposes a tax in I.R.C. 871(a) pursuant to what was consented to under the U.S. Constitutional. An indirect excise tax is levied against privileged incomes. On persons of the status of citizen or resident of the United States as contemplated by the 14th Amendment, not being politically free but completely subject to the political jurisdiction of Congress and, pursuant to the 13th and 14th Amendments, owing Congress, as the agents of the people of the United States, direct and immediate allegiance, Congress has imposed a tax in I.R.C. 1.

The nature of the remuneration received by a State Citizen in exchange for his labor is distinguished from that of a citizen or resident of the United States. For instance, the meaning of the term *wages* is quite significant. The definition of "wages" in I.R.C. 3401(a) is: "For the purposes of this chapter the term 'wages' means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash, except such term shall not include remuneration paid...(6) for such service, performed by a nonresident alien individual, as may be designated by regulation provided by the secretary." Thus privileged remuneration received by a citizen or resident of the United States (per the 14th Amendment) for services performed for his employer is wages. But what a nonresident alien individual receives for his personal services rendered is not wages. As discussed in sections 4.2 and 4.3, his compensation or wages is not subject to the "incomes" tax. Like with feudal arrangements between lord and serf, the second class citizen or resident of the United States has no property rights and can retain only

what the Congress allows him to retain. These individuals are also identified by the term "taxpayer" in I.R.C. 1. Conversely, the first class or State Citizen, being nonresident and alien to the 14th Amendment citizenship and residency, has property rights in his labor to the exclusion of any power of Congress.

7.5 There are circumstances under which nonresident alien individuals may be required to file or make various returns. Pursuant to I.R.C. 1313(b) an individual is only a taxpayer with respect to an applicable revenue law. Those persons who are identified as taxpayers with respect to the tax imposed in I.R.C. 1 are citizens of the United states *residing* at home or abroad, residents of the U.S. even though not a citizen, and nonresident alien individuals to the extent of I.R.C. and 877(d) and 871(b) (i.e., income that is effectively connected with the conduct of a trade or business within the United States). I.R.C. 6012 provides a requirement for all such persons to file a tax return, whether as a citizen, resident, or nonresident alien individual, which is implemented in 26 C.F.R. 1.6012-1. Respecting persons of the 14th Amendment political status, citizens and residents of the United States, 26 C.F.R. 1.6012-1(a) requires that, "(1) an income tax return be filed for each year by each individual, who has income over $750.00 and is (i) a citizen of the United States whether residing at home or abroad, (ii) a resident of the United States though not a citizen thereof, or (iii) an alien bona fide resident of Puerto Rico during the entire taxable year." Item (6) notes that Form 1040 is prescribed for general use and a Form 1040A and Form 1040W are optional forms.

Note that a citizen of the United States is subject to the tax and the filing requirement no matter where resides, and whether or not he is a citizen of the United States. If he *resides* in the United States he is subject to the filing requirements. 26 C.F.R. 1.871-2 denotes residence as "...whether an alien living in the United States is a resident is determined by his *intentions* with

regard to the...nature of his stay" (emphasis added). Merely living in the United States does not make one a resident. It is the intent with regard to the nature (i.e., the substantive system of law under which) one is staying or living somewhere.

Respecting a person of the political status of nonresident alien individual, i.e., the first class or State Citizen, 26 C.F.R. 1.6012-1(b)(1) provides that: "(1) Every nonresident alien who during the year is engaged in a trade or business within the United States which is income within the ambit (or sphere) of 871(b), or who has income which is subject to taxation under Subtitle A of the I.R.C. [which includes I.R.C. 871(a)] shall file a return on Form 1040NR. Moreover, 26 C.F.R. 1.6012-1(b)(2) provides: "A nonresident alien who at no time during year is engaged in a trade or business within the United States is not required to make a return for the taxable year if his tax liability for the year is fully satisfied by the withholding of tax at source under chapter 3 of the code."

