IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

United States of America,	§	
	§	
Plaintiff,	§	
v.	§	
	§	**Case No. 4:03-CR-188-A**
Richard M. Simkanin	§	
	§	
Defendant.	§	
	§	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH INDICTMENT AND MOTION TO DISMISS FOR WANT OF PERSONAL AND SUBJECT MATTER JURISDICTION

In support of his Motion to Quash and Motion to Dismiss, Defendant Richard M. Simkanin (hereinafter "Defendant") files this Brief in Support and shows the Court as follows:

Defendant has raised specific challenges to the personal and subject matter jurisdiction of the Court and will address each of them hereinbelow. The order in which each issue is addressed is *not* necessarily reflective of the *weight* or importance that should be given. Any and all of the challenges, standing alone, are substantial enough to warrant the court to order that the indictment is quashed and the charges are dismissed.

I. NO OATH OF OFFICE

1. The charges for 18 USC §□87 arise from funds sent to the IRS in 1997, 1998 and 1999. The Secretary of the Treasury is the *only* officer of the federal government authorized by Congress to administer the internal revenue laws and to collect a tax. IRC § 6301. Pursuant to 5 USC § 3331 and 3332, the Secretary of the Treasury is

required to *file* an Oath of Office and an Appointment Affidavit before he has any authority or power under his office. Unless and until the Secretary of the Treasury files an Oath of Office and an Appointment Affidavit, he has NOT entered the authority of the office. Defendant has obtained documents that show the Court that from January of 1993 until July 1999 the Office of Secretary of Treasury was VACANT because neither Lloyd Bentsen nor Robert Rubin filed an Oath of Office or an Appointment Affidavit. Therefore, neither Mr. Bentsen nor Mr. Rubin entered upon their office. There can be no argument that overcomes the FAILURE of Mr. Bentsen or Mr. Rubin to knowingly and intentionally commit the OMMISSION to file the Oath and the Appointment Affidavit that must be filed by every OFFICER of the federal government before they have ANY power or authority from the position to which they have been appointed. The appointment is NOT complete and does NOT exist in LAW until the Oath and the Appointment Affidavit have been filed. Notwithstanding that 18 USC §287 is barred by statute to be used as a prosecution for a claim under the internal revenue laws, and, notwithstanding that the claims are NOT false, because the 18 USC § 287 charges pertain to funds paid to the IRS during years when there was no Officer in Office to collect taxes or administer the internal revenue laws, the charges are groundless and wholly without foundation. The Court is in want of personal and subject matter jurisdiction over the defendant for allegations arising under the internal revenue laws to be enforced by the head of the Department of the Treasury when there was no Officer in Office to administer the internal revenue laws or administer the Department of the Treasury during the time in question.

2. Because this information was obtained only very recently (Fax received 8/27/03; hard

copy received 9/3/03) through investigation by a member of the defense team, the defendant respectfully requests additional time to research and file a *Supplemental Brief* on the impact of this set of facts.

II.
IMPROPER PLAINTIFF

3. The federal district courts of the United States have jurisdictional authority *only* as is granted by the Congress that CREATED the federal district courts. Title 28 Section 1345 provides jurisdictional statements regarding the "United States" being a plaintiff in "*suits or proceedings commenced by the United States*" to wit:

> **Section 1345. United States as plaintiff**
>
> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, **suits or proceedings commenced by the United States**, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

4. Id. 28 USC § 1346 provides for jurisdiction of the federal district courts when the "United States" is a defendant in a civil action. There is no provision in either 28 USC § 1345 (United States as a plaintiff) or 28 USC § 1346 (United States as a defendant) for a suit to commence where the plaintiff is the *"United States of America."*

5. Neither is there authority in Title 18 for a *suit to commence* in the name of the "*United States of America."* The jurisdictional statements in Title 18 are found in Sections 5, 7 and 13, and 3231. The later section states, to wit:

> **Section 3231. District courts**
> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

6. The *only* authorization by Congress for a *suit to commence* in the name of the "United States of America" is found in two locations in Title 48, *Territories and Insular Possessions*, to wit:

> **Section 874. Judicial process; officials to be citizens of United States; oath**
> All judicial process shall run in the name of "*United States of America, ss, the President of the United States*", and all penal or criminal prosecutions in the local courts shall be conducted in the name and by the authority of "The People of Puerto Rico." All officials shall be citizens of the United States, and, before entering upon the duties of their respective offices, shall take an oath to support the Constitution of the United States and the **laws of Puerto Rico**.

7. The legislative history of this code section reveals that Congress' authorization of judicial process in the territories was purely pursuant to Admiralty Law where the *Commander in Chief* was the moving party. Again, in the NOTES to Section 1406f of Title 48 is authorized judicial process similar to that in Puerto Rico, to wit:

> **Section 1406f. Judicial process; title of criminal prosecutions**
> All judicial process shall run in the name of "United States of America, scilicet, the President of the United States", and all penal or criminal prosecutions in the local courts shall be conducted in the name of and by authority of "the People of the Virgin Islands of the United States.

8. Defendant is aware that the *only* Treasury Delegation Order ever issued by the Secretary of the Treasury to the Commissioner of the Bureau of Internal Revenue was a Order to *Administer the Internal Revenue Laws in Puerto Rico*, the Virgin Islands and the Panama Canal Zone. *See* TDO 150-42. It does not appear that this TDO has ever been modified or repealed. For reasons that will be supported hereinbelow, this appears to be *consistent* in every respect with the repetitive jurisdictional statements of Congress and the Federal Rules of Criminal Procedure wherein a "State," under federal law, *includes* only the District of Columbia, Puerto Rico and the territories

and possessions. The possessions are *federal enclaves* upon which *Acceptance of Jurisdiction* is filed by the U. S. Attorney General as mandated by 40 USC § 255, *infra*.

9. The "Congress of the **United States**" [Federal Constitution Article 1 Section 1 Clause 1] has enacted numerous laws that distinguish between the "United States" and the "United States of America." The most referenced and utilized statute is that containing the language for an *Unsworn Declaration* found at 28 USC §□1746, to wit:

> **Section 1746. Unsworn declarations under penalty of perjury**
>
> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
>
> > (1) If executed **without the United States**: "I declare (or certify, verify, or state) under penalty of perjury **under the laws of the United States of America** that the foregoing is true and correct. Executed on (date). (Signature)".
> >
> > (2) If executed **within the United States, its territories, possessions, or commonwealths:** "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)".

10. Id. Clearly, Congress recognized that *declarations* could be made both *outside* and *inside* the "United States." The "United States" is clearly distinguished from the "United States of America" when the *declaration* is made *outside* the United States.

11. When the *declaration* is made *outside* the *United States*, the controlling perjury laws are the laws of the *United States of America*. At any given time in history the laws of

the Union States change or are modified. From the time this statute was enacted the number of Union States has been modified. Depending on WHERE someone is *located* when they make the *declaration*, the LAW of that *location* is the *controlling law*. Because the LAWS OF THE UNITED STATES only "*apply locally* to the District of Columbia, Puerto Rico the territories and possessions" [*See* Fed. R. Crim. Pro. 54 (c)] then when someone makes a *declaration* regarding a federal issue and they are *located outside* the *United States*, but situated within the territorial boundaries of one of the Union States of the *United States of America*, then the perjury laws of THAT Union State of the *United States of America* is binding on them because that is the *location* where the act (declaration) occurred. The *distinction* between the "United States" and the "United States of America" is patently clear. Congress is acutely aware that its LEGISLATIVE JURISDICTION is limited to the *seat of government and like places ceded by the States, accepted and purchased by Congress and occupied for government purposes*. *See* Federal Constitution 1.8. 17, United States Attorney Manual Title 9 CRM 662, 663, 664, 664.

