Internal Revenue Service
and
Federal Income Taxes

Their Scope of Authority
In the light of the
Constitutions,

Federal Tax Laws and
Court Rulings

and

Schulz v. IRS
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Federal Income Taxes

The laws controlling the subject commonly known as Federal Income Taxes are codified in the internal revenue laws of the United States in Title 26 of the United States Code (U.S.C.), and "Income Taxes" are in Subtitle A, Sections 1 through 1564. Other parts of the Code relate to other taxes and procedures for administering the code by Treasury personnel and other persons subject to the code. The only method for enforcement of the code is by regulations prescribed by the Secretary for any matter that imposes a requirement upon a taxpayer as set forth at Title 26 USC Section 7805 that states as follows:

Title 26 U.S.C. section 7805(a):
(a) AUTHORIZATION. — Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of alteration of law in relation to internal revenue.

The Federal "income tax" is not imposed upon income directly and federal taxes must be in accordance with the taxing provisions of the United States of America Constitution (U.S.A.C.). Many of the errors in the application of such provisions have been corrected by rulings from the Supreme Court of the United States after the U.S.A.C. has been overstepped. The latest corrections appear to be in the ruling from the United States Circuit Court of Appeals for the Second Circuit in *Schulz v. IRS*, Docket No. 04-0196-cv (January 25, 2006) and reported at 395 F.3d 463 (2d Cir. 2005), that overturned more than forty years of erroneous federal court rulings.

Constitutional Provisions and Prohibitions

The U.S.A.C. did not give Congress power to lay and collect taxes on anything they wish to tax, but delegated limited power for such in two categories, direct taxes and indirect taxes. The Constitutional provisions for direct and indirect taxes for the United States are as follows:

Direct Taxes:
U.S.A. Constitution, Art. I, Sec 2, Clause 3, states in pertinent part, "...direct Taxes shall be apportioned among the several states..."
U.S.A. Constitution, Art. I, Sec 9, Clause 4, states, "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."
Indirect Taxes:
U.S.A. Constitution, Art. I, Sec. 8, Cl. 1, states in pertinent part, "Congress shall have power to collect Taxes, Duties, Imposts and Excises,... but all Duties, Imposts and Excises shall be uniform throughout the United States."

Nature of the "Income Tax" Defined
The Congressional Record of March 27, 1943, contains a statement by a tax law authority, F. Morse Hubbard, in regard to "income tax" that defines the nature of such taxes and is consistent with the laws and court rulings on the subject, which states as follows:

"The income tax is, therefore, not a tax on income as such. It is an excise tax with respect to certain activities and privileges which is measured by reference to the income which they produce. The income is not the subject of the tax; it is the basis for determining the amount of the tax." F. Morse Hubbard, Treasury Department legislative draftsman. House Congressional Record March 27th 1943, page 2580.

Income Means Gain (Profit) Only
The only definition in the internal revenue laws for the term income is under "ordinary income" defined at Title 26 U.S.C. Section 64, that states as follows:

26 U.S.C. Section 64. – For purposes of this subtitle, the term "ordinary income" includes any gain from the sale or exchange of property which is neither a capital asset nor property described in section 1231(b). Any gain from the sale or exchange of property which is treated or considered, under other provisions of this subtitle, as "ordinary income" shall be treated as gain from the sale or exchange of property which is neither a capital asset nor property described in section 1231(b).

Title 26 U.S.C. Section 1231(b) involves depreciation on property used in business and is, therefore, not attached to the "income" defined in Section 64. Therefore, the only "income" that is associated with Subtitle A tax of the internal revenue code is "ordinary income" that is limited to "gain" from investments separated from the capital invested and other sale related expenses. The definition for "gross income" at Section 61 uses "income" in its definition and, therefore, depends upon such term to be defined elsewhere for the term "gross income" to be understood.

The Supreme Court of the United States and other federal courts have had to make rulings on what is and what is not income tax. Several cases contain rulings that clear up many of the errors and misconceptions in regard to federal income taxes and the application of the revenue laws. Some of those controlling cases are set forth below.
Imposed Only Upon a Legitimate Subject of Taxation

The United States decision in *Flint v. Stone Tracy Co.* shows that what is called "income tax"—for federal tax purposes is a tax imposed by an Act of Congress upon a legitimate subject of taxation over which Congress has taxing authority as authorized under the U.S.A.C. and the ruling makes it clear that such subject is not "income" but the income is only used as the "measure" of the tax, the pertinent part of such ruling stating as follows:

"Conceding the power of Congress to tax the business activities of private corporations ... the tax must be measured by some standard...It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income..." *Flint v. Stone Tracy Co.*, 220 U.S. 107, 165 (1911).

There is no way that the revenue laws can be twisted to apply the "income tax" as a direct tax and evade the issue of whether you have acted within a "legitimate subject of taxation".

Income Tax is an "Indirect Tax"

The *Brushaber v. Union Pacific R.R. Co.* case settles the issue that "income tax" is not a direct tax and is in the nature of an excise tax, which states as follows:

"[T]he conclusion reached in the Pollock Case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but on the contrary recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such..." *Brushaber v. Union Pacific R.R. Co.*, 240 U.S. 1, at 16-17. (1916).

"The contention that the (16th) Amendment treats a tax on income as a direct tax...is...wholly without foundation..." *Brushaber v. Union Pacific R.R. Co.*, 240 U.S. 1, 18. (1916).

The ruling in *Stanton v. Baltic Mining Co.*, confirms that the "income tax" is an indirect tax as follows:

"The Sixteenth Amendment conferred no new power of taxation but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of indirect taxation to which it inherently belonged..." *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 112 (1916).

The holding in *Tyler v. U.S.* confirms that income is not the subject of tax but that the tax is laid on an "event" and not the "fruits" of such event, that states in pertinent part as follows:

"A tax laid upon the happening of an event, as distinguished from its tangible fruits, is an indirect tax..." *Tyler v. U.S.*, 281 U.S. 497, 502. (1930)
Taxpayer v. Nontaxpayer

The U.S. supreme Court distinguishes between "taxpayers" and "nontaxpayers" and holds that the revenue laws only apply to taxpayers, not to nontaxpayers, as shown in Economy Plumbing and Heating v. U.S., which shows that the application of the revenue laws is limited and provides the definition of "taxpayer" and "nontaxpayer" as contemplated by the revenue laws, which states as follows

"The revenue laws are a code or system in regulation of tax assessment and collection. They relate to taxpayers, and not to nontaxpayers. The latter are without their scope. No procedure is prescribed for nontaxpayers, and no attempt is made to annul any of their rights and remedies in due course of law. With them Congress does not assume to deal, and they are neither of the subject nor of the object of the revenue laws. Long v. Rasmussen, 281 F. 236, 238. (1922); Economy Plumbing and Heating v. U.S., 470 F.2d 585, 589. (1972).