While a nonresident alien individual might not have income subject to I.R.C. 871(b), he could have income subject to withholding at source under I.R.C. 871(a). However, if the tax liability of this income was withheld, he is not required to file a tax return. Furthermore, a nonresident alien individual who had no income within the meaning of 871(b) or 871(a) would by this provision have no duty to file a tax return. Note, however, that 26 C.F.R. 1.6012-1(b)(2) states: "This subdivision does not apply to a nonresident alien individual who has income for the taxable year which is treated under Section 871(c) or (d) and C.F.R. 1.871-9 [relating to students or trainees] or C.F.R. 1.871-10 [relating to real property income] as income which is effectively connected for the year with the conduct of a trade or business within the United States by that individual." That is to say that I.R.C. 871(c) and (d) also provide for the taxing of a nonresident

alien individual on income "as income with is effectively connected for the year with the conduct of a trade or business within the United States by an individual."

It should come as no surprise therefore that 26 C.F.R. 1.1-1 [which describes the persons on whom I.R.C. 1 imposes a tax] did not mention I.R.C. 871(c) or 871(d). Pursuant to 26 C.F.R. 1.871-9, one can see that I.R.C. 871(c) pertains to nonresident alien students in the United States on an F or J visa who receive income from within the United States. But I.R.C. 871(d)—as implemented by 26 C.F.R. 1.871-10—provides for an interesting phenomenon: "A nonresident alien individual who during the taxable year derives income from real property held for the production of income and located in the United States [like rents and royalties from natural deposits]...which, but for this subsection, would not be treated as income which is effectively connected with the conduct of a trade or business within the United States *may elect* for such taxable year to treat all such income as income which is effectively connected with the conduct of a trade or business within the United States. In such case, such income will be taxable as provided in subsection (b)(1) of Section 871 [which is, of course, pursuant to the tax imposed in I.R.C. 1] whether or not an individual is engaged in a trade or business within the United States for the taxable year" [1954 I.R.C., CCH 1986 edition]." In other words, the nonresident alien, such as Brushaber or Cobin, can make an election to have their earnings taxed as incomes in the same way that a second class citizen would be taxed. The election remains in effect for all years subsequent until revoked, according to I.R.C. 871(d)(1).

7.6 Thus, while I.R.C. Section 871(d) does not mandate any tax liability imposed under I.R.C. 1, it does provide that a nonresident alien can volunteer into that liability on income derived from real property, like natural deposits, which but for that subsection (election) would not be taxable income. "Real property" is apparently left undefined by the I.R.C. and C.F.R., along

with the income "derived" from such real property. Neither of these items would be subject to taxation apart from making this election. In Cobin's understanding, such real property and income, given that 14th Amendment privileges are in view, would be feudal in nature. The "real property" described could be an individual's body and labor.

At first glance such a notion may seem far-fetched, yet given the larger picture developed in the I.R.C. it is the interpretation that makes the most sense. Pollock and Maitland in their famous legal work *The History of English Law before the Time of Edward I* (1898) stated that men in the condition of feudal servitude were called "villeins". These men correspond to the second class citizens under the 14th Amendment, owing a duty to their federal lord for the privileges granted to them. Villeins were merely part of the agriculture capital of the manor, like the cows, horses, carts and plows.

More specifically, these villains were divided into two cohorts. On the one hand, *regardant villeins* were fixed to the manor and would go along with the manor if it were sold. They were attached to the land and were considered real property. On the other hand, *gross villeins* could be severed from the land when sold to another lord. According to *Comyns's Digest* (1822), under the heading "Biens" (the old English word for chattels), there were chattels real and chattels personal. A villein in gross was a *chattels real*.

Consequently, there is a legal basis for claiming that the body and labor of an individual who has become "subject to the jurisdiction" of the United States could be considered as real property. To further support this idea, consider that when the IRS records a form 668Y, *Notice of Federal Tax Lien under Internal Revenue Law*, it is recorded under the real property records of a county. It shows the collateral by which it justifies such a lien by giving notice that they have a security interest in the chattels real: the individual in servitude (i.e., the individual's name,

taxpayer identification number, and address). One must consider the cultural and social context wherein most of the thinking about the income tax legislation originated. By doing so, it becomes clearer why free men would exchange their rights during dire times for the privileges and protections of a modern feudal lord.

The first major edition of the income tax legislation emerged during the Great Depression (I.R.C. of February 10, 1939). There had been several years of massive unemployment in America and much interest in welfare state social programs. President Franklin D. Roosevelt formulated many such programs: the Emergency Banking Act (1932), Federal Emergency Relief Administration (1933), Civilian Conservation Corps (1933), Works Progress Administration (1935), Social Security Act and Administration (1935), and the Fair Labor Standards Act (1938). Many people were poor and hurting; they began to look to the federal government to help alleviate their plight. It was a perfect climate for introducing the opportunity for people to voluntarily enter into "feudal" servitude and be treated like second class "federal citizens" in order to receive the privileged incomes and benefits from its programs. Desperate times call for desperate measures, and desperate men are willing to take desperate actions. In *Cracking the Code: the Fascinating Truth about Taxation in America* (2003), Peter E. Hendrickson agrees with this thesis.