12. In June 1957, U. S. Attorney General Herbert Brownell, was commissioned by President Dwight Eisenhower to create a publish a work entitled Jurisdiction Over Federal Areas Within The States: Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States. Part II of the Study, entitled A Text of Law of Legislative Jurisdiction, was completed by the Committee Appointed by Attorney General Brownell with the assistance of all Assistant U. S. Attorneys in the District of Columbia and with the assistance of the 48 Attorneys General of the particular states, to wit:

> **The Federal Government cannot, by unilateral action on its part, acquire legislative jurisdiction over ANY AREA within the exterior boundaries of a State**. Article I, section 8, clause 17 of the Constitution, provides that legislative jurisdiction may be transferred pursuant to its terms ONLY with the consent of the legislature of the State in which is located the area subject to the jurisdictional transfer. As was indicated in Chapter II, **the consent requirement of article I, section 8, clause 17, was intended by the framers of the Constitution to preserve the State's jurisdictional integrity against Federal encroachment.**" Id., at 46. [emphasis added].
>
> **The Constitution gives express recognition to but one means of Federal acquisition of legislative jurisdiction -- by State consent under Article I, section 8, clause 17** .... Justice McLean suggested that the Constitution provided the sole mode for transfer of jurisdiction, and that if this mode is not pursued, no transfer of jurisdiction can take place," Id., at 41. [emphasis added].
>
> It scarcely needs to be said that unless there has been a transfer of jurisdiction (1) pursuant to clause 17 by a Federal acquisition of land with State consent, or (2) by cession from the State to the Federal Government, or unless the Federal Government has reserved jurisdiction upon the admission of the State, **the Federal Government possesses NO legislative jurisdiction over ANY AREA within a State**, such jurisdiction being for exercise by the State," Id., at 45. [emphasis added]

13. Jurisdiction Over Federal Areas Within The States: Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States. Part II of the Study, entitled A Text of Law of Legislative Jurisdiction, U. S. Government Printing Office, June 1957. In this *Text of Law* there is citation to 551 judicial opinions, many from the U. S. Supreme Court, regarding the total and complete authority of the federal courts to obtain jurisdiction. The bolded phrases in the above paragraphs are the CONCLUSIONS OF LAW that were published by the U. S. Attorney General on behalf of the President of the United States in 1957. To the knowledge of the defendant, NONE of the 551 judicial opinions have been overturned.

14. Unless and until *Acceptance of Jurisdiction* is filed by the U. S. Attorney General as

mandated by 40 USC § 255, the federal government has NO legislative jurisdiction, and, therefore, NO prosecutorial jurisdiction. *See* Adams et al. v. United States, 319 U.S. 312 (1943). The Circuit Court of Appeals for the Fifth Circuit certified to the Supreme Court two questions of law pursuant to 239 of the Judicial Code, 28 U.S.C.A. 346. In answering those two questions the U. S. Supreme Court set forth the **standard for judicial review** as to the sole base for *determining* federal jurisdiction to prosecute a federal crime in a U. S. District Court. The U. S. Attorney has *memorialized* that mandate in the United States Attorney Manual Title 9, CRM 664. In this selective and vindictive prosecution of the defendant, the clear and unambiguous language the United States Attorney Manual has simply been ignored.

15. The controlling law in the Fifth Circuit is U. S. Supreme Court mandate from Adams that 40 USC § 255 must be complied with before a district court can take jurisdiction that federal law can apply to an alleged crime.

16. Defendant's research, study and *correspondence* with the Department of the Treasury appears to reveal that the Internal Revenue Service (IRS) engages in a practice to defraud their computer system to enter codes showing that targeted individuals are effectively connected to the Virgin Islands. However, it is not for the defendant to *speculate* as to why the plaintiff in this suit is an entity that is NOT authorized by Congress to *commence a suit or proceeding* in a federal district court of the United States that has jurisdictional authority only over matters arising within the territorial boundaries of the *federal enclaves* located within the counties that comprise the Northern District of Texas.

17. Additionally, while it is clearly evident from the ***only regulations*** promulgated to *implement* IRC § 6301, Collection Authority of the Secretary, that the "Secretary of

the Treasury" specifically defines the *Secretary of the Treasury* as the "Secretary of the Treasury of Puerto Rico." 27 CFR Part 250.11. Again, it is not for the defendant to *speculate* as to why the plaintiff in this case is a plaintiff that is *only* authorized to be name as the plaintiff in a *suit commenced* under the laws of Puerto Rico or the Virgin Islands. Even under laws of Puerto Rico and the Virgin Islands, the suit must be brought under "*ss The President of the United States"* pursuant to Admiralty Law.

18. Therefore, with the *"United States of America"* as the plaintiff in the instant action, the defendant has not been noticed of the *nature and cause* of the accusation against him since this plaintiff has no standing to *commence a suit or proceeding* in a district court of the United States whose authority extends *only* to the federal enclaves where 40 USC § 255 *Acceptance of Jurisdiction* has been filed by the United States Attorney General.

19. The defendant contends that the *"United States of America"* — as it is the UNION of the 50 States — does not exist in any capacity, to sue or be sued. Therefore, unless some documentation exists that places the defendant under a set of laws unknown to him, his counsel, and most anyone else with legal knowledge that allows the defendant to be prosecuted under ADMIRALTY LAW under the signature of the President of the United States of America," the plaintiff in the instant action has *no standing* before the Court and the defendant will move for the case to be dismissed for want of personal jurisdiction over the defendant.

20. It is incumbent on the government to show by what authority a plaintiff named as the "*United States of America"* can bring a criminal action against the defendant.

III.
PLAIN ERROR VIOLATION OF RULE 6 (f).

21. *Plain error* voids the *indictment* for failure to comply with Rule 6 (f) of the Federal Rules of Criminal Procedure. Rule 6 (f) requires to wit:

> Indictment and Return**.** A grand jury may indict only if at least 12 jurors concur. The grand jury--or its foreperson or deputy foreperson--must return the indictment to a magistrate judge in open court.
>
> If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.

22. The *indictment* was NOT found by 12 jurors. There does not exist any record that the indictment was returned by a concurrence of 12 grand jurors in open court. The *plain error* violations of Rule 6 (f) make the indictment a *nullity* and the court is without subject matter jurisdiction to act on the void indictment.

23. Clause 2 of Rule 6 (f) requires that the TWO grand juries that did NOT indict the defendant were required to "promptly and in writing report the lack of concurrence to the magistrate judge." Id. A *plain error v*iolation of Rule 6 (f) is acting as a shield behind which the government has hidden the FACT that two separate grand juries failed or refused to return an indictment against the defendant. The defendant believes the record is clear that when the grand jury was allowed the opportunity to *hear* and *view* the exculpatory evidence that essentially is the *foundation* of the defendant's case in chief, that they realized the defendant had NOT committed any criminal act, but rather was acting fully within the confines and mandates of the law. The government acted specifically to *withhold evidence* from the grand jury as it *forum shopped* this case to three (3) grand juries before it was finally able to keep known exculpatory evidence from reaching the eyes and ears of the grand jury. These acts by

the government are nothing less than *obstruction of justice*.