Footnote 3 at page 590 states: "The term "taxpayer" in this opinion is used in the strict or narrow sense contemplated by the Internal Revenue Code and means a person who pays, overpays, or is subject to pay his own personal income tax. (See Section 7701(a)(14) of the Internal Revenue Code of 1954.) A "nontaxpayer" is a person who does not possess the forgoing requisites of a taxpayer." Economy Plumbing and Heating v. U.S., 470 F.2d 585, 590 and 591. (1972)

It's interesting to note that the determining factor as to being classified as a "taxpayer" is that the person 'paid, overpaid, or is subject to pay the tax', rather than being someone that engaged in a "legitimate subject of taxation" defined in the U.S.A.C. and taxed by an Act of congress within a territory over which Congress has jurisdiction, and received "gain" therefrom sufficient to create a federal tax liability.

Levy Limited to U.S. Personnel

A federal tax "lien" has to do with creating a tax debt while the "levy" has to do with collection of such debt. The only persons a collection can be imposed upon by "levy" are identified in Title 26 U.S.C. Section 6331(a), and such is limited to officers, employees and elected officials of the United States or an agency or instrumentality of such. If you can't be levied, that in itself is evident that a tax debt in the nature of a "lien" cannot exist or be filed and recorded against you. If the document is certified by the IRS agent for filing pursuant to Florida Statutes 713.901(4), the IRS agent is responsible for the injury by the false claim and the cloud on the title to your property. However, if the document is not certified and is recorded, the records clerk is responsible for placing a cloud on the title to your property and is the one who has imposed the
lien and caused you injury by the presumption of a valid debt. Even in the federal tax laws, there is no purpose to create a debt that cannot be collected because it must involve the limited power of Congress to “lay and collect” taxes.

The federal income tax system is based upon self-assessment and voluntary compliance and has no mandatory effect by distraint except upon specific persons, namely, officers, employees and elected officials of the United States or the District of Columbia, or of an agency or instrumentality of such as set forth in Title 26 U.S.C. Section 6331(a) that states in pertinent part as follows:

“... Levy may be made upon the accrued salary or wages of an officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. ...”

IRS and BATF Separate

In 1972 the United States Treasury Department was reorganized and the Bureau of Alcohol, Tobacco and Firearms (BATF) was made a separate department from the Internal Revenue Service (IRS). Certain sections of Title 26 were transferred to the BATF as identified in the Code of Federal Regulations for Title 27 that applies to bottling alcohol for human consumption, and the way to determine what sections are enforced by the IRS is to consult the “Index and Finding Aids” for the published regulations promulgated by the Secretary of the Treasury in the Code of Federal Regulations. The index for the published regulations shows that there are no enforcement regulations for the IRS to “notice”, “lien”, “levy” or “collect”. The enforcement for such by regulation is only for the BATF.

No tax on Occupations of Common Right

If you are a state citizen working in the private sector and in an occupation of common right, such an activity is not a legitimate subject of taxation for revenues of the united States. Even receiving a profit in your profession is not conclusive that such is from a “legitimate subject of taxation” that Congress has taxed. There is no liability created by performing labor within the private sector, i.e. state territory, and receiving compensation for such labor. The Constitutions, state or federal, have never given the governments, local, state or federal, the authority to tax the
labor of the state people or the fruits of their labor, and that fact is made clear by the prohibition in state and federal constitutions against passing any law that impairs the obligation of contracts. (Florida Constitution, Article I, Section 10) While the federal constitution uses the phrase, "No state shall pass any law impairing the obligation of contracts", the state constitution expands such to, "No ... law impairing the obligation of contracts shall be passed." Compensation for labor is invariably by contract.

Due Process of Law

For the IRS to request information of any type, unless you wish to participate by a voluntary response, the power for the IRS to obtain such information is by a summons issued from the United States District Court (USDC) under Title 26 U.S.C. section 7604 to allow due process of law, and the summons must be served with the verified complaint under a case number and the IRS must provide the proof of your liability in their complaint and must be prepared to provide testimony for each element of their claim or it can be dismissed for lack of a claim upon which relief can be granted (Rule 12(b)(6), FRCP)). The authority of the IRS to impose a federal tax upon anyone is limited to requesting such person to file a 1040 Form and hope that they volunteer by "self-assessment and voluntary compliance", the only alternative being to initiate the claim in the United States District Court by the verified complaint and court issued summons as referenced above.

Proof of Citizenship by Domicile

There is another consideration that is in question as to whether you are subject to the internal revenue laws of the United States. It involves the erroneous presumption that the state people are U.S. citizens by getting them to admit they are residents of the State without proof of state citizenship. This allows the presumption that your domicile is in a U.S. territory. As such, you are subject to Congress under the U.S.A.C., Article I, Section 8, Clause 17 or Article IV, Section 3, Clause 2. Unless you can prove that your domicile is in one of the fifty states of the Union, the presumption of subjection prevails. If you can prove you are a state Citizen, you have the rights protected by the Constitution of your state and of all sister states under the full faith and credit and equal rights clauses of Article IV, Section 1 and Section 2, Clause 1 of the U.S.A.C.
Most people when asked, Are you a U.S. citizen?, have been conditioned to respond “Yes” to the question. Even the state citizens erroneously think they are U.S. citizens. It appears to come from the Fourteenth Amendment that states, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” If the “U.S.” means the territories over which the United States Congress has exclusive jurisdiction, you may have the term imposed upon you whether you like it or not, and even if it’s a misnomer. Such “U.S. citizens” do not have senators or representatives in Congress and cannot participate in United States government functions like state citizens. However, if “U.S.” means the fifty states of the Union, the question is redundant because it is impossible to be born in fifty states or be a citizen in fifty states. You can only be a citizen in one of the states of the Union at any given time. The present Union is fifty states, not forty-nine or less, and one state does not constitute the United States or the Union of states. The ruling by the California Supreme Court in Ex parte Frank Knowles, shows the misconception, that states in pertinent part as follows:

“By metaphysical refinement, in examining the form of our government, it might be correctly said that there is no such thing as a citizen of the United States. But constant usage—arising from convenience, and perhaps necessity, and dating from the formation of the Confederacy—has given substantial existence to the idea which the term conveys. A citizen of any one of the States of the Union, is held to be, and called a citizen of the United States, although technically and abstractly there is no such thing.” Ex parte Frank Knowles, 5 Cal. 300 (July 1855).

