U.S. Department of Justice

Tax Division

Please reply to: *Appellate Section*
P.O. Box 502
Washington, D.C. 20044

Facsimile No. (202) 514-8456
Telephone No. (202) 514-3361

FPCihlar:kwr:tm
5-50-5695
CMN 2005102958

March 1, 2005

FedEx

Roseann B. MacKechnie, Esquire
Clerk, U. S. Court of Appeals
for the Second Circuit
Room 1702, U.S. Courthouse
40 Foley Square
New York, NY 10007

Re: Robert L. Schulz v. IRS, United States, Roundtree
(2d Cir. - No. 04-0196)

Dear Ms. MacKechnie:

Enclosed herewith for filing with your Court are an original and four copies of a notice of motion and motion to amend opinion or, in the alternative, to extend the time to file a petition for rehearing en banc. Please submit this motion to the Court and advise us of the action taken. We also enclose the appearances of Gilbert S. Rothenberg and Frank P. Cihlar.

As indicated by the certificate of service, a copy of this motion, with supporting declaration, has been served on the appellant, appearing *pro se*, together with a copy of this letter. I can be reached at (202) 514-2839.

Sincerely yours,

FRANK P. CIHLAR
Attorney
Appellate Section

Enclosures
cc: (See page 2)

cc: Mr. Robert L. Schulz
2458 Ridge Road
Queensbury, New York 12804

Glenn T. Suddaby, Esquire
United States Attorney
Robert P. Storch, Esquire
Assistant United States Attorney
Post Office Box 7198
100 South Clinton Street
Syracuse, NY 13261-7198

Short Title: ROBERT L. SCHULZ v. IRS and ANTHONY ROUNDTREE

Docket No. 04-0196

NOTICE OF APPEARANCE

Appearance for (provide name of party): IRS and ANTHONY ROUNDTREE

Status of Party:

( ) Appellant/Petitioner
(X) Appellee/Respondent
( ) Cross-Appellant/Cross-Petitioner
( ) Other (Specify):
( ) Cross-Appellee/Cross Respondent
( ) Intervenor
( ) Amicus Curiae

Date of your admission to the bar of this court (month, day, year):_____
Name of attorney who will argue appeal, if other than counsel of record:

Admitted to the bar of this court (month, day, year):_____

THIS INFORMATION WAS FURNISHED PREVIOUSLY — TIME REQUEST

( ) Oral argument is not desired.
( ) Oral argument is desired. Party requests _____ minutes or multi-co parties request a total of _____ minutes to be apportioned as follows:

If more than 20 minutes per side is requested, set forth reasons:

THIS INFORMATION WILL BE FURNISHED LATER — AVAILABILITY OF COUNSEL

I understand that the person who will argue the appeal must be ready at any time during or after the week of argument which appears on the scheduling order.

( ) I know of no dates which would be inconvenient.
( ) I request that the argument of this appeal not be calendared for the following dates, which are inconvenient. I have included religious holidays.

COUNSEL MUST ADVISE THE COURT IN WRITING OF ANY CHANGE IN AVAILABILITY. FAILURE TO DO SO MAY BE CONSIDERED BY THE COURT IN DECIDING MOTIONS FOR ADJOURNMENT BASED ON UNAVAILABILITY.

THIS INFORMATION WAS FURNISHED PREVIOUSLY — RELATED CASES

( ) This case has not been before this court previously.
( ) This case has been before this court previously. The short title, docket number and citation are:_____
( ) Matters related to this appeal or involving the same issue have been or presently are before this court. The short titles, docket numbers and citations are:

Signature of counsel of record: Frank P. Cihlar

Signature of counsel who will argue the appeal, if different:

FRANK P. CIHLAR

Name of Firm: Department of Justice
Tax Division

Address: Post Office Box 502,
Washington, D.C. 20044

Telephone (202) 514-2839 Date: 3/1/05
A/C

Telephone: ( ) Date:
A/C

Short Title: ROBERT L. SCHULZ v. IRS and ANTHONY ROUNDTREE

Docket No. 04-0196

NOTICE OF APPEARANCE

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Status of Party:

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(X) Appellee/Respondent
( ) Cross-Appellant/Cross-Petitioner
( ) Other (Specify):
( ) Cross-Appellee/Cross Respondent
( ) Intervenor
( ) Amicus Curiae

Date of your admission to the bar of this court (month, day, year): DEC. 1975

Name of attorney who will argue appeal, if other than counsel of record:

Admitted to the bar of this court (month, day, year):

THIS INFORMATION WAS FURNISHED PREVIOUSLY

TIME REQUEST

( ) Oral argument is not desired.
( ) Oral argument is desired. Party requests _____ minutes or multi-co parties request a total of _____ minutes to be apportioned as follows:

If more than 20 minutes per side is requested, set forth reasons:

THIS INFORMATION WILL BE FURNISHED LATER

AVAILABILITY OF COUNSEL

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THIS INFORMATION WAS FURNISHED PREVIOUSLY

RELATED CASES

( ) This case has not been before this court previously.
( ) This case has been before this court previously. The short title, docket number and citation are:
( ) Matters related to this appeal or involving the same issue have been or presently are before this court. The short titles, docket numbers and citations are:

Gilbert S. Rothenberg

Signature of counsel of record:

Signature of counsel who will argue the appeal, if different:

GILBERT S. ROTHENBERG
Name of Firm: Department of Justice
Tax Division
Address: Post Office Box 502,
Washington, D.C. 20044
Telephone (202) 514-3361 A/C
Date: 3/1/05
Telephone: ( ) A/C
Date:

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION INFORMATION STATEMENT

Schulz v. IRS, United States, Roundtree

Docket Number(s): 04-0196

Motion for : Amendment of opinion or, in the alternative, to extend the time to file a petition for rehearing en banc

Set forth below precise, complete statement of relief sought:

Amendment of the opinion issued by the Court on January 25, 2005, or, in the alternative, extension of time to file a petition for rehearing en banc

MOVING PARTY: United States

OPPOSING PARTY: Mr. Robert L. Schulz

- ☐ Plaintiff
- ☐ Defendant
- ☐ Appellant/Petitioner
- x Appellee/Respondent

MOVING ATTORNEY: Frank P. Cihlar, Esq.

[name of attorney, with firm, address, phone number, and e-mail]

Tax Division, U.S. Department of Justice
P.O. Box 502
Washington, DC 20044
(202) 514-2839 Frank.P.Cihlar @usdoj.gov

OPPOSING ATTORNEY:

[name of attorney, with firm, address, phone number, and e-mail]

Mr. Robert L. Schulz (Pro se)
2458 Ridge Road
Queensbury, New York 12804
(518) 656-3578

Court-Judge/Agency appealed from: Northern District of New York (Albany)

Please check appropriate boxes:

Has **consent** of opposing counsel:
A. been sought? ☐ Yes x No
B. Been obtained? ☐ Yes x No

Is **oral argument** requested? ☐ Yes x No
(requests for oral argument will not necessarily be granted)

Has **argument** date of **appeal been set:** ☐ Yes ☐ No
If yes, enter date held on December 13, 2004

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made **below**? ☐ Yes ☐ No

Has this relief been previously sought in in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Signature of Moving Attorney:

Frank P. Cihlar Date 3/1/05

Has **service** been effected? x Yes ☐ No
[Attach proof of service]

ORDER

IT IS HEREBY ORDERED that the motion is GRANTED DENIED.

FOR THE COURT:
ROSEANN B. MacKECHNIE, Clerk of Court

Date: _____

By: _____

Form T-1080 (Revised 10/31/02)

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ROBERT L. SCHULZ, Plaintiff-Appellant v. INTERNAL REVENUE SERVICE and ANTHONY ROUNDTREE, Defendants-Appellees	)	No. 04-0196

APPELLEE'S MOTION TO AMEND OPINION OR, IN THE ALTERNATIVE, TO EXTEND THE TIME TO FILE A PETITION FOR REHEARING EN BANC

The United States, appellee herein,[1] respectfully requests that the Court amend the opinion in the above-captioned case issued on January 25, 2005, or in

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[1] As there is no statute authorizing suit against the IRS, taxpayer's action must be considered as solely against the United States. *See Blackmar v. Guerre*, 342 U.S. 512, 514 (1952) ("When Congress authorizes one of its agencies to be sued *eo nomine*, it does so in explicit language, or impliedly because the agency is the offspring of such a suable entity") ; *Freck v. IRS*, 37 F.3d 986, 988 n.1 (3d Cir. 1994); *State of Florida Dep't of Business Reg. v. United States Dep't of the Interior*, 768 F.2d 1248 (11th Cir. 1985). Moreover, when, as here, "an action is one against named individual defendants, but the acts complained of consist of actions taken by defendants in their official capacity as agents of the United States, the action is in fact one against the United States." *Atkinson v. O'Neill*, 867 F.2d 589, 590 (10th Cir. 1989) (citing *Burgos v. Milton*, 709 F.2d 1, 2 (1st Cir. 1983)); *see also Hawaii v. Gordon*, 373 U.S. 57, 58 (1963).

the alternative, extend the time to file a petition for rehearing en banc.[2] As we explain below, the Court's opinion contains language that misapprehends the consequences that ensue from the issuance of an IRS administrative summons. By creating the false impression that taxpayers are free to simply ignore an IRS summons, the Court's opinion threatens seriously to impede the effective administration and enforcement of the nation's tax laws. Moreover, the same misapprehension may have caused the Court to misstate the reason why the District Court was without subject matter jurisdiction over this action. Indeed, the bar to subject matter jurisdiction here is not the absence of a case or controversy, since real consequences can befall a party who contumaciously or in bad faith fails to obey an IRS summons, but rather is the comprehensive procedure devised by Congress (and upheld by the Supreme Court) that gives taxpayers a full and fair opportunity to challenge an IRS summons when the IRS seeks a court order to enforce it, but not before then.[3]

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[2] Should the Court deny our motion to amend, a petition for rehearing en banc might be warranted since the Court's opinion had been circulated to the active members of the Court prior to filing. *See* Slip op. 5, n.1.