24. This is *not* harmless error. Rule 6 (f) is a protection of the PEOPLE that goes to the very heart of protecting an individual from selective and vindictive prosecutions by the government. Here, it is even more suspect because three (3) grand jurys were convened and initiated investigations against the Defendant over a 2.5-year period without returning an indictment. Suddenly, mysteriously and without compliance with Rule 6 (f) that guarantees that 12 jurors found probable cause to indict and must *appear before a magistrate* and state their finding on the Record in *open court*, an indictment (albeit groundless on its face), is allegedly "returned."

25. There is no *"return"* of the indictment unless it is done in compliance with Rule 6 (f). The *plain error* violations of Rule 6 (f) make the indictment a *nullity* and the court is without personal or subject matter jurisdiction to act on the void indictment.

IV. CONGRESS HAS NOT ENACTED TITLE 26 INTO LAW

26. 1 U.S.C. § 204 states, to wit:

> In all courts, tribunals, and public offices of the United States, at home or abroad, of the District of Columbia, and of each State, Territory, or insular possession of the United States –
>
> > (a) United States Code. - The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish prima facie the laws of the United States, general and permanent in their nature, in force on the day preceding the commencement of the following the last session the legislation of which is included: Provided, however, that whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

27. Id. Clearly, for a law to be ***legal evidence of the law*** *contained in a CODE,* it MUST be enacted by Congress. If it has NOT been enacted by Congress, it is NOT ***legal evidence of the law*** *contained in the Code* and cannot be *cited* as that Code and is *not* legal evidence of any law in any federal district court that has jurisdiction only over the laws the United States.

28. The NOTES of 1 USC §□204 provide the dates and Statute that enacted twenty-six (26) *Codes* into positive law, to wit:

> UNITED STATES CODE TITLES AS POSITIVE LAW
>
> The following titles of the United States Code were enacted into positive law by the acts enumerated below:
>
> **Title 1, General Provisions** - Act July 30, 1947, ch. 388, Sec. 1, 61 Stat. 633.
>
> **Title 3, The President** - Act June 25, 1948, ch. 644, Sec. 1, 62 Stat. 672.
>
> **Title 4, Flag and Seal, Seat of Government, and the States** – Act July 30, 194 ch. 389, Sec. 1, 61 Stat. 641.
>
> **Title 5, Government Organization and Employees** - Pub. L. 89-554, Sec. 1, Sept. 6, 1966, 80 Stat. 378.
>
> **Title 6, Surety Bonds** - Act July 30, 1947, ch. 390, Sec. 1, 61 Stat. 646, as amended June 6, 1972, Pub. L. 92-310, title II, Sec.203(4), 86 Stat. 202, and repealed Sept. 13, 1982, Pub. L. 97-258, Sec. 5(b), 96 Stat. 1068, 1085. See, now,
>
> **Title 9, Arbitration** - Act July 30, 1947, ch. 392, Sec. 1, 61 Stat. 669.
>
> **Title 10, Armed Forces** - Act Aug. 10, 1956, ch. 1041, Sec. 1, 70A Stat.
>
> **Title 11, Bankruptcy** - Pub. L. 95-598, title I, Sec. 101, Nov. 6, 1978, 92 Stat. 2549.
>
> **Title 13, Census** - Act Aug. 31, 1954, ch. 1158, 68 Stat. 1012.
>
> **Title 14, Coast Guard** - Act Aug. 4, 1949, ch. 393, Sec. 1, 63 Stat. 495.

Title 17, Copyrights - Act July 30, 1947, ch. 391, Sec. 1, 61 Stat. 652, as amended Oct. 19, 1976, Pub. L. 94-553, title I, Sec.101, 90 Stat. 2541.

Title 18, Crimes and Criminal Procedure - Act June 25, 1948, ch. 645, Sec. 1, 62 Stat. 683.

Title 23, Highways - Pub. L. 85-767, Sec. 1, Aug. 27, 1958, 72 Stat. 885.

Title 28, Judiciary and Judicial Procedure - Act June 25, 1948, ch. 646, Sec. 1, 62 Stat. 869.

Title 31, Money and Finance - Pub. L. 97-258, Sec. 1, Sept. 13, 1982, 96 Stat. 877.

Title 32, National Guard - Act Aug. 10, 1956, ch. 1041, Sec. 2, 70A Stat. 596.

Title 34, Navy - See Title 10, Armed Forces.

Title 35, Patents - Act July 19, 1952, ch. 950, Sec. 1, 66 Stat. 792.

Title 36, Patriotic and National Observances, Ceremonies, and Organizations - Pub. L. 105-225, Sec. 1, Aug. 12, 1998, 112 Stat. 1253.

Title 37, Pay and Allowances of the Uniformed Services - Pub. L. 87-649, Sec. 1, Sept. 7, 1962. 76 Stat. 451.

Title 38, Veterans' Benefits - Pub. L. 85-857, Sec. 1, Sept. 2 1958, 72 Stat. 1105.

Title 39, Postal Service - Pub. L. 86-682, Sec. 1, Sept. 2, 1960, 74 Stat. 578, as revised Pub. L. 91-375, Sec. 2, Aug. 12, 1970, 84 Stat. 719.

Title 44, Public Printing and Documents - Pub. L. 90-620, Sec. 1, Oct. 22, 1968, 82 Stat. 1238.

Title 46, Shipping - Pub. L. 98-89, Sec. 1, Aug. 26, 1983, 97 Stat. 500; Pub. L. 99-509, title V, subtitle B, Sec. 5101, Oct. 21,1986, 100 Stat. 1913; Pub. L. 100-710, title I, Sec. 102, Nov. 23, 1988, 102 Stat. 4739.

Title 49, Transportation - Pub. L. 95-473, Sec. 1, Oct. 17, 1978, 92 Stat. 1337; Pub. L. 97-449, Sec. 1, Jan. 12, 1983, 96 Stat. 2413; Pub. L. 103-272, Sec. 1, July 5, 1994, 108 Stat. 745.

TITLE 26, INTERNAL REVENUE CODE

The Internal Revenue Code of 1954 was enacted in the form of a separate code by act Aug. 16, 1954, ch. 736, 68A Stat. 1. Pub. L. 99-514, Sec. 2(a), Oct. 22, 1986, 100 Stat. 2095, provided that the Internal Revenue Title enacted Aug. 16, 1954, as heretofore, hereby, or hereafter amended, **may be cited as the "Internal Revenue Code of 1986"**. The sections of Title 26, United States Code, are identical to the sections of the Internal Revenue Code.

29. 1 USC §□204 clearly shows that of the Titles that Congress has seen fit to enact into positive law and make the law of the United States, Title 26 is *not* one of those Titles.

30. Curiously, the ONLY Title separately specified in its own little section is "Title 26, Internal Revenue Code." And that section clearly states that on August 16, 1954 Congress enacted what can ONLY be cited, as amended, as the "Internal Revenue Code of 1986"[1] and 1 USC § 204 states that "The sections of Title 26, United States Code, are identical to the sections of the Internal Revenue Code."