Admitting that you are a U.S. citizen eliminates any claim to state citizenship. If you don’t have proof of your state citizenship, the presumption is made that you are merely a “resident” in your state that allows the further presumption that your domicile is elsewhere, particularly in a U.S. territory over which Congress has jurisdiction that now brings to bear the presumption of attachment to the Fourteenth Amendment clause, “and subject to the jurisdiction thereof”. (See “residence” in Black’s Law Dictionary, Fourth Edition). The Slaughter-House Cases, show that there is a distinction between state citizenship and U.S. citizenship that states:

“It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a state, which are distinct from each other and which depend upon different characteristics or circumstances in the individual.”

The specific difference in people in regard to citizenship is the place of their domicile. Domicile is synonymous with citizenship (See Baker v. Keck, 13 F.Supp. 486 (1936)). “Citizenship” flows from “domicile”. To prove your citizenship you must prove your domicile. If your domicile is in
one of the fifty states, your citizenship is in that state and not a territory over which Congress has jurisdiction (except for border issues, U.S. customs, regulating interstate commerce, and protecting the people in such state from foreign invasion). You can settle the citizenship issue by making a “Declaration of Domicile” to establish the state in which you are a citizen, but you need to be cautioned that the forms offered by the clerks of court for such declaration may be grammatically incorrect for your document. If the form contains anything that is inconsistent with your establishing your state citizenship by reason of being domiciled within the state (not “residing in the state”) with all rights secured and protected by the state constitution, you must avoid it and use one that is grammatically correct. Your domicile is the home to which, upon leaving, you always intend to return. The term “residence” or “resident” has no place in a Declaration of Domicile and if the form contains such term it’s grammatically defective. You can only have one domicile and can only prove your citizenship by your domicile. The state citizens are also the state people of Article I, Section 1 of the Florida Constitution. If you have registered to vote using a form declaring you are a “U.S. citizen”, the record can be corrected by withdrawing your name from the list by unregistering at the voter’s registration office.

Two domicile forms are provided herewith that will not allow the presumption that you volunteer yourself back into the erroneous status you are intending to correct. You can file the appropriate declaration for recording in the public records, or the other one can be made out and kept for proof of your citizenship whenever such is needed. Some of the County Recorders refuse to accept the document for recording, which just saves you the recording fee because its your document and you can give notice at any time by serving it on anyone over which a question of your citizenship arises.

Property Rights of Aliens Impaired
Pursuant to the Florida Constitution, Article I, Section 2, the real property of an alien in Florida is “regulated or prohibited by law”. There is no such disability imposed upon the domiciled “natural persons” who are citizens and not aliens. There is no constitutional provision for the United States Congress to legislate for state citizens, but U.S. citizens are subject to Congress in that their domicile is, at least by presumption, in a territory of the United States. The state people have their own legislature that is also of limited power. Congress has the exclusive jurisdiction to
legislate over United States territory as set forth in the U.S.A.C., Article I, Section 8, Clause 17, and Article IV, Section 3, Clause 2 which does not give Congress authority to legislate for the fifty states of the Union. The ruling by the United States Supreme Court in Caha v. U.S. makes it clear that Acts of Congress are limited to their delegated authority and only apply in territory over which they have jurisdiction, that states in pertinent part as follows:

"Generally speaking, within any state of this Union the preservation of the peace and the protection of person and property are the functions of the state government, and are no part of the primary duty, at least, of the nation. The laws of Congress in respect to those matters do not extend into the territorial limits of the states, but have force only in the District of Columbia, and other places that are within the exclusive jurisdiction of the national government. Caha v. U.S., 152 U.S. 211 (1894)."

The Schulz Case and IRS Authority
The latest disposition of the Federal Courts in regard to the authority of the IRS to impose an administrative summons upon a “taxpayer” is set forth in the Schulz v. I.R.S. case that was determined January 25, 2005, with a subsequent ruling rendered June 29, 2005, that is included within this information for educational purposes thereto. Even though it appears that Robert L. Schulz lost the case in the Federal Court, the ruling that was issued is a definite win in that, since the IRS did not injure him, and there is nothing that the IRS can lawfully do that will injure him or affect him adversely by any request or demand from the IRS unless they apply to the United States District Court (USDC) to enforce their summons and Schulz or the one summoned must be allowed an adversarial proceeding where he has the opportunity to challenge the claim and contentions of the IRS before a further order can be imposed. In relation to the case, a list of three questions was submitted to Robert P. Storch, Assistant U.S. Attorney with the U.S. Department of Justice (DOJ) and his response contains answers to three questions asked by the court. The answers alone acknowledge that the IRS has no authority except by initiating an action in the USDC and thereafter, win on their claim. The letter of the DOJ is included in this information, being dated December 20, 2004, the month previous to the first ruling on Schulz by the United States Court of Appeals for the Second Circuit. However, the DOJ sidestepped question #2 as to what the IRS does if someone does not comply with an administrative summons by stating what they “must do” rather than what they “do”. If the Schulz case is referenced when addressing a summons to a third party, the IRS agent may object alleging that
the ruling doesn’t apply, however, the law is the controlling matter and the Schulz ruling shows that the law requires due process of law to be satisfied to avoid injury for lack thereof; and there is no IRS issue that doesn’t start with a court issued summons for production of some type of information. Any request for information from “any person” is in its nature a summons and the IRS is without authority to “compel” the production of such information except by court order as shown by the law itself at Title 26 U.S.C. Section 7604, that states:

(a) JURISDICTION OF DISTRICT COURT. — If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the United States district court for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, production of books, papers, records or other data.

The Schulz case was dismissed because the IRS had not injured Schulz yet. If the IRS had injured Schulz, then it appears by the ruling that the USDC would have jurisdiction to provide Schulz some type of relief for such injury and the error of the IRS would have come to light that they had proceeded unlawfully for failing to follow the due process of law requirements of Title 26 U.S.C. Section 7604 to have the USDC issue and enforce the summons. An IRS issued administrative summons has no force whatsoever as shown in Schulz as follows:

“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 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 reason or lack of reasons for so refusing.” Schulz v. IRS, 04-0196, page 4.