[3] The Court may wish to construe the instant motion as a petition for rehearing. *See March v. IRS*, 335 F.3d 1186, 1187 (10th Cir. 2003) (after issuance of opinion favorable to it, Government filed motion to amend opinion to correct certain inaccuracies therein and, following receipt of response by taxpayer, court construed Government's motion and the response "as motions for rehearing and

STATEMENT

1. As part of an official investigation into the promotion of abusive tax shelters, IRS Agent Anthony Roundtree served a series of administrative summonses on appellant Robert L. Schulz. This case involves the review of an order of the District Court for the Northern District of New York dismissing, for want of jurisdiction, Schulz's motions to quash those summonses.

Schulz filed his first motion in June, his second in September, 2003. Magistrate Judge David R. Homer *sua sponte* dismissed Schulz's motions on October 16, 2003. Magistrate Judge Homer accepted Schulz's factual allegations as true, but nonetheless found his motions fatally defective. The magistrate concluded the court lacked jurisdiction over the motions because (1) a taxpayer is under no compulsion to respond to an IRS summons until the IRS begins an enforcement proceeding under 26 U.S.C. § 7604, and (2) such an enforcement proceeding is an adequate forum in which to advance any defenses the taxpayer may have to compliance with the summons. Consequently, the magistrate ordered the motions dismissed.

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grant[ed] them to the extent necessary to clarify our discussion of the procedures and forms used by the IRS").

Thereafter, Schulz filed with the District Court an appeal and objections to the magistrate's decision. After conducting a *de novo* review of the magistrate's decision and Schulz's submissions, the District Court denied Schulz's objections and dismissed his appeal. Schulz then appealed to this Court.[4]

On January 25, 2005, this Court issued a published opinion affirming the District Court's dismissal of Schulz's motions for want of subject matter jurisdiction. While the Government believes that the Court was correct to affirm the order of the District Court, the Court's opinion contains language that appears to misapprehend the consequences that may befall a taxpayer who fails to act in good faith in responding to an IRS summons. For that reason, we respectfully submit that the Court's opinion should be modified in certain respects.

2. The Court states in its opinion (Slip op. 3) that "IRS summonses have no force or effect unless the Service seeks to enforce them through a § 7604 proceeding" (citing *United States v. Bisceglia*, 420 U.S. 141, 146 (1975)), and goes on (Slip op. 4) to "hold that, absent an effort to seek enforcement through a federal court, IRS summonses apply no force to taxpayers, and no consequence

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[4] Before this Court, Schulz appeared to be claiming (Br. at 2-3, 4, 10, 13-15) that the IRS summonses had been issued in retaliation for his exercise of what he alleged were his protected rights to "petition the government for redress of grievances" regarding his claim that the IRS lacks constitutional authority to tax labor.

whatever can befall a taxpayer who refuses, ignores, or otherwise does not comply with an IRS summons until that summons is backed by a federal court order." The Court then states (Slip op. 4) that "any individual subject to [a judicial enforcement] order . . . cannot be held in contempt, arrested, detained, or otherwise punished for refusing to comply with the original IRS summons, no matter the taxpayer's reasons or lack of reasons for so refusing" (citing *Reisman v. Caplin*, 375 U.S. 440, 446 (1964)). Given what the Court thus perceived to be a lack of consequences for ignoring an IRS summons, the Court concluded (Slip op. 5) "that issuance of an IRS summons creates no Article III controversy and, therefore, federal courts do not have jurisdiction over motions to quash IRS summonses in the absence of some effort by the IRS to seek court enforcement of the summons." While we agree that Schulz's motions were properly dismissed for want of subject matter jurisdiction, as discussed below, the quoted portions of the Court's opinion are inaccurate in several respects. This will undoubtedly result in taxpayers asserting that they are simply free to ignore IRS summonses and are under no obligation to comply with them.[5] The fair and effective administration and enforcement of our tax laws may thereby be significantly impaired.

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[5] *See, e.g.*, Schulz's press release, related articles and a letter submitted by a party in another appellate proceeding under Fed. R. App. P. 28(j), attached as exhibits to the accompanying Declaration.

DISCUSSION

1. While it is true that an IRS summons can be enforced only by the courts, it does not follow that the summons is therefore without effect (or, as the Court states in its opinion, applies "no force"), or that its command may be ignored with impunity "no matter the taxpayer's reasons or lack of reasons for so refusing." (Slip op. 4.) To the contrary, as the Supreme Court noted in *Reisman v. Caplin*, 375 U.S. at 446-447, "any person summoned who 'neglects to appear or to produce' may be prosecuted under [26 U.S.C.] § 7210 and is subject to a fine not exceeding $1,000 or imprisonment for not more than a year or both." Although Section 7210 "does not apply where the witness appears and interposes good faith challenges to the summonses," 375 U.S. at 447, and although "noncompliance is not subject to prosecution thereunder when the summons is attacked in good faith," *ibid.*, a willful failure to comply with an IRS summons carries with it the risk of criminal prosecution. Thus, in *United States v. Becker*, 259 F.2d 869 (2d Cir. 1958), this Court affirmed a conviction for violating Section 7210, where the defendant had willfully and knowingly neglected to produce certain of the books and papers called for under a summons issued by an IRS special agent.

