

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Robert L. Schulz

Plaintiff-Appellant

No. 04-0196

-vs-

IRS, United States, Anthony Roundtree

Defendants-Appellees

**APPELLANT'S OPPOSITION TO MOTION TO AMEND AND
PETITION FOR REHEARING EN BANC**

Robert Schulz, Plaintiff-Appellant herein, respectfully requests that the Court deny Defendants' motion to amend the opinion in the captioned case issued on January 25, 2005, or in the alternative, Plaintiff petitions for a rehearing en banc.

STATEMENT OF THE CASE

This is a case that arises from the Constitution and a controversy where the United States is a party.

This is an action to quash IRS Summonses served on Schulz on the ground that the issuance of the Summonses has caused personal, non-speculative, distinct injury to Plaintiff.

Plaintiff argues that under the facts and circumstances of this case the Summonses amount to nothing more than an effort by the government to chill the

enthusiasm of Schulz and the thousands of citizens who have been participating with Schulz in a high-profile process of Petitioning the government for Redress of Grievances regarding well documented evidence of constitutional torts including government's violation of the war powers, tax, money and debt-limiting, and due process clauses of the Constitution. Plaintiff argues that the IRS Summonses equate to Constitutionally impermissible retaliation against Schulz because they lessen and diminish specific, individual Rights that the Constitution guarantees Schulz is free to exercise without abridgment, infringement, harassment, retribution or prior restraint: the Right to Petition government for Redress of Grievances; the Right to Peaceably Assemble and to associate with like minded people; the Right to Speak Freely; the Right to Publish in newspapers, on the Internet, on compact discs and video tapes; the Right to be Secure in Person, House, Papers and Effects Against Unreasonable Searches and Seizures; etc. (Plt's Mot. Quash, A.16).¹

This is also an action to quash IRS Summonses on the ground that they are *ultra vires* in light of the restrictions of Article I, Section 8, Clause 17 of the Constitution and its implementing statute, that limit the jurisdiction of the IRS to territory that does not include Plaintiff's Town or County. (Plt's Mot. Quash, A.16).

The District Court and the Court of Appeals decided that the judicial power of the federal courts, under Article III of the Constitution, does not extend to this case because Schulz has not and will not incur any injury unless and until the IRS

¹ References beginning with "A." are references to page numbers in the APPENDIX FOR PLAINTIFF.

initiates an action against Schulz in District Court, under 26 U.S.C. section 7604(b), to compel compliance with the IRS summons.²

In effect, the Court dismissed Plaintiff's motions to quash the IRS Summonses on the ground that the IRS has only taken the first step of a two-step enforcement program against Plaintiff, and until the IRS takes the second step there is no case or controversy giving the Court jurisdiction.³

On appeal, Plaintiff again argued that the Summonses should be quashed on the ground that the Summonses amounted to nothing more than "Constitutionally impermissible retaliation," abridging Plaintiff's Right to Petition the government for Redress of Grievances and other fundamental Rights guaranteed by the Bill of Rights (App. Br., Pt. I), that the District Court erred in ruling that because the IRS has not initiated an enforcement action the court lacks subject matter jurisdiction (App. Br., Pt. II), and that the IRS lacked territorial jurisdiction under Article I, Section 8 of the Constitution (App. Br., Pt. III).

The Court of Appeals, in affirming, held that the IRS Summonses amount to requests that do not threaten any injury, have no force or effect unless the IRS seeks to enforce them under 7604, and no consequences can befall a taxpayer, who in *good faith* refuses, ignores, or otherwise does not comply with the summons until

² Plaintiff does not argue here the issue of subject matter jurisdiction based on the Summons' diminishment of his Rights under the First Amendment. However, Plaintiff does preserve the question for rehearing and/or appeal.

³ The first of the two steps is the issuance of a Summons under 26 USC 7602, requiring the party summoned to turn over his private and personal property (his books and records), to an IRS Agent. The second step is an action in federal District Court by the IRS, under 26 USC 7604, against the party summoned, if the party summoned did not comply with the IRS Summons.

that summons is backed by a federal court order. In addition, the Court held that any taxpayer subject to a court order under 7604 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.

Defendants have moved to amend the Court's decision and order.

DISCUSSION

Defendants' are wrong in their chastisement of the Court for "creating a false impression," and "misapprehending" and "misunderstanding" and "misstating" and being "inaccurate," regarding the "consequences that flow from the issuance of an IRS summons."

The Court's opinion is not only true to certain holdings of the U.S. Supreme Court in *Reisman* and *Bisceglia*, it is entirely consistent with Defendant IRS' arguments before the Court in the instant case.