After the first order was issued on January 25, 2005, the IRS asked the court to soften the ruling after which the court granted them forty-five days to file their motion for a rehearing but the order containing the grant, issued on June 29, 2005, confirmed their first order and added an explanation of additional consequences upon the IRS. The original ruling showed that the
summons must be enforced by the USDC and there can be no adverse affect on anyone for failure to respond to an IRS administrative summons regardless of the reason or lack thereof for not responding, but the second order, also supplied with this information, shows that the IRS cannot apply for an indictment on a criminal charge unless they have exhausted all the procedures for due process of law in an adversarial proceeding in the USDC, and the final order of the court from such a proceeding must be violated before the IRS would have a cause to proceed criminally. It’s important to understand the two rulings because that case overturned forty years of bad case law and now, if you know the issues of the case, you can use such along with the other court decisions that shows the nature of federal taxes to address any of the IRS issues in the event they would invite you to an adversarial proceeding in the USDC. Three issues were enumerated on page 3 of the ruling of June 29, 2005, stating as follows:

"Having considered the arguments of the parties, we grant the petition to rehear for only the limited purpose and to the extent necessary to clarify our prior opinion and hold that: 1) absent an effort to seek enforcement through a federal court, IRS summonses "to appear, to testify, or to produce books, papers, records, or other data," 26 U.S.C. § 7604, issued "under the internal revenue laws," id., apply no force to the target, and no punitive consequences can befall a summoned party who refuses ignores, or otherwise does not comply with an IRS summons until that summons is backed by a federal court order; 2) if the IRS seeks enforcement of a summons through the federal courts, those subject to the proposed order must be given a reasonable opportunity to contest the government’s request; 3) if a federal court grants a government request for an order of enforcement then any individual subject to that order must be given a reasonable opportunity to comply and cannot be held in contempt or subjected to indictment under 26 U.S.C. § 7210 for refusing to comply with the original, unenforced IRS summons, no matter the taxpayer’s reasons or lack of reasons for so refusing."

While this sounds like the federal courts will act consistent with the tax laws and require the IRS to do the same, it appears that there are indictments being handed down by grand juries where no adversarial proceeding has been held to settle the Section 7604 requirement. And the injuries remain even though the court’s viewpoint has allegedly been readjusted to conform to the law as it existed for decades.

Erroneous Records
The problem that remains now is that there are numerous “lien” documents recorded in the public records that are in error for lack of a ruling from the USDC establishing a valid tax
liability. The documents were erroneous before being submitted for recording that has resulted in an enormous amount of money and property being taken from the people on the fraudulent claims of federal tax debt in the county records and they are neither certified to qualify for filing nor are they in accordance with the laws of the United States.

The requirement for federal tax liens or notices thereof to be in accordance with the Uniform Florida Federal Lien Registration Act (UFFLRA) and certified for filing is at Florida Statutes 713.901(3) and (4), that states in pertinent part as follows:

(3) PLACE OF FILING.—
   (a) Notices of liens, certificates, and other notices affecting federal tax liens or other federal liens, notices of which, under any act of Congress or any regulation adopted pursuant thereto, are required or permitted to be filed in the same manner as notices of federal tax liens, must be filed in accordance with this section.

(4) EXECUTION OF NOTICES AND CERTIFICATES. Certification of notices of liens, certificates, or other notices affecting federal liens by the Secretary of the Treasury of the United States or his delegate, or by any official or entity of the United States responsible for filing or certifying of notice of any other lien, entitles them to be filed, and no other attestation, certification, acknowledgment is necessary.

The requirement for federal tax liens or notices thereof to be “in accordance with the laws of the United States” for the Clerk of Court to have authority to record such is set forth in Florida Statutes 28.222(3)(e), which states as follows:

“(3) The clerk of the circuit court shall record the following kinds of instruments presented to him or her for recording, upon payment of the service charges prescribed by law:
   “(e) Notices of liens for taxes payable to the United States and other liens in favor of the United States, and certificates discharging, partially discharging, or releasing the liens, in accordance with the laws of the United States.”

The notices of federal tax liens are filed without certification and do not ‘qualify for filing’ under the UFFLRA, and are inconsistent with the requirements of the law defining the duties of the clerk to record such as set forth above. Since the records are in the clerk’s possession, such is an in rem matter over which the state circuit court has exclusive jurisdiction as supported by the United States Supreme Court in Princess Lida v. Thompson and in the ruling from the Florida appeals court in Meridian v. Suncoast, that state in pertinent part as follows”
“On the other hand, if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought the jurisdiction of the one court must yield to that of the other.” Princess Lida v. Thompson, 305 U.S. 456, 466 (1939).

“We think appellate’s action is at least quasi in rem, and that the state court, therefore, acquired exclusive jurisdiction over the creditors assets with power to shield them from forays originating in all other forums, including federal.” Meridian v. Suncoast, 388 So.2d 8 (July 23, 1980):

The federal tax lien is alleged on a tax assessment that gives the state circuit court exclusive jurisdiction of such action pursuant to the Florida Constitution at Article V, Section 20(c)(3), which states in pertinent part as follows:

Section 20. Schedule to Article V.—
(c) After this article becomes effective, and until changed by general law consistent with sections 1 through 19 of this article:
(3) Circuit courts ... shall have exclusive jurisdiction ... in all cases involving legality of any tax assessment..."

If a federal tax lien document is not “in accordance with the laws of the United States” and did not come from a procedurally proper judgment rendered from an adversarial proceeding in the USDC, then there is no tax liability lawfully established and the act of recording the instrument by the Clerk creates a presumption of debt that is erroneous and injures the citizen whose property it affects.

Conclusion

In view of the foregoing, anyone that has neither worked in, nor received income from, a legitimate subject of taxation that Congress has taxed for revenues of the United States, there is no foundation for a claim that a federal tax liability exists. If the IRS proceeds properly by filing a complaint and applies to the USDC to issue the summons to be served with their complaint, the one the action operates against has the right to defend their position by getting the truth revealed in the evidentiary hearing that must be demanded. If the IRS proceeds independently from the court they are acting beyond the scope of their authority.

Note: The information provided here is for educational purposes only and is not to be viewed as legal advice, nor is it a guarantee that the clerks, the IRS or the state and federal courts will act in accordance with the laws of the state or the U.S. tax laws.
December 20, 2004

BY OVERNIGHT MAIL

Hon. Chester J. Straub
United States Court of Appeals for the Second Circuit
1702 United States Courthouse
40 Foley Square
New York, New York 10007

RE:  Schulz v. IRS
Docket No. 04-0196-cv

Dear Judge Straub:

As directed by the Court, the government submits this letter memorandum in response to three questions raised at the conclusion of oral argument on December 13, 2004. I have consulted regarding the content of this letter memorandum with the regional office of the Internal Revenue Service, Office of District Counsel, in New York City, and it remains the government's position that the district court correctly determined that it lacked jurisdiction over petitioner-appellant Schulz' action seeking to quash the administrative summonses on various bases prior to the initiation of enforcement action by the IRS.