> "The simple tawdry fact is that Congress wants to spend lots of your money, and even though it can't seize it from you legally, they are perfectly willing to set up a system by which you are led to believe that they can, and about which you will have great difficulty discovering the truth." Dwell on this a while and the nuances of the phrase 'voluntary compliance' will suddenly become clear. What it refers to is you 'voluntarily' allowing yourself to be characterized as a recipient of pub-

> lic sector privilege, and then complying with requirements that attach to that status" (p. 63).

(Note that Hendrickson is writing over a decade after Cobin came to the same conclusion.)

The paradigm for the opportunity set up in the I.R.C. was based on the feudal system of serfdom where one pledged allegiance to his liege lord and his body and labor became a commodity ("real property") to be traded between merchants. The governing law was the *Law Merchant*, which is now codified in the *Uniform Commercial Code*. In the same way that medieval English "freemen" were afforded an opportunity to volunteer into a system of servitude in order to gain the military protection from marauding bands of invaders by a lord, so beleaguered Americans during the Great Depression were afforded an opportunity to exchange their sovereign, free, *sui juris* status for the welfare state benefits and protections afforded to federal citizens under the 14th Amendment.

Yet all along the way Congress left open the means for first class citizens to retain their sovereign status guaranteed under the American Constitution. First one must understand what the term "nonresident alien" individual means and then invoke the appropriate revocation of his implicit election to be treated as a second class citizen. Of course, this thesis begs the question: "Why would Congress go to all that trouble? Could they not have simply forced everyone into this sort of feudal submission?" The answer is simply that while they had the ability to compel people into servitude it was in their best interest (and in the best interest of a minority of wealthy and powerful Americans—among others), to maintain a means whereby the first class status could be retained, along with all its corresponding benefits, rights, and liberties. To have unalienable rights recognized by government—unlike any other nation in the world—was something

too prized to give up. Thus the loophole was created, which men like Cobin and Brushaber have accessed, along with many astute Americans who are considered "nonresident alien" individuals.

7.7 Congress provides in I.R.C. 871(d)(3) that the aforementioned election and the revocation of that election "may be made only in such manner and at such time as the secretary may by regulation prescribe." This provision is prescribed in 26 C.F.R. 1.871-10(d)(1) (see subparagraph (i)). It provides that both an election and a revocation can be made without the consent of the commissioner within the time prescribed in I.R.C. 6511 for making a claim for refund (i.e., within three years of the date the return was due, or two years from the payment of the money, whichever is later). It also provides that such a revocation shall be made by filing an amended return or claim for refund for each year being so revoked (see subparagraph (ii)). It provides that, "...such an election shall be made by filing with the income tax return required by Section 6012 and the regulations thereunder...a statement to the effect that the election is being made." This schedule (or statement of election) shall include: "(1) A complete schedule of all real property, or any interest in real property, of which the taxpayer is the titular or beneficial owner, which is located in the United States; (2) An indication to the extent to which the taxpayer has direct or beneficial interest in each such item of real property, or interest in real property; (3) The location of the real property or interest therein; (4) A description of any substantial improvements upon any such real property; (5) An identification of any taxable year or years in respect of which a revocation or new election under this Section has previously occurred; (6) Note the exception to returns filed under Section 6851 [pertaining to jeopardy assessments]."

Once again, the term "include*"* used in 26 C.F.R. 1.871-10(d)(1)(ii) could be restrictive or expansive, but as shown in section 7.2 above, it is *restrictive*. The enumeration does not require that one state that he is making a statement or an election (or that the statement be entitled

"statement" or "election"). Therefore, any document whereon all of the facts necessary to constitute the statement or enumeration effectuate the election—provided it is duly filed with a document that also meets the return requirements of I.R.C. 6012 and the corresponding regulations. There is nothing that says this election may not be done on a document like Form 1040, or its revocation on Form 1040NR.