For instance, at oral argument, Defendant was asked by the court, "So, it is your position that a taxpayer who receives a subpoena and does not comply suffers absolutely nothing until an enforcement action is brought?" Defendant answered, "That is my understanding."

At oral argument, Defendant was also asked, "So, the enforcement action does not seek to hold somebody in contempt, it seeks the court order that if then

violated would prompt a contempt?” Defendant answered, “I believe that is correct.”

When asked by the Court if the taxpayer is under compunction to comply with an IRS summons, Defendant wrote:

“Thus, as indicated in oral argument, the IRS does not have the power to compel the taxpayer to obey an administrative summons without obtaining an order from the proper district court.” (Dfs’ Ltr., page 1).⁴

There is only one meaning that can be given to Defendants’ response. The Court correctly held that IRS Summonses are “requests,” having “no force or effect unless the Service seeks to enforce them through a Section 7604 proceeding,” and “apply no force to taxpayers, and no consequences can befall a taxpayer who refuses or ignores, or otherwise does not comply with an IRS summons until that summons is backed by a federal court order.” (Opinion 3,4) (Plaintiff’s emphasis).

However, Defendants are now asking the Court to amend its decision and order by striking all of this quoted language from its opinion. (Dfs’ Mot., at 12-13). Plaintiff strongly objects for the reasons given below.

When asked by the Court what the IRS does when a taxpayer neglects or refuses to comply with an IRS Summons, Defendants’ response was again consistent with *Reisman* and the basic tenets of due process. Defendants wrote:

⁴ Defendants have also argued, “that until the IRS commences an enforcement proceeding under 26 U.S.C. Section 7604, the taxpayer is under no compulsion to disclose information or records”(Def’s Brief, page 4).

“When any person refuses or neglects to comply with an administrative summons, the IRS must seek judicial enforcement of the summons by bringing what it refers to as a ‘summons enforcement action’ in district court. In such an action, the IRS can request an order from the court compelling testimony and/or production of relevant or material documents. 26 U.S.C. Section 7604(b); see *Powell*, 379 U.S. 58 (‘It is the court’s process which is invoked to enforce the administrative summons....’); *Reisman v Caplin*, 375 U.S. 440, 445-46 (1964) (enforcement action in the district court ‘would be an adversary proceeding affording a judicial determination of the challenges to the summons and giving complete protection to the witness.’) The Internal Revenue Code grants the district court in the district where the person resides or is found jurisdiction to hear a summons enforcement suit initiated by the IRS. 26 U.S.C. Section 7604(a), 7402(b). In such an action, the government would have the burden of establishing a *prima facie* case for enforcement of the summons, by showing that ‘(i) a legitimate purpose exists for the investigation, (ii) the summons may be relevant to that purpose, (iii) the information sought is not already in the possession of the government, and (iv) the procedural and administrative steps required by the Code for serving a summons have been followed.’ *PAA Management, Ltd. v. United States*, 962 F.2d 212, 215 (2d Cir. 1993) (citing *Powell*, 379 U.S. at 57-58). Once that showing has been made, the burden shifts to the party challenging the summons to show that it was issued for an improper purpose, issued in bad faith, or was otherwise deficient. *PAA Management*, 962 F.2d at 215 (citing *Reisman*, 375 U.S. at 449); see generally *United States v. LaSalle National Bank*, 437 U.S. 298, 316 (1977).” (emphasis in the original). (Dfs’ Ltr., page 2).

This response by Defendants is a model of due process by judicial review. It is consistent with *Bisceglia* and *Reisman*. Notably, Defendant made no mention of the application by the IRS of any force against the taxpayer before the government initiates a legally prescribed enforcement action, and before the IRS establishes a *prima facie* case in federal court, and before the taxpayer has a reasonable

opportunity in federal court to defend himself against a complaint that he neglected or refused to comply with the original summons, and before a federal district court orders the taxpayer to comply with the original summons. Defendants made no mention of any exceptions to its procedural model above, and no mention of the remotest possibility of the taxpayer being held in contempt, arrested, detained, or otherwise punished for simply refusing to comply with the original IRS summons.

The Court thus held:

“[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 than we hold, consistent with 26 U.S.C section 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....” (Opinion at 4-5).

However, Defendants are now also asking the Court to amend its opinion and order by striking all of this quoted language from its opinion. (Dfs’ Mot. at 13). Plaintiff strongly objects for the reasons given below.