The specific questions raised by the Court, and the government's responses, are as follows:

1. Is the taxpayer under compulsion to comply with an IRS administrative summons?

   While the IRS certainly maintains that a taxpayer is required to comply with a properly served administrative summons, this obligation is not self-enforcing. See, e.g., Hudson Valley Black Press v. IRS, 307 F. Supp. 2d 543, 546 n.5 (S.D.N.Y. 2004) ("A summons issued pursuant to § 7602 is not self-enforcing; if a taxpayer refuses to comply with a summons, the IRS must bring an adversary proceeding in a district court pursuant to § 7604 to enforce it.") (citing United States v. Powell, 379 U.S. 48, 58 (1964)). 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.
2. What does the IRS do when a taxpayer fails to comply with a summons?

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. § 7604(b); see Powell, 379 U.S. at 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 adversarial 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. §§ 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).

Thus, the taxpayer is afforded an opportunity to present challenges to the IRS summons prior to being found in contempt by the district court.1 Moreover, the IRS indicates that, in the usual case, it seeks to have the information sought in the summons turned over to it. When the court orders the taxpayer to provide this information, but the taxpayer fails to comply with the order, it is the district court, not the IRS, that has the authority to then issue an order of contempt against the non-complying individual. 26 U.S.C. § 7604(b); Reisman, 375 U.S. at 450 (concluding that equitable relief is inappropriate because of “the comprehensive procedure of the Code, which provides full opportunity for judicial review before any coercive sanctions may be imposed”).

3. What is the impact of Judge Friendly’s opinion in Application of Colton on the government’s position?

Application of Colton, 291 F.2d 487 (2d Cir. 1961), was a case with which the undersigned was unfamiliar when it was cited by the Court at oral argument. After reviewing the decision, it does appear to provide that the statutory framework described by the government and in § 7604 of the Code is not the exclusive remedy for challenging an administrative summons. 291 F.2d at 489-90. However, the Court’s belief that the district court had jurisdiction over the motion to quash in Colton was based on its concern that a taxpayer could be assessed criminal penalties or possibly be found in contempt prior to a judge ordering enforcement of a subpoena. Id. This aspect of Colton does not survive the Supreme Court’s 1964 decision in Reisman, which expressly prohibits such

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1 The summons issued to Schulz included IRS Form 2039, which sets forth relevant provisions of the Code, including the jurisdictional provisions of § 7604. A.162.
consequences without prior judicial review where a taxpayer wishes to interpose good faith challenges to an IRS summons. *See Resiman, *375 U.S. at 447-48. It was on this basis that Judge Friendly himself subsequently recognized that *Resiman* "seems to destroy the basis underlying decisions of this court which authorized applications to vacate such a summons . . . in advance of any judicial proceeding by the Government for their enforcement." *United States v. Kulukundis,* 329 F.2d 197, 199 (1964) (citing *inter alia, Colton* as being "destroy[ed]" by *Resiman*). The IRS District Counsel has confirmed that they believe *Resiman* overturned the jurisdictional holding of *Colton*, and that the district court does not have subject matter jurisdiction over a motion to quash that is filed by a taxpayer prior to the IRS seeking judicial enforcement of a summons.

In this regard, the government notes that, at oral argument, Schulz repeatedly emphasized that he believes this case is controlled by *Resiman*. We agree. The government respectfully submits that, at least since that decision, it has been absolutely clear that district courts do not have jurisdiction to consider a motion to quash such as that at issue herein, unless and until the IRS moves for enforcement in the district court. ² There is nothing inequitable about this as, if and when that occurs, Schulz will have a full opportunity to raise all of his claims about the alleged impropriety of the summonses. Therefore, the order of the district court should be affirmed.

Respectfully submitted.

GLENN T. SUDDABY
UNITED STATES ATTORNEY

By:

ROBERT P. STORCH
ASSISTANT U.S. ATTORNEY
SENIOR LITIGATION COUNSEL

cc: Robert L. Schulz, pro se

² In his Reply Brief and at oral argument, Schulz relies upon language from *Resiman* and other cases involving the ability of parties in interest to challenge summonses issued to third-party record keepers, for which an exception to the general rule was created in § 7609(b). The summonses in question here were issued to Schulz himself, so this exception does not apply. *See* 26 U.S.C. § 7609(c)(2)(A).
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2004


Docket No. 04-0196-cv

ROBERT L. SCHULZ,

Plaintiff-Appellant,

—v.—

INTERNAL REVENUE SERVICE and ANTHONY ROUNDTREE,

Defendants-Appellees.

Before:

FEINBERG, STRAUB, and RAGGI, Circuit Judges.

Appeal from a judgment in the United States District Court for the Northern District of New York (David N. Hurd, Judge), dismissing for lack of subject matter jurisdiction appellant’s motions to quash administrative summonses served upon him by the Internal Revenue Service.

AFFIRMED.
PER CURIAM:

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 requests. 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, Schulz’s motion does not satisfy this requirement. As the Supreme Court pointed out in United States v. Bisceglia, IRS summonses 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 procedure 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 inApplication 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 ofColton and TurnerinUnited States v. Kulukundis, 329 F.2d 197 (2d Cir. 1964). There, Judge Friendly, who authored bothColton and Turner, points out thatReisman “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 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 with26 U.S.C. §7604 andReisman, 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. SeeReisman, 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,
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.

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. The decision of the District Court
dismissing Schulz's motions for want of subject matter jurisdiction is AFFIRMED.¹

¹ This opinion has been circulated to the active members of this Court prior to filing.
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2004

(Petition for Rehearing: March 2, 2005

Docket No. 04-0196-cv

ROBERT L. SCHULZ,

—v.—

INTERNAL REVENUE SERVICE and ANTHONY RONDTREE,

Defendants-Appellees.

Before:

FEINBERG, STRAUB, and RAGGI, Circuit Judges.