We do not think the Court intended to do violence to *Becker* or to disregard the teachings of *Reisman*; but its opinion here may be read broadly (and

erroneously) to rule out a criminal prosecution under Section 7210 for a willful failure to comply with an IRS summons, where the summoned party acted in bad faith and willfully failed "to appear and to produce." Such a result would be at odds with the language of the statute, the Supreme Court's decision in *Reisman*, and this Court's decision in *Becker*. Contrary to the statement made in the Court's opinion, the summoned party's reasons or lack of reasons for not complying with the summons *do* matter.

2. Similarly, language in the Court's opinion may be interpreted as reading 26 U.S.C. § 7604(b) out of the law, a result we think the Court also did not intend. Section 7604(b) provides as follows:

> Whenever any person summoned . . . neglects or *refuses to obey such summons*, . . . as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, *to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.*

(Emphasis added.) Under the statute, a court may punish disobedience *of an IRS summons*, consistent with the law for the punishment of contempts. It is the contempt of the summons, and not only any subsequent court order enforcing it, that may be punished. As the Supreme Court noted in *Reisman*, 375 U.S. at 448, Section 7604(b) is "intended only to cover persons who were summoned and wholly made default or contumaciously refused to comply." Section 7604(b) – like Section 7210 – underscores the facts that a summoned party's reasons for noncompliance do matter and that contumacious behavior does have consequence. Indeed, when a Section 7604(b) complaint is filed, "[i]f the taxpayer has contumaciously refused to comply with the administrative summons and the Service fears he may flee the jurisdiction, application for the sanctions available under § 7604(b) might be made simultaneously with the filing of the complaint." *United States v. Powell*, 379 U.S. 48, 58, n.18 (1964).

The summoned party in a Section 7604(b) proceeding – like the defendant in a Section 7210 prosecution – is always free to present any defenses he may have to enforcement of the summons or to any other relief sought by the Government. Nonetheless, in an appropriate case he may be detained or otherwise punished according to the law of contempts, if he is found to have been contumacious in his refusal. Accordingly, contrary to the Court's statement (Slip op. 4), a summoned

party *can* "be held in contempt, arrested, detained, or otherwise punished for refusing to comply with the original IRS summons" – *provided* the summoned party wholly defaults or is contumacious in his refusal.[6]

3. Given the misunderstanding of the consequences that flow from the issuance of an IRS summons, it is not surprising that the Court concluded (slip op. 5) that "issuance of an IRS summons creates no Article III controversy and, therefore, federal courts do not have jurisdiction over motions to quash IRS summonses in the absence of some effort by the IRS to seek court enforcement of the summons." But, placed in the proper context, we do not think the District Court's lack of subject matter jurisdiction over Schulz's motions was due to the absence of an Article III case or controversy. As Chief Justice Hughes famously said, "[a] justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character, from one that is academic or moot. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what

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[6] We note that the Court's reliance (Slip op. 4) on the statement in *Reisman*, 375 U.S. at 446, that "only a refusal to comply with an order of the district judge subjects the witness to contempt proceedings," is misplaced. The Supreme Court was there discussing an enforcement proceeding brought under *7402*(b), *not* a proceeding under Section 7604(b) and the Court clearly regarded proceedings under each provision as distinct alternatives. 375 U.S. at 446 n.4 ("Section 7604(a) and (b) gives an additional remedy which is considered hereafter.").

the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937). Certainly, there is nothing "hypothetical or abstract" about the nature of the dispute between a taxpayer who is summoned by the IRS "to testify, and to produce" but refuses to do either. Indeed, so real are the potentially adverse effects that may flow from the mere issuance of a summons to a person other than the taxpayer that Congress has seen fit to permit a taxpayer to file a petition to quash a third-party summons without demonstrating any other harm. *See* 26 U.S.C. § 7609(b)(2).

That the summoned party himself is not permitted to seek pre-enforcement judicial review of the summons's validity is thus a matter of congressional choice, rather than an absence of a case or controversy. It is not surprising, then, that the Supreme Court in *Reisman* decided that the petitioners' attempt to challenge the summonses at issue there had to be dismissed, not for want of a case or controversy, but rather because "the remedy specified by Congress works no injustice and suffers no constitutional invalidity." 375 U.S. at 450. The parties were therefore remitted "to the comprehensive procedure of the Code, which provides full opportunity for judicial review before any coercive sanctions may be

imposed."[7] *Ibid.* It is the comprehensive procedure established by Congress, and this holding of *Reisman*, that bars Schulz's action, not the absence of a case or controversy.