The Court has apparently determined that unless and until the IRS applies more force against Plaintiff, the matter is “premature” as an Article III case and controversy, because Plaintiff’s alleged injuries are “speculative or abstract” and not sufficiently “distinct or definite.”

Thus, the Court held:

“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.*” (Opinion at 3).

Defendants are also now asking the Court to amend its decision by striking all of this quoted language from its opinion. (Dfs’ Mot. at 12). Plaintiff strongly objects for the reasons given below.

DEFENDANTS’ MOTION TO AMEND SHOULD BE DENIED

Defendants’ suggested amendments to the Court’s opinion are based on Defendants’ theory that “the Court’s opinion creates the false impression that taxpayers are free to simply ignore an IRS summons.”

In fact, as Defendants themselves have argued, the recipient of an IRS summons *is* free to ignore the original summons for any reason whatsoever and the IRS has no power to compel compliance with the original summons.

The Supreme Court, in *Reisman*, made clear the fact that People can refuse to comply with IRS administrative Summonses and cannot be punished for refusing or neglecting to comply, and that if the IRS feels it can establish a *prima facie* case and wants to enforce the summons they must seek judicial review.

By necessity, the compelling interests of the People must stand above the limited interests of the government.

Defendants admit that the recipients of IRS Summonses are free to ignore the summons. However, the IRS *knows* the average tax payer, on receipt of a Summons from the IRS is going to view that as he/she would any other Summons, and that is, that it requires action. The IRS *knows* that the average recipient of an IRS summons is *not* likely to ignore the Summons unless the recipient knew he could do that.

The problem the IRS has, as shown by its motion to amend, is that the IRS does not want the People to know they have the option of ignoring an IRS summons. The IRS does not want the Summons, itself, to say the recipients have any options, other than the “*required*” action, and the IRS certainly does not want any Court to let that truth out as clearly as this Court has done.⁵

⁵ In fact, the IRS has had over 40 years, since the decision in *Reisman*, to seek an amendment to the “Stalinesque” language of section 7604(b), but the IRS has made no attempt to do so. Plaintiff believes it would be helpful if this

The IRS is content with leaving unaltered the widespread “Orwellian” illusion that recipients of Summonses have no option to the “required” action, and that if the recipient neglects or refuses to comply, government agents can simply arrest him in the middle of the night and put him in jail for “contempt.”

If anyone is guilty of creating false impressions it is the IRS. For forty years or more, the IRS has been covering the People with a blanket of propaganda, routinely acquiring personal and private property, *on demand*, without judicial review, leaving the People with the illusion that there must be an IRS exception to the law of due process.

The IRS merely wants to continue doing what it has been doing --- operating above the law, bullying and intimidating the People into “voluntarily” giving up their due process Rights while giving the IRS what it wants, AND not allowing the People to hold them accountable in an Article III court.

There is nothing false about what the Court has said. The Court’s candid and honest opinion provides a much-needed check on the operation of the IRS who, as its motion to amend clearly implies, prefers to act extra-judicially.

If the primary role of the Judiciary is to protect the Liberties, Rights and Freedoms of the People by keeping the other two branches in their Constitutional places, then the Court is to be commended for its decision, certainly not chastised by the IRS and its attorneys.

Court would amend its January 25, 2005 Opinion by declaring 26 U.S.C. section 7604(b) to be null and void.

Defendants argue that the Court's opinion creates a false impression that taxpayers are free to simply ignore an IRS summons and that this will impede "the effective administration and enforcement of the nation's tax laws."

This is not entirely true.

It may be true that the Court's opinion means it will not be business as usual for the IRS and its agents: more due process and less "do it my way or else," might result in less "effective" tax collection, however, any suggestion that taxpayers do not have due process Rights and are *not* free to ignore an IRS Summons that is not backed by a court order is false.

Defendants can't have it both ways. Either the Court lacks jurisdiction because Plaintiff is free to ignore the original IRS Summons, or the Court has subject matter jurisdiction because the Plaintiff has no option but to act in response to his receipt of the IRS Summonses.

The issue here is due process, not one of "false impressions" by the Court.

As the Defendants have argued in their pleadings and at oral argument, and as the court correctly held, taxpayers are free to ignore an IRS Summons at their own risk. As the IRS and DOJ have argued in their pleadings and at oral argument, "The IRS does not have the power to compel the taxpayer to obey an administrative Summons without obtaining an order from the proper district court." (Dfs' 12/20/04 ltr, page 1).