For instance, Form 1040 has all of the information that 26 C.F.R. 1.871-10(d)(1)(ii) requires must be included to constitute a valid election. It requires a *schedule* of the real property. Listing the names of the individuals (as one does on line 1 of Form 1040) provides such a schedule—given that a person in the condition of servitude is considered real property. Form 1040 also fulfills the requirement to indicate the extent of one's *interest* in the real property. The first line (right side) of Form 1040 calls for a taxpayer identification number. The villein or serf identification number shows an interest in an individual's own real property, as well as any federal benefits actually or potentially due to him because of such property. Form 1040 also meets the requirement that an individual show the *location* of the real property, since lines 2 and 3 provide for his address of domicile. If there are any "substantial *improvements* on the real property", namely one's children, they may be listed on Form 1040. (Note that children substantially improved a villein's potential output on his tenement in manorial society.)[9] Thus, Congress made it

[9] Under the provisions of the *Uniform Commercial Code*, the "organization" (per U.C.C. 1-201(28)) known as the federal government could be construed as a "merchant", defined under U.C.C. 2-104 as a *person* (per U.C.C. 1-201(30)) who deals in goods of a kind, or holds himself out as an authority in such goods, or has an agent who holds himself out as such an authority. By definition, the United States and the Internal Revenue Service are persons in commercial law, if they are dealing in goods of a kind. Moreover, the term, "between merchants", according to U.C.C. 2-104(3), means that both parties to a transaction are chargeable with knowledge or skill of merchants. They are *chargeable* in that the law ascribes to them rights and duties and a remedy if the rights are violated. Therefore, it is plausible that the good being dealt with in commercial law is voluntary servitude of one's body (a "good" or movable thing, according to U.C.C. 2-105) by means of making an election under 26 C.F.R. 1.871-10(d)(1)(ii), and the merchants are qualified by making a sale at least yearly (perhaps on April 15th). The government's purchase is thus done pursuant to U.C.C. 1-201(32) and 1-201(33) in a voluntary manner via the election. By filing a Form 1040 (or failing to make a timely objection to the contents of a confirmatory writing the government or its agent) the government can be said to have purchased a person by gift under commercial law. One may agree to gift himself to the government. In the terms of the U.C.C., the government may acquire an interest in a man or woman by purchase, i.e. by gift. This purchase by gift is an agreement (per U.C.C. 1-201(3)) or contract. The U.C.C. provides for the full application of contract by *consensu*. Article 9 of the U.C.C. is entitled "secured transactions". Section 9-102 at the first sentence in the official comments explains, "The main purpose of this Section is to bring all consensual security interests in personal property and fixtures under this Article" (emphasis added). IRS agents must be apprised of the principles of contract by consensus since the *Legal Reference Guide For Revenue Officers,* page 57(16)0 294 (glossary of terms) has: "Consensual Contract. A term denoting a contract founded upon and contemplated by the mere consent of the contracting parties, without any external formality or symbolic act to fix the obligation." Hence, failure to respond in a timely manner to

easy for a nonresident alien individual who has no income that is effectively connected with the conduct of a trade or business within the United States to *elect* to be taxed on income from real property which but for that election would not be taxable. Cobin made such an election by completing forms 1040 for years 1979 through 1990, but then revoked that election by writing the statement listed above in section 1.3 on Form 1040NR for years 1991 and 1992.

8. Cobin Had No "Effectively Connected" Income "Derived from" Taxable Sources

8.1 Income taxes are valid only as taxes on privileges. The federal government may not arbitrarily tax fundamental rights because to do so would be to abridge them. Several cases, in particular the recent U.S. Supreme Court decisions, including *United States v. Lopez*, 514 U.S. 546 (1995), reinforce the notion that there remain even today some Constitutional limits on government and the court is not entirely moribund. The difficulty many IRS challengers face is that courts often look more at court decisions, the tax codes, and other law rather than the American Constitution. If one finds that the I.R.C. (though difficult to interpret) agrees with the American Constitution when properly understood, one can more easily accept an unusual provision here and there. The I.R.C. is carefully crafted so that it does indeed follow the American Constitution.

8.2 The key question is whether or not the income tax imposes a duty on property (i.e., the money earned) or on an event (i.e., the earning of money). A tax on the property would be direct and must be apportioned. A tax on the event of receiving income is an excise and must be

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a confirmatory writing from the IRS could be considered one's consent to such a contract. *Black's Law Dictionary*, 4th edition, says: "conusant: cognizant; acquainted with; having actual knowledge; as, if a party knowing of an agreement in which he has an interest makes no objection to it, he is said to be conusant. Co. Litt. 157".