4. Consequently, we respectfully ask the Court to amend its opinion, *mutatis mutandis*, as follows (new language in *italics*; deleted language ~~struck through~~), to make clear the importance of a taxpayer's obligation to comply in good faith upon receiving an IRS summons:[8]

> In May and June 2003 defendant-appellee, the Internal Revenue Service ("IRS"), served plaintiff-appellant, Robert L. Schulz, with a series of administrative summonses seeking testimony and documents in connection with an IRS investigation of Schulz. Schulz filed in the United States District Court for the Northern District of New York motions to quash those summonses. In an order dated October 16, 2003, Magistrate Judge David R. Homer dismissed Schulz's motions for lack of subject matter jurisdiction, finding that, because the IRS had not commenced a proceeding to enforce the summonses, a procedure described in 26 U.S.C. § 7604, Schulz was under no threat of consequence for refusal to comply and, until such time as the IRS chose to pursue compulsion in a United States district court, no case or controversy existed. Magistrate Judge Homer further found that if the IRS did attempt to compel Schulz to produce testimony and documents named in the summonses, the enforcement procedure described in § 7604 would provide Schulz with adequate opportunity to contest the request.

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[7] The Court could just as easily have relied on the doctrine of sovereign immunity or on the bar of the Anti-Injunction Act. *See* 26 U.S.C. § 7421.

[8] For ease of comprehension, the entire body of the Court's opinion (with the changes we suggest) is set forth in the text below.

Schulz filed an appeal and objection in the District Court. By order dated December 3, 2003, the District Court denied those objections and dismissed the appeal. Schulz now appeals from that final decision of the District Court. We assert jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

~~It is well-established that 'Article III of the Constitution confines the jurisdiction of the federal courts to actual "Cases" and "Controversies."' *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (citations omitted). To demonstrate the standing necessary to invoke the jurisdiction of the federal courts Schulz must 'allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' *Allen v. Wright*, 468 U.S. 737, 751 (1984). This injury may not be speculative or abstract, but must be distinct and definite. *Id.*~~

~~In its present posture, Schultz's motion does not satisfy this requirement.~~ [¶]As the Supreme Court pointed out in *United States v. Bisceglia*, IRS summonses *can be enforced only by the courts* ~~have no force or effect unless the Service seeks to enforce them through a § 7604 proceeding~~. 420 U.S. 141, 146 (1975), *partially superseded by* 26 U.S.C. § 7609, as stated in *In re Does*, 688 F.2d 144, 148 (2d Cir. 1982). The IRS has not initiated any enforcement proceeding against Schulz ~~and therefore what amount to requests do not threaten any injury to Schulz~~. Of course, if the IRS should, at a later time, seek to enforce these summonses, then the procedures set forth in § 7604(b) will afford Schulz ample opportunity to seek protection from the federal courts. *See Bisceglia*, 420 U.S. at 146; *see also Reisman v. Caplin*, 375 U.S. 440, 447-50 (1964) (denying injunctive relief from IRS summonses because § 7604(b) "provides full opportunity for judicial review before any coercive sanctions may be imposed"); *United States v. Tiffany Fine Arts, Inc.*, 718 F.2d 7,11 (2d Cir. 1983)("[*Bisceglia*] reasoned that by creating the enforcement proceeding mechanism Congress had intended to place the federal courts between the IRS and the person summoned, and that the courts could contain [the threat of IRS overreaching] by narrowing the scope of or refusing to enforce abusive summonses.").

We realize that our holding today stands in direct contradiction to our previous decisions in *Application of Colton*, 291 F.2d 487, 491 (2d Cir. 1961), and *In re Turner*, 309 F.2d 69, 71 (2d Cir. 1962). While reversal of our prior precedent is never a matter we regard lightly, we take no small solace in Judge Friendly's discussion of *Colton* and *Turner* in *United States v. Kulukundis*, 329 F.2d 197 (2d Cir. 1964). There Judge Friendly, who authored both *Colton* and *Turner*, points out that *Reisman* "seems to destroy the basis underlying decisions of this court which authorized applications to vacate [an IRS] summons and (appeals from their denial) in advance of any judicial proceeding by the Government for their enforcement." *Id.* at 199. In light of this, we view ourselves today as completing a task begun forty years ago and hold that, ~~absent an effort to seek enforcement through a federal court, IRS summonses apply no force to taxpayers, and no consequence whatever can befall a taxpayer who *in good faith* refuses, ignores, or otherwise does not comply with an IRS summons until that summons is backed by a federal court order. In addition, we hold that if the IRS seeks enforcement of a summons through the courts, those subject to the proposed order must be given a reasonable opportunity to contest the government's request. If a court grants a government request for an order of enforcement then we hold, consistent with 26 U.S.C. § 7604 and *Reisman*, that any individual subject to that order must be given a reasonable opportunity to comply and cannot be held in contempt, arrested, detained, or otherwise punished for refusing to comply with the original IRS summons, no matter the taxpayer's reasons or lack of reasons for so refusing. *See Reisman*, 375 U.S. at 446 ("[O]nly a refusal to comply with an order of the district judge subjects the witness to contempt proceedings.") Any lesser protections would expose taxpayers to consequences derived directly from IRS summonses, raising an immediate controversy upon their issuance. Holding as we have, however, allows us to hold further that issuance of an IRS summons creates no Article III controversy and, therefore,~~ *apart from petitions to quash third-party summonses under 26 U.S.C. § 7609(b)(2),* federal courts do not have jurisdiction over motions to quash IRS summonses in the absence of some effort by the IRS to seek court enforcement of the summons. *Congress has not chosen to permit taxpayers to challenge IRS summonses until the IRS seeks a court order to enforce them. As the Supreme Court noted in Reisman, 375 U.S. at 450, summoned parties are remitted "to the comprehensive procedure of the Code, which*

provides full opportunity for judicial review before any coercive sanctions may be imposed." For them, the remedy at law – namely, proffering their defenses in the context of summons enforcement proceedings – is fully adequate. Reisman, *375 U.S. at 443.*