Defendants now arrogantly argue that the Court's decision should be amended

because the Court:

1. "misapprehends the consequences that ensue from the issuance of an IRS administrative summons" (page 2)
2. "[is under] the false impression that taxpayers are free to simply ignore an IRS summons" (page 2)
3. "misstate[ed] the reason why the District Court was without subject matter jurisdiction over this action" (page 2)
4. "misapprehend[ed] the consequences that may befall a taxpayer...." (page 4)
5. "[is] inaccurate in several respects." (page 5)
6. "[did not intend] to do violence to *Becker* or to disregard the teachings of *Reisman*"(page 6)
7. "misunderstand[s] the consequences that flow from the issuance of an IRS summons...."(page 9)

The court did not misapprehend or misunderstand the consequences that could befall a taxpayer who did not respond to an IRS Summons. The court is fully familiar with the Internal Revenue Code.

If, as Defendants now argue, taxpayers are, exposed to "real consequences" derived directly from the issuance of IRS Summonses, then it follows that a real controversy *is* raised immediately upon their issuance, giving rise to subject matter jurisdiction under Article III of the federal Constitution.

However, in order to prevent the court from accepting jurisdiction, and thus to prevent the underlying issues from being heard by the court, Defendants brazenly argue that "the bar to subject matter jurisdiction here is not the absence of a case or

controversy... but rather is [a] comprehensive procedure devised by Congress.”⁶
Motion, page 2.

Defendants arrogantly tell the Court to rewrite its decision so that what goes down is a decision to dismiss for lack of jurisdiction with no mention of Article III of the Constitution.⁷

In effect, Defendants recommend that the Court adopt the following posture: “The federal Judiciary has no power to act in a case that arises under the Constitution or in a controversy to which the United States is a party, if the case or controversy involves a ‘comprehensive procedure devised by Congress.’” In other words, Defendants are suggesting a new court doctrine against jurisdiction based on a CPDC exception to Article III of the Constitution.

Defendants suggest the Court re-write the decision to show that a recipient of an IRS directive is not permitted to seek pre-enforcement judicial review of the validity of that directive and that this is “a matter of congressional choice, rather than an absence of a case or controversy.” Motion, page 10.

It is common knowledge that heavy-handed consequences routinely befall parties that do not comply with IRS’ administrative Summonses. It is common knowledge that the IRS routinely issues Summonses just like the one

⁶ Based on a reading of Defendants’ Motion, by “comprehensive procedure devised by Congress,” Defendants are referring to the combination of 26 USC Section 7602 (Authority to Summon), Section 7604 (Enforcement of Summons in federal Court), and Section 7210 (penalty for failure to obey Summons).

⁷ Defendants motion the court to go so far as to strike in its entirety the first paragraph of the Court’s decision that reads, “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).”

received by Plaintiff Schulz. It is common knowledge that most people react the way Plaintiff Schulz reacted when he received his Summons. Anxiety enveloped Schulz. The Summons read, “You are hereby summoned and required to”

Schulz didn’t want to turn over his personal and private property to the IRS. He did not want to turn over the names and addresses of all the People who were participating with Schulz in Petitioning the government for Redress of Grievances.

Schulz wondered what would happen if he refused to obey the Summons. Schulz read the next page of the Summons, which read in part:

“7604. Whenever any person summoned ... neglects or refuses to obey ...the [IRS] may apply to the judge of the district court ... for an attachment against him as for contempt. It shall be the duty of the judge...to hear the application, and, if satisfactory proof is made, to issue an attachment ... for the arrest of such person ... and ... the judge shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce such obedience to the requirements of the summons and to punish such person for his default or disobedience.”

With each dawn following his receipt of the IRS summons Plaintiff was expecting to be arrested. Plaintiff knew he could not comply with the IRS’ demands without betraying his core Constitutional beliefs and all the People who were participating with him in seeking a remedy to their grievances regarding Constitutional torts. Each day, Plaintiff would awake and immediately look down

his long driveway, half expecting to see IRS agents approaching with guns drawn. That is why Plaintiff moved to quash the summons.

Defendants would now have the Court cooperate with the Executive (and the Congress) in a collective decision to deny due process to Plaintiff and others. Defendants “instruction” to the court is shocking to the senses.

CONCLUSION

The Executive asserts its authority to act without Constitutional restraint or judicial review. It assumes the unilateral prerogative to interpret its own authority, and to act unchecked outside the limited powers delegated to it by the terms and conditions of the Constitution. If the People are truly sovereign, the Court, as a neutral arbiter and protector of the People and the People’s Natural Right as the final interpreter of the Constitution, should deny Defendants’ motion to amend or in the alternative grant Plaintiffs’ petition for a rehearing *en banc*.

DATED: March 9, 2005

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