The government has moved to amend a prior per curiam opinion, reported at Schulz v. I.R.S., 395 F.3d 463 (2d Cir. 2005), affirming the judgment of the United States District Court for the Northern District of New York (David N. Hurd, Judge), dismissing for lack of subject matter jurisdiction appellant's motions to quash administrative summonses served on him by the Internal Revenue Service. The motion is construed as a petition for rehearing and is granted to the extent necessary to clarify the prior panel decision. The prior opinion remains in force to the extent it is not inconsistent with this opinion.
In its motion the government argues that the prior per curiam opinion misconstrues the grounds for denial of jurisdiction over motions to quash IRS summonses and otherwise misunderstands the roles of 26 U.S.C. §§ 7210 and 7604 in the comprehensive statutory tax-enforcement scheme. In particular, the government claims that a taxpayer may be subjected to criminal prosecution under 26 U.S.C. § 7210 or contempt sanction under 26 U.S.C. § 7604(b) for disobedience of an IRS summons whether or not the summons is enforced by a federal court order and, if an order of enforcement is granted, regardless of the taxpayer’s compliance with that order. The prior per curiam opinion rejected this view as contrary to due process. That holding is confirmed on rehearing. Consistent with the demands of constitutional due process, an indictment under 26 U.S.C. § 7210 shall not lie and contempt sanctions under 26 U.S.C. § 7604(b) shall not be levied based on disobedience of an IRS summons until that summons has been enforced by a federal court order and the summoned party, after having been given a reasonable opportunity to comply with the court’s order, has refused. This holding does not prejudice the privilege of a court in which the government has sought enforcement of an IRS summons to issue, consistent with the law of contempt, an order of attachment to ensure the presence of a party who has contumaciously refused to comply with a summons. The motion to extend time in which to file a petition for rehearing en banc is granted.

ROBERT L. SCHULZ, pro se, Queensbury, N.Y.

FRANK P. CIIHAR, Assistant United States Attorney, Tax Division, United States Department of Justice, Washington, D.C., for Defendants-Appellees.
The government has moved to amend our *per curiam* opinion, reported at *Schulz v. I.R.S.*, 395 F.3d 463 (2d Cir. 2005) ("Schulz I"). In support of its motion, the government relies on arguments that it did not advance in the District Court or on the original appeal. In light of these new arguments, and because the proposed amendments, if accepted, would alter significantly our prior holding, we, at the government’s suggestion, construe the motion to amend as a petition for panel rehearing. Having considered the arguments of the parties, we grant the petition to hear for only the limited purpose and to the extent necessary to clarify our prior opinion and hold that: 1) absent an effort to seek enforcement through a federal court, IRS summonses “to appear, to testify, or to produce books, papers, records, or other data,” 26 U.S.C. § 7604, issued “under the internal revenue laws,” *id.*, apply no force to the target, and no punitive consequences can befall a summoned party who refuses, ignores, or otherwise does not comply with an IRS summons until that summons is backed by a federal court order; 2) if the IRS seeks enforcement of a summons through the federal courts, those subject to the proposed order must be given a reasonable opportunity to contest the government’s request; 3) if a federal court grants a

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1 In our prior *per curiam* opinion we held that “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.” 395 F.3d at 465. Contrary to the government’s view that § 7604(b) allows a court to “punish disobedience of an IRS summons” without providing an intervening opportunity to comply with a court order of enforcement, we maintain that “no punitive consequences can befall a summoned party who refuses, ignores, or otherwise does not comply with an IRS summons until that summons is backed by a federal court order,” but we recognize that 26 U.S.C. § 7604(b) allows courts to issue attachments, consistent with the law of contempt, to ensure attendance at an enforcement hearing “[i]f the taxpayer has contumaciously refused to comply with the administrative summons and the Service fears he may flee the jurisdiction.” *United States v. Powell*, 379 U.S. 48, 58 n.18 (1964). While such an attachment is not, consistent with due process and the law of contempts, “punitive,” it is nonetheless a consequence.
government request for an order of enforcement then any individual subject to that order must be

given a reasonable opportunity to comply and cannot be held in contempt or subjected to

indictment under 26 U.S.C. § 7210 for refusing to comply with the original, unenforced IRS

summons, no matter the taxpayer’s reasons or lack of reasons for so refusing.² Our prior opinion

otherwise remains in effect to the extent that it is not inconsistent with this opinion. We grant

the motion to extend time in which to file a petition for rehearing en banc.

BACKGROUND

The facts underlying the original appeal are set forth in our prior opinion, Schulz I, 395

F.3d at 464. For purposes of completeness and clarity, however, we repeat that work here.

The IRS served Schulz with a series of summonses in May and June of 2003, ordering

Schulz to appear and provide testimony and documents in connection with an investigation of

Schulz by that agency. Rather than comply with the summonses, Schulz filed a motion to quash

in the United States District Court for the Northern District of New York. That motion was

heard by Magistrate Judge David R. Homer and, on October 16, 2003, was dismissed for lack of

subject matter jurisdiction. In his unpublished opinion the Magistrate Judge found that, because

the IRS had not commenced a proceeding to enforce the summonses, no case or controversy

existed, and if the IRS did attempt to compel compliance, the enforcement procedure described

in § 7604 would provide Schulz with adequate opportunity to attack the summonses on their

merits.

² Our conclusions here and in Schulz I are consistent with dicta in our recent decision in

Schulz filed in the District Court an appeal from and objection to the Magistrate Judge’s

order. The District Court (David N. Hurd, Judge) denied those objections and dismissed the

appeal on December 3, 2003, by an unpublished order. Schulz appealed to this Court. By our

January 25, 2005, per curiam opinion, we affirmed. See Schulz I, 395 F.3d 463. The focus of

that opinion was whether issuance of an IRS summons presents a case or controversy under

Article III of the United States Constitution. Id. at 464. Relying on the Supreme Court’s

decisions in Reisman v. Caplin, 375 U.S. 440 (1964), and United States v. Bisceglia, 420 U.S.

141 (1975), and in view of our decisions in Application of Colton, 291 F.2d 487 (2d Cir. 1961),

and United States v. Kulukundis, 329 F.2d 197 (2d Cir. 1964), we held that a taxpayer’s motion

to quash an IRS summons, in the absence of an effort by the agency to seek enforcement of that

summons in a federal court, does not present an Article III case or controversy. Schulz I, 395

F.3d at 465. Because that holding entailed overruling, in part, our prior holding in Colton, we

circulated Schulz I to all active members of the Court prior to filing. Id. at n.1.

After Schulz I was issued, the government filed the present “motion to amend or, in the

alternative, to extend time to file a petition for rehearing en banc,” which the government also

invites us to view as a petition for panel rehearing. The government’s principal concerns are that

we misunderstand the nature of the jurisdictional bar on motions to quash IRS summonses and

“misapprehend[] the consequences that ensue from the issuance of an IRS administrative

summons.” As to the latter point, the government appears to argue alternatively, or in

combination, that: 1) the government may use the federal courts to punish taxpayers who disobey

an IRS summons even if the summons is never enforced by a court order; 2) if an IRS summons

is enforced by a court order, the court may punish disobedience of the IRS summons before
providing the taxpayer an opportunity to comply with the court’s order; or 3) if an IRS summons
is enforced by a court order, the court may punish disobedience of the IRS summons even if the
taxpayer complies with the court’s order. In our view, expressed in Schulz I, none of these
proposals is consistent with the comprehensive tax-enforcement scheme in which 26 U.S.C. §§
7210, 7604(a), and 7604(b) are situated, constitutional due process, or the relevant precedents of
this Court and the United States Supreme Court. Therefore, while we grant the petition for panel
rehearing, we do so to clarify rather than to amend substantially Schulz I, which remains in force
to the extent it is not inconsistent with this opinion.

