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

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES	CRIMINAL INDICTMENT
Plaintiff	CASE NO: CR –S-04-0119-KJD-LRL
V	
IRWIN SCHIFF, CYNTHIA NEUN And LAWRENCE N. COHEN, a/k/a/ LARRY COHEN,	DEFENDANTS' MEMORANDUM TO DISMISS ALL COUNTS AT ISSUE INVOLVING INCOME TAXES, SINCE ALL SUCH COUNTS
Defendants	WERE SECURED BY FRAUD

Defendant has attached to this Memorandum (as Exhibit A) page 168 from Senate Report No. 1637 and page A18 from House Report No 1337, 83rd Congress, 2nd Session. Note that Congress stated in both reports that, "The definition (of income as contained in Section 61 of Title 26) is based upon the 16th Amendment, and the word 'income' is used in its constitutional sense." Obviously, "income" *used* in its "constitutional sense" is not the same thing as income "*used"* in its "ordinary sense" which is how the Government "used" that term both before the grand jury and in the language contained in the instant indictments. Had the Government correctly explained to the grand jury the true meaning of "income" as that term is used in our revenue laws, (i.e. the meaning "income" when used in its "constitutional sense") the Government never would have gotten any indictments involving income taxes, since none of the defendants, nor anyone they ever came in contact with, ever received "income" in the "constitutional sense." Thus the government secured indictments on all counts involving the income tax, such as those based on Title 26 and 18 U.S.C. 371, by fraudulently misleading the grand jury as to the legal meaning of "income" as that term is used in the our revenue laws.

I

THE "CONSTITUTIONAL" MEANING OF INCOME

The only question, therefore, is what is the meaning of "income" in the "constitutional sense" and how does it differ from "income" in the "ordinary sense"? [1] The "constitutional" meaning of "income" is derived from the holding in the bedrock decision, Brushaber *v. Union Pacific RR*, 240 U.S. 1, 17 in which the Supreme Court stated, "The whole purpose of the (16th) Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived." Therefore the "whole purpose" of the 16th Amendment was not to amend the Constitution but "to relieve all income taxes when imposed ***from apportionment*** from a consideration of the source whence the income was derived." Therefore, in order to be "relieved" from the constitutional requirement of "apportionment," a tax on "income," cannot take into "consideration" the "sources" from which "the income is derived." Therefore, an "income tax," based on the 16th Amendment, must be imposed in a manner in which the "sources" that produced the "income" (such as commissions, dividends, wages, interest, rents) are not "considered" and are thus not directly taxed. This occurs only when the "sources" of income (i.e. such as fees, commissions, dividends, interest, etc…) are funneled through a corporate profit and loss statement and emerge either as a "profit" or a "loss." If they emerge as a profit, a tax on that "profit" (as was made taxable in the Corporate Excise Tax Act of 1909) would not be a tax on the "sources" that produced the profit but would only on be a tax on the profit itself. Thus the "sources" that produced the profit would not have been "considered" and would not have been directly taxed. A corporation can receive billions of dollars in income from a variety of "sources," but if those billions do not produce a profit, the corporation pays no income taxes on the billions of dollars of income it received, since those billions did not produce a profit.[2] So the 16th Amendment meaning of "income" and its

[1] "No attempt has ever been made by Congress to define with specificity the term 'income' as it is used in the sixteenth amendment" *Conner v. U.S*, 303 F. Sup.1187, 1189. " The general term 'income' is not defined in the Internal Revenue Code," *U.S. v. Ballard*, 535 F.2d 400, 404. The reason that Congress has never defined "income" is because it has no authority to do so. "Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution" (*Eisner v. Macomber*, page 206), which Congress does every time it changes what is taxable as "income" in each succeeding tax "reform" act.

[2] While Section 61 *claims* to define "Gross income," it does not do so, since it "defines" it by using the word "income" in its definition. Obviously, a word cannot be defined with itself. In any case, Code section 61 does not make a distinction between corporations and individuals. So whatever applies to one, must also apply to the other. Since corporations do not pay income taxes on their income, neither, therefore, are individuals required to do so. And since corporations only pay income taxes on their profit, this too must apply to individuals. However, individuals do no generate "profit," (which can only be derived from a profit and loss statement), therefore, individuals earn nothing that is subject to an income tax. What can be simpler than that?

"constitutional meaning" are both synonymous with "corporate profit," since that is the only instance where "income" is separated from its sources.

This meaning of income, as used in the 16th Amendment and in all of the taxing statutes in title 26, is confirmed by a number of Supreme Court decisions, which have never been reversed or repealed. The 1921 Supreme Court decision of ***Merchant's Loan & Trust Co v. Smietanka,*** 255 U.S. 509, could not have not said it more clearly when it held on pages 518-519:

> The word (income) must be given the same meaning in all of the Income Tax Acts of Congress that was given to it in the Corporation Excise Tax Act (of 1909) and that what that meaning is has now become definitely settled by decisions of this court."