31. It is patently clear is that there is no lawful authority to cite anything as "26 USC"

[1] Publications by the U. S. Government Printing Office of the *Internal Revenue Code* include at the end of the Code, as required by law, the RULES OF THE UNITED STATES TAX COURT — the *administrative court* where the *Tax Code* is adjudicated. Federal Rules of Procedure are *not* used in this *administrative court*. The filing fee is a mere $60. Certified Public Accountants, who are NOT attorneys, provide *legal advice* regarding the *administrative Tax Code* but are NOT prosecuted for the Unauthorized Practice of Law. The Tax Court Rules *cite only* to the "Internal Revenue Code" (IRC). There is **never** a citation in the U. S. Tax Court to 26 U.S.C. because no such law exists. All Tax Court opinions and all pleadings filed in the U. S. Tax Court cite *only* to the IRC. Those opinions, because they are the opinions of an *administrative court* that has only "Petitioners" and "Respondents" and no party can invoke a jury trial, are NOT binding on the district courts of the United States. *See* IRC § 7463 (b). Tax Court judges are NOT confirmed by the Senate to serve in the *administrative* Tax Court to adjudicate the *administrative* Tax Code. Indeed, the DISCLAIMER posted on the HOME PAGE of the Tax Court Website states, "Pursuant to Internal Revenue Code Section 7463(b), Summary opinions may not be treated as precedent for any other case." §□7463(b) states, **"A decision entered in any case in which the proceedings are conducted under this section shall not be reviewed in any other court and shall not be treated as a precedent for any other case."** The IRC falls under the authority 5 USC 553, Administrative Procedures Act, because it is an *administrative code*. Only individuals considered "federal personnel" as that term is defined in the Privacy Act, 5 USC § 552a (13), are subject to federal administrative law. The federal agencies can *only* maintain *records* on "federal personnel." 5 USC 552(a).

because no such law exists. An administrative code enacted by Congress in 1954, as amended, can be cited, as stated within the ACT, Ch. 736, 68A Stat. 1, Pub. L. 99-5514, Sec. 2(a) and 100 Stat. 2095 as the "Internal Revenue Code."

32. Defendant has been charged with 15 counts of violating "26 USC 7202." No such laws exist. Because Title 26 has not been enacted into law, and, therefore, there exists no *code section* enacted as *Positive Law* for § 7202, the government is compelled to indict for the Statute at Large from which the *penalty statute* was derived. The *penalty statute* is from 53 Stat 145 (b).[2] The *intent of Congress* is more clearly viewed within the Statute at Large that reveals that § 145 (b) is but one of three *penalty statues* that impose the *penalty* when someone is found to have violated one of the sections in Subchapter C of 53 Stat Volume 1 (a/k/a 1939 Internal Revenue Code).

33. The Court is without jurisdiction over laws that have not been enacted, do not exist and cannot be violated.

34. Therefore, specifically with regard to this argument, the Court is in want of personal jurisdiction over the defendant and in want of subject matter jurisdiction as to the allegations of a violation of 26 USC § 7202.

[2] Title 26 § 7851, Applicability of the Internal Revenue Code, states, "(a) General rules. (6) Subtitle F. (A) General rule. The provisions of subtitle F shall take effect on the day after the date of enactment of this title and shall be applicable with respect to any tax imposed by this title. The provisions of subtitle F shall apply with respect to any tax imposed by the Internal Revenue Code of 1939 only to the extent provided in subparagraphs (B) and (C) of this paragraph." Id. Subparagraph (C) states, "Taxes imposed under the 1939 Code. After the date of enactment of this title, the following provisions of subtitle F shall apply to the taxes imposed by the Internal Revenue Code of 1939. (iii) Chapter 75, relating to crimes and other offenses." The *penalty statute* § 7202 is the second section of Chapter 75. So until the Title is enacted, the 1939 Code applies. *If* and *when* the Title is enacted, the 1939 Code applies. Either way, enacted or not enacted, the controlling law is 53 Stat Volume 1, the 1939 Tax Code.

V.
DEFENDANT IS NOT A 53 STAT § 145 (c) "PERSON" WHO CAN BE CHARGED WITH A VIOLATION OF FAILING TO COLLECT A TAX.

35. Neither Title 26 (not enacted) nor the Internal Revenue Code (enacted as a "separate code" [administrative code of U. S. Tax Court]) correctly re-states the mandate of Congress with regard to the "person" can be prosecuted for violations of the penalty statutes found at 53 Stat 145 (b) [IRC § 7202]. The IRC has been *bastardized* by extracting the *penalty statute* from the *Chapter* containing the *sections* in the organic Act of Congress to which the *penalty statute* applies. Therefore, it is necessary to look at the Statute at Large to determine the *"legal evidence"* of the Law.

36. "Where, however, a title, as such, has not been enacted into positive law, then the title is only prima facie or rebuttable evidence of the law. If the construction of a provision to such a title is necessary, recourse may be had to the original statutes themselves." 1 USC 204 (a). *See* United States v. Welden, 377 U.S. 95, 84, S. Ct. 1082.

37. The Official source for the United States laws is Statute at Large and United States Code is only *prima facie* evidence of such laws. *See* Royer's Inc. v. United States (1959, CA3 Pa) 265 F.2d 615, 59-1 USTC 9371, 3 AFTR 2d 1137.

38. The Statutes at Large are "legal evidence" of laws contained therein and are accepted as proof of those laws in any court of the United States. *See* Bear v. United States (1985, DC Neb) 611 F Supp 589, affd (1987, CA8 Neb) 810 F.2d 153.

39. Unless Congress affirmatively enacts title of United States Code into law, title is only prima facie" evidence of law. *See* Preston v. Heckler (1984, CA9 Alaska) 734 F.2d 1359, 34 CCH EPD 34433, later proceeding (1984, DC Alaska) 596 F Supp 1158.

40. Where title has not been enacted into positive law, title is only prima facie or rebuttable evidence of law, and if construction is necessary, recourse may be had to original statutes themselves. *See* United States v. Zuger (1984, DC Conn) 602 F Supp 889, affd without op (1985, CA2 Conn) 755 F.2d 915, cert den and app dismd (1985) 474 US 805, 88 L Ed 2d 32, 106 S Ct 38.

41. Even codification into positive law will not give code precedence where there is conflict between codification and Statutes at Large. *See* Warner v. Goltra (1934) 293 US 155, 79 L Ed 254, 55 S Ct 46; Stephan v. United States (1943) 319 US 423, 87 L Ed 1490, 63 S Ct 1135; United States v. Welden (1964) 377 US 95, 12 L 2d 152, 84 S Ct 1082.

42. United States Code does not prevail over Statutes at Large when the two are inconsistent. *See* Stephan v. United States (1943) 319 US 423, 87 L Ed 1490, 63 S Ct 1135; Peart v. The Motor Vessel Bering Explorer (1974, DC Alaska) 373 F Supp 927.

43. Although the United States Code establishes prima facie what laws of United States are, to extent that provisions of United States Code are inconsistent with Statutes at Large, Statutes at Large will prevail. *See* Best Food, Inc. v. United States (1965) 37 Cust Ct 1, 147 F Supp 749.