A Form 1040 tax return could be considered an agreement for deed or conveyance of one's labor for a year. Section 6321 provides that when an assessment has been made and notice of the assessment and demand for payment has been made and the taxpayer fails to pay the same, a lien exists in favor of the United States against all property and interest in property held by the taxpayer. Article 7 of the U.C.C. is entitled "Documents of Title". Documents of title are also know as commodity paper. A warehouse receipt is a document of title. Therefore, Form 1040 tax return could be a document of title to one and one's labor for one year. A Form 1040 tax return could also be a bond or conveyance, a double legal obligation, that is, an obligation with a penal condition. This technique, it seems, is perfectly descriptive of the way the Internal Revenue Service operates today. They always have something they can point to as evidences of a consensual agreement wherein one deeded and conveyed oneself to the government in slavery for the year. The agreement itself recognizes rights in the government or real party of interest comparable to a judgment. There need be no injured party, no judicial determination, and no judicial process.

uniform (American Constitution, Article I, Section 9). The Supreme Court ruled in *Pollock v. Farmers' Loan and Trust,* 157 U.S. 429 (1895), that an income tax on rent from property would be the same as a tax on property thus would be a direct tax and must be apportioned. Direct taxes being difficult, the 16th amendment was proposed and ratified to sever this connection between the source (property) and the income, and the U.S. Supreme Court ruled in (*Brushaber v. Union Pacific Railroad Co.,* 240 U.S. 1 (1916)) that this did not change the fundamental nature of Constitutional taxation. It merely kept the source of income from being considered in an action, thus causing the tax to be deemed direct when in its essence it was in fact indirect.

8.3 The original income tax Act of 1862 clearly imposed a tax on government workers against their privileged income (Section 86) and it also allowed for a voluntary tax on others "residing" in the United States who had declared their earnings assessable and treated like the privileged income of federal workers (Section 93). The fact that the "salaries" of the former group are directly taxed but the latter group's "income" is only accessible from the "gains", etc. "derived from any kind of property, rents, interest, dividends, salaries…" is telling. After all, if the gain derived from salaries were the same as the salaries themselves, then having a separate section to describe the tax on federal employee salaries would be nonsensically superfluous. Further proof of the early recognition of Constitutional limitation on taxation is found in the 1913 legislation. Notably, 26 C.F.R. 39.22(b)-1 says: "No other items may be excluded from gross income except (a) those items of income which are, under the Constitution, not taxable by the Federal Government." Since each tax code revision builds on the previous tax code, and the Act of 1862 was the original income tax code, it stands to reason that the distinction between a source itself and what is derived from that source are two entirely separate classes and distinct items in law.

Moreover, the I.R.C. and the courts use very precise language when they say that income taxes are imposed on things that are "derived from" activities such as "salaries, wages, and compensation for personal services" (*Lucas v. Earl*, 281 U.S. 111 (1930)). The fact that Congress chose to retain this qualification is instructive and indicates the intention of Congress to differentiate between a source of income and something derived from a source of income (see *Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108, 64 L.Ed.2d 766, 100 S.Ct. 2051 (1980); *Federal Trade Commission v. Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 72 [fn6], 71 L.Ed.2d 748, 102 S.Ct. 1534 (1982)).

For instance, taxing the interest derived from a bond is different than taxing a bond itself; taxing the dividend derived from a block of common stock is different than taking a few shares of the stock; taxing the rent from an apartment building differs from taking 5% of the land it sits on per year as a tax. If a man's labor is part of his property and he possesses and unalienable right to it, and if he exchanges his labor for other property, then there is no way to tax the surplus without affecting the principal. However, if a man's earnings are derived from labor that he undertakes as part of a privileged economic or social position (e.g., an inventor that profits from a patent or a federal employee), then he owes a duty to the privilege grantor. Likewise, if a corporation (which enjoys government-granted privileges like limited liability or higher profits due to a tariff) employs land, labor, and capital, such that rent, salaries, and equipment fees are paid to create profitable output, the earnings would be subject to a duty. But individual workers in the firm do not face such a duty since their efforts are neither sanctioned nor blessed by privilege.