~~Consistent with these holdings, we find that, on the facts before us, no force has been applied to Schulz and his request for action is premature.~~ [¶] *Accordingly, [t]*he decision of the District Court dismissing Schulz's motions for want of subject matter jurisdiction is AFFIRMED.

CONCLUSION

For the reasons discussed above, the opinion in this case should be amended (as outlined above) to clarify that a district court is without jurisdiction to quash a summons the IRS issues to a taxpayer in connection with its examination of the taxpayer's own liabilities under the Internal Revenue Code prior to the Government's seeking enforcement of the summons in court.

In the alternative, should this Court conclude that its opinion should not be amended and that this motion should be denied, we respectfully request that, pursuant to Fed. R. App. P. 35(c), 40(a)(1), and 41(b),(d)(1), the Court stay its mandate and extend the period for filing a petition for rehearing en banc for 45 days from the date of the denial of this motion.

Respectfully submitted,

EILEEN J. O'CONNOR
Assistant Attorney General

GILBERT S. ROTHENBERG (202) 514-3361
FRANK P. CIHLAR (202) 514-2839
Attorneys
Tax Division
Department of Justice
P.O. Box 502
Washington, D.C. 20044

GLENN T. SUDDABY
United States Attorney
for the Northern District of New York

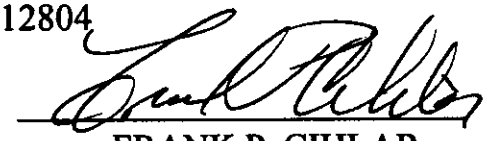
ROBERT P. STORCH
Assistant United States Attorney

MARCH 2005

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing motion to amend opinion or, in the alternative, to extend the time to file a petition for rehearing en banc, and a copy on computer diskette thereof, were sent to the Clerk by Federal Express on this 1st day of March, 2005. It is further certified that the motion has been served on appellant, appearing *pro se*, by sending to him, on this 1st day of March, 2005, by Federal Express, two paper copies, and one copy on computer diskette thereof, in an envelope properly addressed to him as follows:

Mr. Robert L. Schulz
2458 Ridge Road
Queensbury, New York 12804



FRANK P. CIHLAR
Attorney

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ROBERT L. SCHULZ,	)	
	)	
Plaintiff-Appellant	)	
	)	
v.	)	No. 04-0196
	)	
IRS, UNITED STATES, ANTHONY ROUNDTREE,	)	
	)	
Defendants-Appellees	)	

DECLARATION

Frank P. Cihlar, of the Department of Justice, Tax Division, Appellate Section, Washington, D.C., states as follows:

1. The facts stated in the accompanying motion are true and correct to the best of my knowledge.

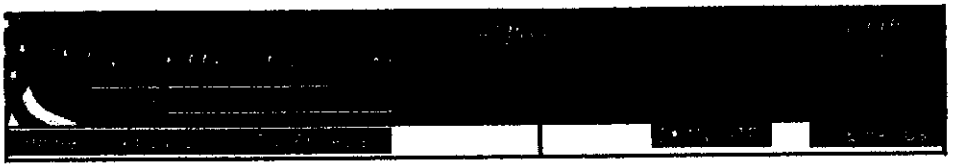
2. Attached hereto is a true and accurate copy of a press release downloaded from the Internet website http://www.givemeliberty.org on February 2, 2005.

3. Attached hereto is a true and accurate copy of an article downloaded from the Internet website http://worldnetdaily.com on February 25, 2005.

4. Attached hereto is a true and accurate copy of a letter filed under Fed. R. App. P. 28(j) by the taxpayer's counsel in a pending Eighth Circuit appeal, *Morse v. Commissioner*, No. 04-2040.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct. Executed this 1st day of March, 2005, in Washington, D.C.

FRANK P. CIHLAR
Attorney for Appellee



We The People Foundation For Constitutional Education, Inc.

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www.givemeliberty.org info@givemeliberty.org

January 30, 2005

Contact: Bob Schulz (518) 656-3578

For Immediate Release

U.S. Court of Appeals Rules IRS Cannot Apply Force Against a Tax Payer Without A Court Order

Taxpayers Free To Ignore An IRS Summons

Queensbury, NY – On January 25, 2005, the U.S. Court of Appeals for the Second Circuit held that taxpayers cannot be compelled by the IRS to turn over personal and private property to the IRS, absent a federal court order.