44. Where there is conflict between codification and Statutes at Large, Statutes at Large must prevail. *See* American Export Lines, Inc. v. United States (1961) 153 Ct Cl 201, 290 F. 2d 925; Abell v. United States (1975) 207 Ct Cl 207, 518 F.2d 1369, cert den (1976) 429 US 817, 50 L Ed 2d 76, 97 S Ct 59.

45. Internal Revenue Code construction to Statutes at Large must be by individual section and subsection since each section and subsection is derived from their own set of

Statutes at Large. *See* Pamphlet, Joint Committee on Taxation, "Derivations of Code Sections of the Internal Revenue Codes of 1939 and 1954 (JCS-1- 92), January 21, 1992, U.S. Government Printing Office. *See* also: United *States v. Wodtke* (1985, ND Iowa) 627 F Supp 1034, 86-2 USTC 9669, 57 AFTR 2d 86-1334, affd (1988, CA8 Iowa) 871 F.2d 1092.

46. The alleged violation of penalty statute §7202 is found in Chapter 75 of the Internal Revenue Code. However, it is patently clear from viewing the organic Act of Congress that § 7202 was clause 1 of subsection (b) of 53 Stat 145 and applied ONLY to the violations that arose from within Subchapter C of 53 Stat Volume 1, §§ 101 through 373. The *applicability of the penalty* is perfectly consistent with the language in the *original act* that the *penalty* could be imposed on the "person" defined in the very next subsection at **53 Stat 143 (c)** who was "required by that *chapter*" to collect or pay over a tax "imposed by that *chapter*." The "person" subjected to the *penalty* was the person who had to *duty* to perform the acts imposed within Subchapter C, 53 Stat §§ 101 – 373. None of the taxes to be collected under the authority or imposition of 53 Stat 101 – 373 are applicable to the defendant, his business or his employees.

47. Further, it is plainly clear from the reading of 53 Stat 143, 144 and 145 that the "person" who is required to collect and pay over the taxes defined in 53 Stat §§ 103 - 373 is defined in 53 Stat 3797 (16) as a ***"withholding agent."*** The corresponding derivation in the IRC is § 7701 (16). All cross-references point directly to the parent section of 53 Stat §§ 101-373. Those applicable sections in the current IRC are as follows:

a) Section 1441. Withholding of tax on nonresident aliens;
b) Section 1442. Withholding of tax on foreign corporations;
c) Section 1443. Foreign tax-exempt organizations; and
d) Section 1446. Withholding (FOOTNOTE 1) tax on foreign partners' share of effectively connected income.

48. These are the *only* code sections that derive from § 7202 penalties as those penalties are applied under the organic Act of Congress titled "Requirement of Withholding," 53 Stat 143.

49. Subsection (c) of 53 Stat 143, Withholding of Tax at the Source — Requirement of Withholding, states to wit:

> Return and Payment. — Every person required to deduct and withhold any tax under this section shall make a return thereof on or before March 15 of each year and shall, on or before June 15, in lieu of the time prescribed in section 56, pay the tax to the official of the United States Government authorized to receive it. Every such person is **HEREBY MADE LIABLE FOR SUCH TAX** and is hereby indemnified against the claims and demands of any person for the amount of any payments made in accordance with the provisions of this section.

50. Id. This is the LIABILITY STATUTE for withholding. This statue is *missing* in the *indictment*. The corresponding *code section* codified in the Internal Revenue Code is § 1461, that has been *modified severely* to wit:

> Every person required to deduct and withhold any tax under this chapter is **hereby made liable for such tax** and is hereby indemnified against the claims and demands of any person for the amount of any payments made in accordance with the provisions of this chapter.

51. The *taxes in the chapter* are listed in §§ 1441, 1442, 1443 and 1446, *supra*. Small wonder the government failed to include the LIABILITY STATUTE in the *indictment* and risk revealing that the *taxes imposed* for *collection* by a *Withholding Agent* with the *Requirement to Withhold* could not possibly be the defendant.

52. Further, the *"withholding agent"* must be authorized by a Delegation of Authority by

and through the Commissioner. The process for this authorization is the filing of a Form 2678, EMPLOYER APPOINTMENT OF AGENT, OMB# 1545-0748. The *corporations* listed in 53 Stat §§ 103 – 373 are required to have an *officer or employee* delegated as the *"Withholding Agent"* for that corporation. That Form has been specified by the IRS Commissioner to be the Form to be used to CERTIFY a *withholding agent* to be authorized to collect taxes for the federal government. Essentially, the *withholding agent* is the Biblical equivalent the *Tax Collector* who withholds at the *source* and, from time to time, sends the funds to the federal government.

53. **Tax collectors**[3] are effectively *Trustees* of the United States who hold the funds collected in "a ***Special Trust Fund*** **for the United States" government**. IRC § 7501. The *withholding agent* is the "officer or employee of a corporation, or a member or employee of a partnership, who as such officer, member or employee is under a DUTY to perform the act in respect of which the violation occurs." *See* 53 Stat 145 (c); [IRC § 7343]. This is the *only* person who can be prosecuted for failure to collect a tax required to be *withheld from wages* as required by federal law in 53 Stat §§ 101 – 373, Subchapter C of Volume 1.

54. The defendant is ***not*** a Withholding Agent/Trustee who is defined as an officer or employee of *any* corporation or partnership placed under the *taxing authority of the*

[3] If the defendant is *truly* claimed to be a Tax Collector/Withholding Agent/Trustee for and on behalf of the federal government, then the government will be required to produce the *contract* that created such a *fiduciary relationship* that clearly states the CONSIDERATON to the defendant for this *service* to the United States government. Absent CONSIDERATION, the government is essentially admitting to a scheme of *involuntary servitude* enforced by *imprisonment* for failure to follow the commands of the master. Involuntary servitude was outlawed by the 13th Amendment to the federal Constitution.

federal government in 53 Stat 103 – 373, therefore, he cannot be subjected to the *penalty statute* at 53 Stat 145 (b); [IRC § 7202] because he is NOT the "person" defined in 53 Stat 145 (c) [IRC §□7343].

55. IRC Section 7501 states, to wit:

> Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a ***special fund in trust*** for the United States.

56. If the government takes the position that the defendant is a *Trustee* of the United States government, the defendant can and will produce an *abundance* of case law where the Supreme Court has ruled that no one can be compelled to act in a fiduciary capacity as a *Trustee* without the consent and clear *intent* of the parties clearly known and preserved.

57. Additionally, it is not possible to arise to the position of *Trustee* without knowledge and consent as to *duties* of the OFFICE.

58. The defendant has propounded discovery as to the Standard Form 83 [SF-83] that was filed by the Secretary of the Treasury with the OMB as an application for an OMB # for the Form 2678, Employer Appointment of Agent. Once obtained, this discovery will show the code sections and regulations specified by the Secretary of the Treasury that authorize the collection of information on the Form 2678. As such those citations will reveal the *qualifications* of a ***withholding agent*** who is APPOINTED by the federal corporation (employer) as the AGENT to withhold, account for, and pay over taxes withheld from employees of the corporations specified in 53 Stat 103 – 373. Until such time as those funds that are withheld are *paid over,* the U. S. Trustee holds those funds in "**a *special fund in trust*** for the United States" government. IRC

§ 7501.