DISCUSSION

Because it was the focus of the parties, our discussion in Schulz I focused primarily on the
doctrinal rules of jurisdiction that the Supreme Court has derived from the “Cases” and
“Controversies” clauses of the United States Constitution, Article III, Section 2. See Reisman,
375 U.S. at 443 (dismissing petition to quash “for want of equity”). Underlying our analysis
there was the equally venerable line of Supreme Court doctrine limiting the protections afforded
to administrative action by sovereign immunity based on the due process clauses of the Fifth and
Fourteenth Amendments to the United States Constitution. The “leading cases on this question
are Ex parte Young, 209 U.S. 123 (1908), and Oklahoma Operating Co. v. Love, 252 U.S. 331
(1920).” Reisman, 375 U.S. at 446. In particular, our decision in Schulz I was informed by
concerns, also stated in Colton, 291 F.2d at 489-90, and Kulukundis, 329 F.2d at 199, “that the
penalties of contempt [or prosecution] risked by a refusal to comply with the summonses are so
severe that the statutory procedure amounts to a denial of judicial review.” Reisman, 375 U.S. at
On its present motion, the government presses the claim that Congress has, in the
statutory scheme that includes 26 U.S.C. §§ 7210 and 7604, exercised its right to immunize
agents of the IRS from suits seeking prospective relief from the enforcement of administrative
summons. That this is so was settled in Reisman. However, the privilege of that immunity
comes with certain costs demanded by due process. Our holding in Schulz I took account of
those costs while providing clear guidance to the government as to the constitutional limitations
on its authority, and to taxpayers as to how their due process rights are protected by the statutory
scheme. We take the opportunity provided by this petition to further explicate our view.

At issue on the present petition is whether 26 U.S.C. §§ 7210 and 7604 may be read to
allow the imposition of penal consequences for failure to comply with an IRS summons or if
levying of punishment for disobedience under those sections requires review by a federal court of
the merits of a summons and, where the merits are upheld, a reasonable opportunity to comply
with a court order of enforcement before punitive or coercive sanctions may be imposed.

Addressing a view of 26 U.S.C. §§ 7210 and 7604 similar to that advanced by the government on
this petition, Judge Friendly, writing for this Court, pointed out that:

If the statutory scheme were like that for enforcement of subpoenas
of such agencies as the Interstate Commerce Commission, 49
U.S.C. § 12, or the Civil Aeronautics Board, 49 U.S.C. § 1484,
there would be merit in the Government’s position that courts
ought not intervene at so early a stage; since disobedience to a
subpoena under those statutes has no penal consequences until a
judge has ordered its enforcement, there is no occasion for any
preliminary resort to the courts. Here, however, at least the
criminal penalty of § 7210 is incurred by disobedience, and it is not
altogether plain that a contempt citation under § 7604(b) may not
be. Under such circumstances the principle of Ex parte Young,
1908, 209 U.S. 123, 147, 28 S. Ct. 441, 52 L. Ed. 714 and
S. Ct. 338, 64 L. Ed. 596, comes into play; we see no reason why
that principle should not be applicable to a summons, disobedience
of which carries criminal penalties... We are not unmindful of
the potentialities of delay inherent in such an extra round --
potentialities sufficiently serious without one, as illustrated, for
example, by Penfield Co. of Cal. v. S.E.C., 1947, 330 U.S. 585, 67
S. Ct. 918, 91 L. Ed. 1117; but the Government seems to be a
victim of its own Draconianism. We hold the District Court had
jurisdiction of the motion and thus reach the question of our
appellate jurisdiction to review its denial.

Colton, 291 F.2d at 490.

Our view of the constitutional issues implicated in these sections of the tax enforcement
scheme and the conflicts posed by the government’s “Draconianism” is the same now is it was
then. Reading 26 U.S.C. §§ 7210 and 7604 to allow the imposition of penal consequences for
failure to comply with an IRS summons renders the sections unconstitutional unless the
summoned taxpayer has an opportunity to seek judicial review of the summons before placing
the taxpayer at risk of punishment. In Colton we held that taxpayers could seek such a review by
filing a preliminary motion to quash an IRS summons before deciding whether to comply. That
saving condition was excluded by the Supreme Court in Reisman. 375 U.S. at 445; see also
Kulukundis, 329 F.2d at 199. In our view, that leaves only the remedy excluded in Colton—that
“disobedience to [an IRS summons] has no penal consequences [under either 26 U.S.C. §§ 7210
or 7604] until a judge has ordered its enforcement,” 291 F.2d at 490—to keep the scheme
consistent with due process. Reisman advances this view. 375 U.S. at 450 (“[W]e remit the
parties to the comprehensive procedure of the Code, which provides full opportunity for judicial
review before any coercive sanctions may be imposed.”); see also Bisceglia, 420 U.S. at 151
(“Congress has provided protection from arbitrary or capricious action by placing the federal
courts between the Government and the person summoned [by the IRS].”). *Schulz I* provided our first opportunity to conform the law of this Circuit to that view.

Absent the protections afforded by *Colton*, the “Draconian” view of the statutory scheme advanced by the government in *Colton*, and on this petition, would render the scheme itself unconstitutional. In *Schulz I* we found that *Reisman* and *Bisceglia* provide guidance on how 26 U.S.C. §§ 7210 and 7604 must be read so as to preserve agency immunity from preliminary suit while avoiding the *Ex parte Young* concerns that we identified in *Colton*. In light of this guidance, we held that, before punishment for disobedience of an IRS summons may be levied, the agency must seek enforcement through a federal court in an adversarial proceeding through which the taxpayer can test the validity of the summons. See *United States v. Euge*, 444 U.S. 707, 719 (1980) (“[T]he summoned party is entitled to challenge the issuance of the summons in an adversary proceeding in federal court prior to enforcement, and may assert appropriate defenses.”) (emphasis added)); *Donaldson v. United States*, 400 U.S. 517, 525 (1971) (“Thus the IRS summons is administratively issued but its enforcement is only by federal court authority in an adversary proceeding affording the opportunity for challenge and complete protection to the witness.”) (internal quotations marks omitted, emphasis added)); see also *United States v. LaSalle Nat. Bank*, 437 U.S. 298, 302 (1978) (§ 7604(a) procedure commenced by petition followed by an adversarial hearing); *United States v. Edgerton*, 734 F.2d 913, 915-917 (2d Cir. 1984) (describing complete and properly pursued § 7604(b) procedure leading to provision of a coercive contempt penalty); *United States v. Noall*, 587 F.2d 123, 124-26 (2d Cir. 1978) (§