Quoting from the decision (*Schulz v. IRS*, case number 04-0196-cv), "...absent an effort to seek enforcement through a federal court, IRS summonses apply no force to taxpayers, and no consequence whatever can befall a taxpayer who refuses, ignores, or otherwise does not comply with an IRS summons until that summons is backed by a federal court order...[a taxpayer] cannot be held in contempt, arrested, detained, or otherwise punished for refusing to comply with the original IRS summons, no matter the taxpayer's reasons, or lack of reasons for so refusing."

Without declaring those provisions of the Code unconstitutional on their face, the court, in effect, nullified key enforcement provisions of the Internal Revenue Code, stripping the IRS of much of its power to compel compliance with its administrative demands for personal and private property. The court characterized IRS summonses issued under Section 7602 as mere "requests."

The court went on to say that the federal courts are there to protect taxpayers from an "overreaching" IRS, and that the IRS must go through the federal courts before force can be applied on anyone by the IRS to turn over personal and private property to the IRS.

In addition, the Court held, in effect, that the enforcement language of Section 7604 of the Internal Revenue Code is unconstitutional. In plain language, Section 7604 directs federal District Court judges to issue orders, merely upon a request by the IRS, for the immediate arrest and incarceration of a tax payer "for contempt" for not complying with the demands of an IRS administrative summons/request.

Declaration Exhibit 1

Prior to the 2nd Circuit's recent landmark decision, the common practice of compliant federal judges was to issue such orders, often without an evidentiary hearing or allowing the taxpayer, in an Article III Federal Court, to challenge IRS claims before being subjected to formal enforcement proceedings (liens, levies, wage garnishments, searches, property seizures, etc.). The result has been widespread and egregious abuse of its lawful authority by the IRS, and substantial injury to millions of tax payers.

- more -

"Does the Court's decision mean that companies do not have to turn over a worker's paycheck to the IRS simply because the IRS demanded it; and banks do not have to turn over to the IRS the contents of someone's bank account merely because the IRS requested it?," asked Bob Schulz, the plaintiff in the case, and the Chairman of the We The People Foundation for Constitutional Education, Inc.

Schulz asked, "Does this mean that at least in the 2nd Circuit, no individual, no third party (such as an employer or a bank) need worry about being threatened and intimidated by the IRS for refusing to comply with an IRS demand for personal and private property? Isn't the 2nd Circuit Court of Appeals stating, in clear language, that without an Article III Federal Court order, the IRS cannot apply force against a tax payer?

"We would agree, the use of force by the IRS against the person or property of any tax payer without an evidentiary hearing and formal order issued by an Article III Federal Court, is a direct violation of the Privacy and Due Process clauses of the United States Constitution. It appears that the IRS has now been put on notice – they are not above the law."

In 2003, Schulz, was served several IRS summonses ordering him to produce his books and records. Schulz, as plaintiff, immediately challenged the IRS in District Court on constitutional grounds, claiming that the summonses were issued without any *bona fide* authority in law and with the sole, deliberate intent to harass and intimidate as a result of the Foundation's high-profile activism questioning the lawful authority of the IRS to impose a direct, un-apportioned tax on labor.

Despite the clear language of an IRS summons which states, **"You are hereby summoned and required..."** and the threatening language of the federal tax statute at 26 USC 7604 (which governs enforcement of IRS summons), the 2nd Circuit Court of Appeals has effectively ruled that the language of the Internal Revenue Code, and the administrative and enforcement practices of the IRS and DOJ, must comply with the strict Due Process requirements of the United States Constitution, and that the IRS will not be allowed to continue its practice of serving summonses upon average tax payers with the intent of intimidating them into compliance.

Naturally, this Appellate decision directly leads to further questions regarding IRS's other day-to-day administrative practices where substantial constitutional "injuries" are, in fact, inflicted routinely upon citizens and businesses in the form of liens, levies, salary garnishments, property seizures, etc. – all of which are administrative, agency actions taken without any judicial review or court order.

The 2nd Circuit's decision also carries profound implications regarding the Foundation's historic Right-to-Petition Lawsuit now underway in the D.C. Federal District. (*We The People, et al v. The United States, et al.*, Civ. No. 04-0211)

The IRS and DOJ, as defendants in the RTP lawsuit, have recently filed motions asserting that the government has "no obligation" to "listen to" or "respond to" the People's First Amendment Petitions regarding the unlawful administrative and enforcement practices and the systemic abuse of power by the IRS and DOJ.

(more)

The 2nd Circuit's recent decision could potentially have a powerful positive effect on the RTP lawsuit, and the People's historic struggle to hold the IRS and our government leaders at every level, accountable to the law.

The Court's decision in the Schulz case is an historic and courageous first step in restoring constitutional order to the administration and enforcement of our nation's tax laws, and effectively puts the IRS and DOJ on notice that violations of tax payer's Due Process rights will no longer be tolerated.