59. Defendant has no knowledge of ever being APPOINTED as a withholding agent, nor is he an officer of any corporation with a duty to withhold pursuant to IRC §§ 1441, 1442, 1443 or 1446. The *indictment* does not allege that the defendant was a *withholding agent* or a *Trustee* for the federal government.

60. Under the Law of Trusts, it is impossible to be *forced* into the capacity of a *Trustee* or be held liable for a fiduciary duty that is not known. The government's burden is to prove how the defendant became and *IS* a *Trustee for the federal government* to hold huge sums of money in "**a *special fund in trust*** for the United States" government without having knowledge of such an appointment or ever having accepted such an appointment.

61. The Court is without personal jurisdiction over the defendant because he is NOT the "person" specified in 53 Stat 145 (c) [IRS § 7343] who has the fiduciary duty to collect taxes and hold them in "**a *special fund in trust*** for the United States" government.

62. The *indictment* does not allege that the defendant is such a "person."

63. Therefore, specifically with regard to this argument, the Court is in want of personal jurisdiction over the defendant and in want of subject matter jurisdiction as to the allegations of a violation of 26 USC § 7202.

64. With regard to the 18 USC § 287 charges, because the defendant has no **lawful authority** to withhold, collect, account for or pay over funds to the government, all acts to withhold, collect, account for or paid over were done in the absence of lawful authority a/k/a/ a *violation of law*.

65. The defendant's acts to obtain a return of those funds were to *rectify* acts wrongfully done in the past, to mitigate damages incurred by his business and to remedy the unlawful procedure so no further unlawful acts would be done in the future.

66. Defendant's acts were not a "*false claim.*" Defendant's acts were grounded solidly in the federal law to which and for which he has a lawful right to a return of his funds.

67. The only "person" from who the Department of the Treasury could have authority to accept the payment of funds from "**a *special fund in trust*** for the United States" government is a duly appointed **Trustee/Withholding Agent**. Therefore, the Department of the Treasury was without lawful authority to **accept** such a payment.

68. The *indictment* is totally silent as to *any* statute that shows how the defendant became the "person" who is the ***Withholding Agent/Trustee*** who was lawfully required to collect and pay over the taxes specified in 53 Stat §§ 303 – 373.

69. This Court is in want of personal and subject matter jurisdiction over any a claim that has not been made. The defendant cannot be held to answer for a crime that is not defined by citation to statute, code, and regulation. Fed. R. Crim. Pro. 7(c)(1).

VI.
DEFENDANT CANNOT VIOLATE A PENALTY STATUTE

70. The defendant is charged with violating a PENALTY STATUTE at IRC § 7202. It is not *possible* to violate a PENALTY STATUTE. The *plain language* of § 7202 applies to a person *"required under this title"* to collect a *"tax imposed by this Title"* as *"provided by law."* Clearly, the *violation of law* is OUTSIDE the penalty statute. However, the *indictment* fails completely to provide a code section "required under this title" or "tax imposed by this title." Therefore, it is IMPOSSIBLE for the defendant to know the *nature and cause* of the accusation against him.

71. In United States v. Menk, 200 F. Supp. 784, (1966), the court held to wit:

> The defendant's contention that the information must allege that he was engaged in a "trade or business" of gambling for a profit is based on the use of those words in Title 26 U.S.C. § 4901. The defendant argues that this section, and not section 4461, defines the offense charged. In its pertinent parts, this section provides:
>
> > "(a) Condition precedent to carry on certain business. — No person shall be engaged in or carry on any trade or business subject to the tax imposed by section * * * 4461(a) (1) (coin-operated gaming devices) * * * until he has paid the special tax therefor."
>
> **It is immediately apparent that this section alone does not define the offense as the defendant contends**. But rather, **all three of the sections referenced in the information — Sections 4461, 4901 and 7203 — must be considered together before a complete definition of the offense is found.** Section 4461 *imposes a tax* on persons engaging in a certain activity; Section 4901 provides the *payment of the tax shall be a condition precedent to engaging in the activity subject to the tax*; and ***Section 7203*** *makes it a misdemeanor to engage in the activity without having first paid the tax*, and provide the penalty.

72. Id. §□7203 in Menk is 53 Stat § 145 (a) and is the *sister* statute to 53 Stat 143 (b) Failure to Collect; Attempt to Defeat and Evade a Tax [§§□7201, 7202] that allows for a *misdemeanor penalty* when the *Withholding Agent/Trustee* fails to make a return of the funds to the United States government that were collected and held "**a *special fund in trust."*** Since the *Tax Collector/Withholding Agent/Trustee* did collect the funds and was not involved in a scheme to defeat or evade the corporate tax, but only failed to file and return the funds to the United States government, the *penalty* is a *misdemeanor* rather than a felony.

73. In the instant case the defendant is charged with violating § 7202 of Chapter 75 of 26 USC[4]. The *indictment* contends that the defendant violated § 7202. However, it is

[4] Any and all references to 26 USC § 7202 or IRC § 7202 for clarity due to *common parlance* when referring to the Internal Revenue Laws. These references do NOT

manifestly *obvious* from the clear language of § 7202, as has been held in Menk, that the defendant cannot violate IRC §7202.

74. Similar in many respects to the *penalty statute* referenced in Menk, the penalty statute in the instant case § 7202 states, to wit:

> **Section 7202. Willful failure to collect or pay over tax**.
>
> Any person **required under this title** to collect, account for, and pay over any **tax imposed by this title** who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to **other penalties provided by law**, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

75. Id. The code section contains *plain language* that the "person" is "***required to collect***" "under this title." The *requirement* is clearly outside penalty statute §7202. The *penalty statute* itself does **NOT** state, "whoever violates **THIS** SECTION of the code . . ." As was held in Menk, the defendant cannot violate §7202. If the government can show *what tax* the ***"person required under this title to collect, account for, and pay over any tax imposed by this title***" is required to collect and pay over, thereby showing *what code section(s) was/were violated,* then the defendant, presuming all other jurisdiction (personal, subject matter and territorial) can be proven, could be punished utilizing §7202. Section 7202 is simply a statutory authorization to prosecute putative *Withholding Agents/Trustees*. The defendant has the right to know what section "under this title; imposed this title" that requires him to collect and pay over pay one of the taxes to be withheld as specified in 53 Stat §§ 101

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concede to any degree and are not meant to convey on any level the absolute solidity of the arguments made *supra* that clearly hold that 26 USC has not been enacted into law, and that the IRC, though enacted, is only an *administrative code* and is, at best, *prima facie* evidence of the law until rebutted.

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76. “It is IMPOSSIBLE to determine the meaning or intended effect of any one of these sections without reference to the others.” Menk. The indictment is *silent* as to the “others.” Therefore, without reference to some “other” statute, it is IMPOSSIBLE for the Court to determine the intended meaning and effect of §□202. The defendant, having no ability to know the *nature and cause of the accusation* cannot possibly be afforded his constitutional guarantee of due process of law.

77. The Federal Rules of Criminal Procedure 7(c)(1) requires the indictment to “state for each count **the official or customary citation of the statute, rule, regulation or other provision of law** which the defendant is alleged therein to have violated.” The notification of legal responsibility "or other provision of law which the defendant is alleged therein to have violated"□is not found in the indictment. Criminal process must allege every essential element of the offense.