In the current version of the I.R.C., such limitations are seen—not created or proven, just evidenced—by the use of words like "includes" with lists of items of income all derived from privileges. As already discussed section 7.2 above, the listing is restrictive and limited rather

than expansive in the I.R.C. and comprises only privileged incomes. Once again, only privileges—rather than rights—can be lawfully taxed using an indirect excise tax. Moreover, it thus follows that strict definitions of "employee" and "employer" must not apply to people working in occupations of common right who are not exercising or utilizing any federal privilege. "[W]here Congress includes particular language in one section of a statute but omits it in another…it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (*Russello v. United States*, 464 U.S. 16, 23, 78 L.Ed.2d 17, 104 S.Ct. 296 (1983); *Barnhart* v. *Sigmon Coal Co.*, 534 US 438, 122 S. Ct. 941, 951 (2002)). The I.R.C. has clear, strict definitions for such words.

And so it is with terms such as "effectively connected", "trade or business", "derived from", "includes", "within the United States", and "employee". Why would State Citizens be under obligation to involuntarily participate in (or leave unchallenged) any process whereby their nontaxable receipts are transformed into taxable benefits of privilege? Accordingly, Cobin's earnings in 1991 and 1992 were not privileged income and he had therefore no corresponding tax liability as the IRS is now alleging, but was in fact a nonresident alien as described in the I.R.C.

9. Conclusion: Cobin Does Not Have Any Alleged Tax Liability

9.1 In conclusion, although the I.R.C.'s language is somewhat ambiguous at points, when the code is taken as a whole, and taking into account the opinions of the courts and the recorded intention of Congress in formulating the 16th Amendment, as well as understanding the duality of citizenship in America, Cobin believes that his legal basis and conclusions are correct and thus his filing procedure has also been correct. Nevertheless, even if Defendant disagrees, so long as Cobin's position is at least plausible or reasonable (or even if it was merely held in earnest at the time of its actuation in 1991 and 1992), the U.S. Supreme Court has ruled that disputes over un-

certainties in the tax code should be resolved in favor of the individual who is being challenged by the IRS. "In view of other settled rules of statutory construction, which teach that...if doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer..." (*Hassett v. Welch*, 303 U.S. 303, 314 (1938) and cf. *Cheek v. United States*, 498 U.S. 192 (1991)). In view of this plain declaration and all other factors Cobin has cited, Cobin affirms that he did not have the tax liability that the IRS alleges he did in 1991 and 1992. Hence, because there is a dispute over Cobin's tax liability, the U.S. District Court is the proper venue for making a determination regarding it. Cobin respectfully requests that the Court release and exonerate him of the tax liability erroneously ascribed to him by the IRS.

9.2 Cobin realizes too that such a determination would be difficult in U.S. Tax Court on account of what economists have termed "public choice problems". That is, the incentives faced by U.S. Tax Court judges who are so closely-related to the operation of the IRS will tend to make it more challenging for them to enter rulings that make them stand out as "mavericks" against their peers and popular opinion—or even against what is considered to be "accepted" jurisprudence. Doing so might also curtail such judges' opportunity for promotion to a higher court. In short, economists have described public officials' difficulty of subordinating "self-interested" motives in favor of "public interest" goals. However, this "public choice" phenomenon is most likely to emerge in U.S. Tax Court because of its putative close nexus with Defendant. Alternatively, Cobin expects that the U.S. District Court (and Judge Floyd in particular) will be able to escape such challenges, thus taking a stand against the tide of incorrect interpretations of the tax code in U.S. Tax Court decisions (and in various state tax courts) by ruling in Cobin's favor. The U.S. District Court is indeed known for a history of appropriate "arm's-length" rulings in IRS matters.

9.3 Cobin respectfully requests that this Court recognize, and also cause the IRS to recognize (in writing to Cobin): (i) that Cobin does not have any unpaid federal income tax liability; (ii) that Cobin should be given a fair face-to-face hearing to discuss any issues that may further arise; (iii) that the liens placed against Cobin—which should have expired except that the IRS unlawfully extended them—should be removed (with release letter from the IRS sent to Cobin); and (iv) that the IRS cease and desist from harassing Cobin any further.

Certificate of Service: I do hereby certify that on this date I delivered properly a copy of this pleading to opposing counsel.

Executed on February 14, 2005.

Respectfully submitted,

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