To read the Second Circuit's decision, go to

www.GiveMeLiberty.org/rtplawsuit/courtfilings/2ndCirc-Decision-Jan-05.pdf

To learn about the Right-to-Petition lawsuit and read the RTP legal research, go to:

www.GiveMeLiberty.org/rtplawsuit/InfoCenter.htm

The Foundation's website is : www.GiveMeLiberty.org

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WorldNetDaily

TUESDAY
FEBRUARY 1
2005

WORLDNETDAILY EXCLUSIVE

LAW OF THE LAND

Court: Taxpayers can ignore IRS summonses

Ruling says action has no teeth without federal court order

Posted: February 1, 2005
1:00 a.m. Eastern

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A U.S. appeals court has ruled the IRS cannot compel taxpayers to turn over personal and private property without a federal court order and that taxpayers can ignore the agencies summonses until actual enforcement action is taken.

In the case Schulz v. IRS, the Second Circuit Court of Appeals in Manhattan ruled:

> ... absent an effort to seek enforcement through a federal court, IRS summonses apply no force to taxpayers, and no consequence whatever can befall a taxpayer who refuses, ignores, or otherwise does not comply with an IRS summons until that summons is backed by a federal court order. ... [A taxpayer] cannot be held in contempt, arrested, detained, or otherwise punished for refusing to comply with the original IRS summons, no matter the taxpayer's reasons, or lack of reasons for so refusing.

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TaxEngine.com makes filing taxes online easy. IRS E-file partner. ...
http://www.taxengine.com

Bob Schulz, the plaintiff, is head of We the People, an organization that has taken separate legal action against the federal government for its failure to answer a "petition for redress of grievances" regarding the income tax. Though the court affirmed a lower court decision in favor of the IRS, saying Schulz's motion to quash an IRS summons lacked "subject matter," it used the ruling as a means to clarify the agency's power under 26 U.S.C. Section 7604.

The appeals court decision [*.pdf document*] of Jan. 25 stated the federal courts protect taxpayers from an "overreaching" IRS and that the agency must go through the federal courts before force can be applied on anyone to turn over personal and private property to the IRS. Absent a federal court order, the IRS summons amounts simply to a "request," the court ruled, which can be ignored.

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A statement on the group's website went on to say: "Without declaring provisions of the code unconstitutional on their face, the court, in effect, nullified key enforcement provisions of the Internal Revenue Code, stripping the IRS of much of its power to compel compliance with its administrative demands for personal and private property."

We the People claims the court decision will benefit the organization's class-action lawsuit against the IRS.

States the group: "The court has expressly recognized that the IRS, as has been asserted in the right-to-petition lawsuit, routinely violates people's due process rights in their day-to-day administrative practices. As such, the findings of the Second Circuit firmly establish for the District Court the substance of the causes of action put forth in our right-to-petition lawsuit."

Schulz's lawsuit stemmed from an IRS summons served on him in relation to an investigation. He claims the summons was a direct infringement on his First Amendment rights.

Activists of the "tax honesty" movement, in which WTP is a leading voice, believe the federal government lacks any legal jurisdiction to enforce the income tax, that there is no law that requires Americans to pay the tax, and that the tax is enforced in a manner that violates the U.S. Constitution.

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15 February 2005

United States Court of Appeals for the 8TH Circuit
Thomas F. Eagleton Court House
Room 24.329
111 South 10TH Street
Saint Louis
Missouri 63102

Re: *Kevin J. Morse vs. Commissioner of Internal Revenue*, Appellate Case No. 04–2040.

Dear Honorable Judges of the Court of Appeals and Clerk Gans:

I have received the notice from the Court dated February 8, 2005, that oral argument in the above–captioned case will not be had since the Court has determined to hear this case without oral argument.

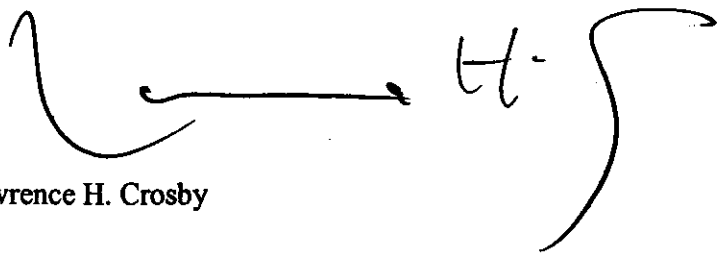
I cannot remember circumstances where I have not been permitted to offer oral argument in our 8TH Circuit. (This has regularly happened in my cases in the 10TH Circuit since oral argument is not regularly granted.) I understand that the Court has decided that it does not need additional information or comment to decide this case. I will abide by the Court's decision.

Pursuant to Rule 28(j), Federal Rules of Appellate Procedure, Citation of Supplemental Authorities, I also want to bring to the Court's attention a case from the 2ND Circuit, *Schulz vs. Internal Revenue Service*, 04–0196–CV (2005), which indicates that a taxpayer (and, one may infer, a taxpayer's agents such as an accountant or banker) cannot be compelled by an Internal Revenue Summons to turn over personal property without an accompanying court order. Given that many of the documents obtained by the Internal Revenue Service in the present Morse case were obtained by means of Internal Revenue Service Summons, there may be a question as to the legitimacy of the admission of many of these documents.)

Please call my office if you have any questions

J-21797

Sincerely yours,



Lawrence H. Crosby

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