78. In Evans v US, 153 US 584, the Supreme Court overturned a conviction because the indictment was insufficient in describing the alleged crime, to wit:

> In U. S. v. Britton, 107 U.S. 655 -669, 2 Sup. Ct. 512, the words 'willfully misapplied,' used in the section upon which the present indictments were found, were considered; and the court, speaking by Mr. Justice Wood, said: '**The words 'willfully misapplied' are, so far as we know, new in statutes creating offenses, and they are not used in describing any offense at common law.** They have no settled technical meaning, like the word 'embezzle,' as used in the statutes, or the words 'steal, take, and carry away,' as used at common law. **They do not, therefore, of themselves, fully and clearly set forth every element of the offense charged.** It would not be sufficient simply to aver that the defendant willfully 'misapplied' the funds of the association. This is well settled by the authorities we have already cited. **There must be averments to show how the application was made, and that it was an unlawful one.**' It follows that the demurrer to each of the four general counts was well taken, and should have been sustained.

79. Id. In Hamling v US, 418 US 87, the Supreme Court held, to wit:

> Our prior cases indicate that an indictment is sufficient if it, first, **contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend,** and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. Hagner v. United States, 285 U.S. 427 (1932); United States v. Debrow, 346 U.S. 374 (1953). It is generally sufficient that an indictment **set forth the offense in the words of the statute itself, as long as "those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished."** United States v. Carll, 105 U.S. 611, 612 (1882). "Undoubtedly the language of the statute may be used in the general description of an offence, but **it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged**." United States v. Hess, 124 U.S. 483, 487 (1888).

80. Id. In Connally v General Construction Co., 269 US 385, 391 (1926), the Supreme Court held to wit:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well- recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; **and 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.** International Harvester Co. v. Kentucky, 234 U.S. 216, 221 , 34 S. Ct. 853; Collins v. Kentucky, 234 U.S. 634, 638 , 34 S. Ct. 924.

81. In Grosso v U. S., 390 US 62, the Supreme Court addressed an issue of willful failure to pay wagering tax (IRC 4401) and willful failure to pay an occupational license tax (IRC §4411). The concept of willful failure, is not described in either §4401 or §4411. The willful failure language arose from the applicable penalty statute, § 7203, that was applied for violation of § 4401 and § 4411. Clearly, the *violation* was for failure to pay the tax specified in §§4401 and 4411, and was *outside* as those were

the "*tax imposed by the title.*"

82. In Ingram v US, 360 US 672, the Supreme Court case utilized §7201 to punish violators of §4401, §4411, and §4421, to wit:

> [Footnote 1] Section 4401 of the Internal Revenue Code of 1954 provides:
>
> "(a) Wagers. - There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.
>
> . . . . .
> "(c) Persons liable for tax. - Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery." 68A Stat. 525.
>
> Section 4411 of the Code provides: "There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable." 68A Stat. 527.
>
> Section 4421 of the Code includes in the definition of "wager" "any wager placed in a lottery conducted for profit" and includes in the definition of "lottery" "the numbers game, policy, and similar types of wagering." 68A Stat. 528.
>
> Section 7201 of the Code provides: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony . . . ." 68A Stat. 851.
>
> These were the links in the statutory chain under which the petitioners were indicted and convicted.

83. Id. As in Menk, the Supreme Court confirmed that it took all three code sections taken together to sufficient describe the offense. The Ingram court plainly demonstrated that § 7201 would have been meaningless without knowledge of the violations of §§ 4411 and 4421.

84. In Tyler v US, 397 F2d 565, §7203 was used to convict the defendant of willful

failure to file excise tax returns required by §4401 and §4411. The same or similar result is in US v Stavros, 597 F2d 108; Edwards v US, 321 F2d 324; US v Sams, 340 F2d 1014; Scaglione v US, 396 F2d 219; US v Magliano, 336 F2d 817; Rutherford v US, 264 F2d 180; US v Gaydos, 310 F2d 833; US v Sette, 334 F2d 267; US v Simon, 241 F2d 308; US v Wilson, 214 FSup 629.

85. In US v Willoz, 449 F2d 1321, §7206 was relied upon for a conviction of willfully making a false statement on a wagering form required by §4412 and §4401.

86. Wagering and occupational tax violations are not the only cases that can be prosecuted by utilizing the *penalty* provisions of Chapter 75 (including §7201 through §7209). §4071 imposes a tax on tires, §4081 imposes a tax on gasoline and diesel fuel, §4091 imposes a tax on aviation fuel, §4121 imposes a tax on coal mining, §4161 imposes a tax on sporting goods. There are over 80 specific taxes imposed by Congress in the IRC.

87. The defendant demands that the *indictment* must show what "tax imposed by this title" for which he is alleged to have *failed to collect and pay over*. **The "tax imposed" is the most basic element of the offense.**

88. The indictment includes nebulous, vague and ambiguous language claiming that the defendant failed to collect "F.I.C.A., Medicare and income taxes." Defendant is unaware of any law of Congress that is applicable to him that imposes such a *duty* on him to be a *tax collector* in the form of *withholding agent* to act as a *Trustee* to oversee a *special trust fund* on behalf of the United States government. **Surely, if such a law exists, the government could and would cite to that law in its indictment.**

89. Failure to cite the code section(s) *imposed by the title* that create a *duty* on the defendant to do the act for which the defendant is charged with the crime of *omission* for failure to perform an act, bars this Court from personal and subject matter jurisdiction. The *indictment* should be QUASHED for want of personal and subject matter jurisdiction resulting from a *fatally defective indictment* that charges the defendant "**in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application"** which **"violates the first essential of due process of law.**" International Harvester Co. v. Kentucky, 234 U.S. 216, 221.

VII.
FAILURE TO PUBLISH — NO FORCE AND EFFECT OF LAW

90. In United States v. Mersky , 361 U.S. 431, 437-438 the United States Supreme Court held, to wit:

> The result is that neither the statute nor the regulations are complete without the other, and only together do they have any force. In effect, therefore, the construction of one necessarily involves the construction of the other.

91. Id. Again in California Banker's v. Shultz, 416 U.S. 21, 26, the United States Supreme Court stated,

> We think it is important to note that the Act's civil and criminal penalties attach only upon violation of the regulations promulgated by the Secretary [of the Treasury]; if the Secretary were to do nothing, the Act itself would impose no penalties on anyone."

92. Id. No one can be required to comply with any form or "rule" that is not published in the federal register. Pursuant to the Administrative Procedures Act codified at 5 USC §§ 552 et. seq. and the Federal Register Act codified at 44 USC §§ 1501 et seq., anything having general applicability and effect, **particularly if it prescribes a**

penalty, must be published in the Federal Register. Also, the IRS's own internal regulation on the subject published in the Federal Register by the Secretary of the Treasury is 26 CFR 601.702 which states, to wit:

> **Effect of Failure to Publish**. Except to the extent that a person has actual and timely notice of the terms of any manner referred to in subparagraph (1) of this paragraph **which is required to be published in the Federal Register**, **such person is not required in any manner to resort to, or be adversely affected by, such matter if it is not so published or is not incorporated by reference therein** pursuant to subdivision (1) of this subparagraph. Thus, for example, any such matter which imposes an obligation and which is not so published or incorporated by reference will not adversely change or effect a person's rights.