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3 The holding in *Donaldson* that third parties do not have an absolute right to intervene in enforcement proceedings is not to the contrary—that holding was, of course, superceded by 26 § 7609.
7604(a) procedure commenced by petition followed by an order to show cause, submission of opposing affidavits, and argument). We further held in Schulz I that, if the summons is not enforced, then no contempt sanction may be levied against the summoned party and no prosecution under 26 U.S.C. § 7210 may lie; and, in the alternative, if the summons is enforced by the court, then the summoned party must have a reasonable opportunity to comply with the court’s order and only upon refusal to obey the court order may contempt sanctions be imposed or an indictment under 26 U.S.C. § 7210 pursued. See Donaldson, 400 U.S. at 525; Reisman, 375 U.S. at 450. Any lesser protections would be constitutionally insufficient and, with respect to 26 U.S.C. § 7604(b), would also be inconsistent with the law of contempts. See Fed. R. Crim. P., Rule 42; Bloom v. Illinois, 391 U.S. 194, 201-208 (1968); United States v. Rizzo, 539 F.2d 458, 463-65 (5th Cir. 1976).

The rule of due process upon which we relied in Schulz I, and upon which we rely now, can be stated thus: any legislative scheme that denies subjects an opportunity to seek judicial review of administrative orders except by refusing to comply, and so put themselves in immediate jeopardy of possible penalties “so heavy as to prohibit resort to that remedy,” Oklahoma Operating Co. v. Love, 252 U.S. 331, 333 (1920), runs afoul of the due process requirements of the Fifth and Fourteenth Amendments. This is so even if “in the proceedings for

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4 We rejected this interpretation of 26 U.S.C. § 7210 in Colton, 291 F.2d at 489. That holding was constitutionally tenable only in view of our determination that summoned witnesses would have an earlier chance to test the merits of a summons in a motion to quash. Informed by intervening decisions of this Court and the Supreme Court, we reversed our Colton holding in Schulz I. Having considered the government’s arguments on this appeal, we see no reason to change our view again, particularly in view of the fact that § 7210 provides for prosecutions only against those “duly summoned . . . under sections 6420(e)(2), 6421(g)(2), 6427(j)(2), 7602, 7603, and 7604(b).” 26 U.S.C. § 7210 (emphasis added).
contempt the validity of the original order may be assailed.” *Id.* at 335; see also *Reisman*, 375 U.S. at 446; *Ex parte Young*, 209 U.S. 123, 147-48 (1908).

According to the government’s present view of 26 U.S.C. §§ 7210 and 7604, the agency may summon a taxpayer and the taxpayer must choose either to comply or, if not, put herself directly at jeopardy of sanction without an intervening opportunity to seek judicial review of the summons. In *Colton* we rejected that view as contrary to due process. The remedy we proposed there, consistent with *Ex parte Young*, was a prospective suit in the form of a motion to quash. The Supreme Court in *Reisman* rejected that solution and instead held that the agency has no power or authority to compel compliance with a summons and must pursue enforcement in an adversarial proceeding before a federal judge. *Reisman*, 375 U.S. at 445-46. The Court further held that “[i]n such a proceeding only a refusal to comply with an order of the district judge subjects the witness to contempt proceedings,” *id.* at 446, and that attempts to quash IRS summonses are “subject to dismissal for want of equity,” *id.* at 443. Addressing directly *Ex parte Young* issues, the Court recognized that prosecution under 26 U.S.C. § 7210 and attachment under 26 U.S.C. § 7604(b) may present sufficient threat to trigger due process concerns. *Id.* at 446-50. However, noting the lack of administrative enforcement and the limited applicability of both § 7210 and § 7604(b) to “default” or a “contumacious refusal to honor a summons,” *id.* at 449, the Court held that “in any of these procedures . . . the witness may challenge the summons on any appropriate ground,” *id.*. In light of these holdings, the Court concluded that the procedure for challenging IRS summonses “specified by Congress works no injustice and suffers no constitutional invalidity” because it “provides full opportunity for judicial review before any coercive sanctions may be imposed.” *Id.* at 450.
In our view, this provides a reasonable, non-Draconian, solution to the problem we noted

in *Colton* by requiring both judicial review of an IRS summons and an intervening opportunity to

comply with a court order of enforcement prior to the imposition of coercive or punitive

sanctions. See *Kulukindis*, 329 F.2d at 199. *Schulz I* made clear that view. Nothing in the

government's petition inspires us to withdraw except insofar as *Schulz I* may be read to prohibit

pre-hearing attachments of those summoned by the IRS who have wholly defaulted or

contumaciously refused to comply in order to ensure their presence at a promptly held

enforcement hearing. Such attachments are meant solely to ensure the presence of an obstinate

taxpayer at an enforcement hearing. Because indefinitely detaining a taxpayer whose summons

has yet to be enforced by a court would violate the taxpayer's due process rights, the enforcement

hearing must be held as soon after the taxpayer's arrest as possible. See 26 U.S.C. § 7604(b)

(allowing attachment “as for contempt,” and, if appropriate after “a hearing of the case,” issuance

of orders “not inconsistent with the law for the punishment of contempts”); *United States v.

Hefti*, 879 F.2d 311, 312 n.2 (8th Cir. 1989) (“Judicial enforcement of orders under 26 U.S.C. §

7602 is governed by 26 U.S.C. § 7604(b). Only a refusal to comply with an order of the District

Court subjects the witness to contempt proceedings.” (citing *Reisman*)); see also *United States v.

Powell*, 379 U.S. 48, 58, n.18 (1964) (pointing out that summons enforcement “proceedings are

instituted by filing a complaint, followed by answer and hearing. If 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.” (emphasis added)); *Reisman*, 375 U.S. at 446-
50. Neither this opinion nor *Schulz I* prohibits the issuance of pre-hearing attachments consistent

CONCLUSION

For the foregoing reasons the petition for rehearing is GRANTED for the limited purpose
of providing clarification to *Schulz I* contained in this opinion. *Schulz I* shall remain in force to
the extent that it is not inconsistent with this opinion. The motion to extend the time for filing of
a petition for rehearing *en banc* is GRANTED. Either party may file such a motion within 45
days of the filing of this opinion.