Therefore the meaning of "income" in our revenue laws means a corporate profit as is clearly stated in the above decision and as confirmed in the following five other Supreme Court decisions.

> As has been repeatedly remarked, the Corporation Tax Act of 1909 was not intended to be and is not in any proper sense an income tax law. This court had decided in the *Pollock Case* that the income tax law of 1894 amounted in effect to a direct tax upon property, and was invalid because not apportioned according to population as prescribed by the Constitution. The act of 1909 avoided this difficulty by imposing not an income tax, *but an excise tax upon the conduct of business in a corporate* capacity, measuring, however, the amount of tax *by the income* of the corporation…(citations omitted).
> *Stratton's Independence v. Howbert,* 231 U.S. 399, 414. (Emphasis added)

> Certainly the term "income" has no broader meaning in the 1913 Act than in that of 1909 (See *Stratton's Independence v. Howbert,* 231 U.S. 399, 416, 417), and for the present purpose we assume *there is no difference in it's meaning as used in the two acts.*
> *Southern Pacific v. Lowe,* 247 U.S. 330 (1918)(Emphasis added)

> It was not the purpose or effect of that (16th) Amendment to bring any new subject within the taxing power. Congress *already had power* to tax all incomes. But taxes on incomes from some sources has been held to be "direct taxes" within the meaning of the constitutional requirement as to apportionment…. "Income" has been taken *to mean the same thing* as used in the Corporation Excise Tax Act of 1909, in the Sixteenth Amendment and in the *various revenue acts subsequently passed.* (Citations omitted)
> *Bowers v. Kerbaugh-Empire Co.,* 271 U.S. 170, 174 (1926) (Emphasis added)

> And before the 1921 Act this Court has indicated (see *Eisner v. Macomber*, 252 U.S. 189, 207), what it later held, that "income," as used in the revenue acts taxing income, adopted since the Sixteenth Amendment, has the <u>*same meaning*</u> that it had in the Act of 1909. *Merchant's Loan &Y Trust Co. v. Smientanka,* 255 U.S 509, 519; see *Southern Pacific Co. v. Lowe*, 247 U.S. 330, 335
> *Burnet v. Harmel,* 287 U.S.103, (1932)
>
> Whatever difficulty there may be about a precise and scientific definition of 'income" it imports, as used here, something entirely distinct from principal or capital either as a subject of taxation or as a measure of the tax; *conveying rather the idea of gain or increase* <u>*arising from corporate activities*</u>.
> *Doyle v. Mitchell Bros.*, 247 U.S. 179, (1918)(Emphasis added)

Therefore, there can be no doubt that "income" within the meaning of our revenue laws means gain or profit "arising from corporate activities." Therefore, "corporate profit" and "income" in the "constitutional sense" both mean the same thing. [3]

However in all of the testimony solicited from witnesses before the grand jury and in all representations made to it by Government attorneys, the term "income" was used in its "ordinary sense." Thus the grand jury was fraudulently led to believe that *income* used in its "ordinary sense" means the same thing as *income* "used" in its "constitutional sense."

Therefore, this Court must dismiss all of the counts at issue involving income taxes, since all such counts were obviously secured by Government attorneys fraudulently misleading the grand jury as to the meaning of "income" as that term is used in sections 61, 62 and 63 of Title 26, and, similarly, the government has fraudulently misused that term throughout the indictments at issue.

Therefore, defendants put this Court on judicial notice that "income" as used in sections 61, 62, and 63 of Title 26 is used in its "constitutional sense" as stated in House Report 1337 and Senate Report No. 1637, and is not used in its "ordinary sense," which is how that term is used in all of the counts involving Title 26 and 18 U.S.C. 371. Defendants would also put the Court on judicial notice that: "Fraud destroys the validity of everything into which it enters," *Nudd v. Burrows,* 91 U.S 426. "Fraud vitiates everything," *Boyce v. Grundy*, 3 Pet. 210. "Fraud vitiates the most solemn contracts, documents and <u>*even judgments,*</u>" *U.S. v. Throckmorton,* 98 U.S. 61.

[3] However, as explained in the *Stratton's* decision, the 1909 tax on corporate profit was imposed as an "excise" tax on the alleged "privilege" of operating as a corporation. However, the current income tax is not imposed in this manner (as an excise tax on corporate profit), neither is it imposed as an apportioned direct tax on corporate profit; therefore, not even corporate profit can be subject to an income tax which is neither imposed as an excise tax nor as an apportioned, direct tax.

Therefore, this Court must dismiss all the counts at issue involving the income tax, because they were all clearly secured on the basis of fraud perpetrated by the Government. And this fact is not even open to debate.

Dated: March 30, 2004

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

Irwin A. Schiff, pro per