93. The Federal Courts have consistently upheld the requirement to publish in the Federal Register. In U.S. v. Reinis 794 F. 2d 506 (9th Cir. 1986) the Ninth Circuit Court of Appeals reversed a district court conviction for failure of the defendant to complete a "currency transaction reporting form" (IRS Form 4789) on the finding that there was no requirement to complete the form where the form was never promulgated pursuant to the rulemaking requirements of the Administrative Procedure Act. 5 U.S.C.A. § 553" Id. at 506-507.

94. And just two years earlier in U.S. v. $200,000, 590 F. Supp. 866 (1984) a Federal District Court properly ordered the return of $200,000.00 to the Defendant on finding, to wit:

> [The] Currency Reporting form (IRS Form 4790) claimant failed to fill out, was void and invalid. The Currency Reporting Form as a 'rule' under Administrative Procedures Act, should have been published in Federal Register and should have been subject to APA notice and comment procedures, and since Form was not constructively published sufficiently to satisfy APA procedural requirements, Form was a nullity with respect to Claimant . . . and the Form is invalid unless and until it is properly published in the Federal Register pursuant to APA requirements. For agency requirement to be considered a valid 'rule,' three conditions must be satisfied: 'rule' must be within agency's granted power, it must be

> issued pursuant to proper administrative procedures and **it must be reasonable as a matter of due process. 5 U.S.C.A. 551; U.S.C.A. Const. Amend. 5."**

95. Id. at 868-869. Failure to publish is a violation of *due process* in violation of the 5th Amendment to the federal constitution. It violates the principle of FAIR NOTICE that is necessary to insure that someone *knows* of the burden to comply with lawfully enacted and implemented statutes. No one can be held to answer for an alleged crime that has not been properly noticed and published.

96. The standing and binding decisions of a federal district court, the Ninth Circuit Court of Appeals and the United States Supreme Court (twice), *supra*, uphold the lawful mandate that administrative agencies MUST publish their regulations in the federal register for the rule of law to have force or effect on anyone.

97. The indictment is absent any reference to a published implementing regulation that would show that the § 7202 had force or effect or law, or how it could be applied to the Defendant.

98. There is no published regulation for the *penalty statute* § 7202, therefore, it has no force or effect of law.

99. Therefore, because §□7202 has no published regulations, without force and effect of law and is a *nullity*.

100. The defendant presumes the government will argue that the Form 941 is the information collection *form* used as the vehicle of a duly appointed *Withholding Agent/Trustee* to report what has been collected and is being paid over. The Form 941 has NOT been published in the Federal Register.

101. Pursuant to the Paperwork Reduction Act of 1980 the Secretary of the Treasury is

required by law to request an OMB # for the Form 941. That *process* involves the filing of what is known as a Standard Form – 83 to the OMB requesting that an OMB # be issued for Form 941. The SF-83 reveals the *code sections* and *regulations* that authorize the use of the Form 941 to collect information. There are NO code sections or regulations effectively connected to any business activity associated with the defendant.

102. In direct violation of the Paperwork Reduction Act of 1980 the Form 941 fails to display a *valid* OMB Control Number because a **valid number** is defined by law to be a number accompanied by statements as to whether filing the form is mandatory or voluntary and displays an EXPIRATION DATE on the Form. The Form 941 does *not* contain a statement as to whether the form is mandatory or voluntary. The Form 941 does *not* display an Expiration Date. In the PUBLIC PROTECTION portion of the Paperwork Reduction Act of 1980 Congress clearly stated, to wit:

> Forms that "require and request information of the public must display a control number, an expiration date, and indicate why the information is needed, how it will be used, and whether it is a voluntary or mandatory request. Requests, which do not reflect a **current** OMB control number or fail to state why not, are '**bootleg'** requests **and may be ignored by the public**.

103. Id. The fact that the Form 941 does NOT have a valid OMB number may be acknowledged further by a review of a large number of other IRS federal agency forms bearing the words **"FORM APPROVED"** just above the OMB Number. The Form 941 does ***not*** bear such words as "Form Approved" and, is, therefore, NOT printed by the United States Government Printing Office because is it NOT an **APPROVED** form.

104. The Form 941 is a ***"boot-leg"* form and may be ignored by the public."**

105. Failure to publish makes the Form 941 a nullity and no one can be *penalized* for failure to file the Form 941. 26 CFR 601.702; 5 USC §§ 552 et. seq.; 44 USC §§ 1501 et seq.; United States v. Mersky , 361 U.S. 431, 437-438; California Banker's v. Shultz, 416 U.S. 21, 26; U.S. v. $200,000, 590 F. Supp. 866 (1984).

106. The Court is in want of personal and subject matter jurisdiction over any act that was alleged to be a duty for which there was *failure to publish*. Therefore, the charges in the indictment must be found to be a nullity and the *indictment* should be QUASHED.

CONCLUSION

As the Supreme Court held in *The State of Rhode Island v. The State of Massachusetts*, 37 U.S. 709, once the question of jurisdiction is raised "it must be *considered* and *decided* before **the court can move one step further.**" [Italics added] "Jurisdiction cannot be assumed by a District Court nor conferred by agreement of parties, but it is incumbent upon plaintiff to allege in clear terms, the necessary facts showing jurisdiction which must be proved by convincing evidence." *Harris v. American Legion*, 162 F. Supp. 700. [See also *McNutt v. General Motors Acceptance*, 56 S. Ct. 780.] Until such proof of jurisdiction is unequivocally established and/or Defendant has been afforded EVERY opportunity to appeal any unlawful finding of this court (in the face of such overwhelming evidence otherwise), any prosecution of Defendant would be a violation of due process and equal protection of law.

The personal jurisdiction over the defendant and the subject matter jurisdiction of this Court have been **CHALLENGED**. The burden of proof is on the moving party, NOT THE COURT, to prove jurisdiction. The district court should not go "ONE STEP FURTHER" UNTIL JURISDICTION IS PROVEN.

THEREFORE, ALL PROCEEDINGS SHOULD BE IMMEDIATELY STAYED

pending the exhaustion of all lawful remedy**.** The fatally defective Indictment should be QUASHED and all charges against Defendant should be DISMISSED with prejudice.

REQUEST FOR HEARING AND STAY OF PROSECUTIION

Defendant Simkanin hereby respectfully requests that this Court GRANT a STAY of this criminal prosecution and, further requests that the Court set this matter for a hearing no sooner than 30 days from the date of this filing. Defendant requests that the Court issue an ORDER that the government appear before the Court for this matter to be heard and subject matter jurisdiction to either be proven and a superseding indictment issued to reflect proper jurisdiction.

PRAYER

Defendant prays that this Court find want of subject matter jurisdiction and order that the indictment is quashed.

Defendant prays that this Court dismiss all counts with prejudice and that the record of this proceeding be expunged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document were served by hand delivery, facsimile transmission and/or by Certified Mail (RRR) to:

Mr. David Jarvis
U.S. Department of Justice
Assistant United States Attorney
Northern District of Texas, Ft. Worth Division
801 Cherry Street, 17th Floor
Forth Worth, Texas 76102

Arch C. McColl III