May it Please the Court:

Statement of Facts

On November 15, 2001 Plaintiff, the United States Government initiate this proceeding to have this Court to issue an injunction pursuant to 26 U.S.C. §§7402 and 7408 against the presumptively protected speech of the Defendant. Plaintiff sought relief in that the Defendant be permanently enjoined from:

> making false speech (commercial) regarding the "tax shelter, plan or arrangement known as "the §861 argument";
>
> engaging in making materially false statements, the preparation of returns making understatements of liabilities; and;
>
> interfering with the administration and enforcement of the internal revenue laws.

On January 10, 2003 this Court enjoined the Defendant from the above listed activities stating that Defendant's speech was false, thus Defendant's argument of law frivolous, and therefore Defendant's First Amendment activities were not protected.

Defendant subsequently, for the reasons set forth more fully in this Memorandum herein below, filed a Motion to Stay the January 10, 2003 Preliminary Injunction against his First Amendment expressions a political activism.

ARGUMENT

The Preliminary Injunction of January 10, 2003 (Doc. 91) fails its own standards for waiver of the doctrine of prior restraint as set forth by this issuing Court on page 14 of the Memorandum to doc. 91, and the required First Amendment standards of review of speech in relationship to tax regulations as set forth by the U.S. Supreme Court.

Error in Standard of Review

This Court in determining whether or not the prior restraint doctrine applies to this matter cited the case of *Castrol Inc. v. Penzoil Co.*, 987 F.2d 939, 949 (3rd Cir. 1993) which quoted *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973), and held that "an adequate determination" that Defendant's First Amendment expression is unprotected is first required of the Court before restraint of Defendant's speech could issue.

In N. A. A. C. P. v. Button, 371 U.S. 415, 439 (1963), citing Bates v. Little Rock, 361 U.S. 516, 524 (1960), the standard applied by the U.S. Supreme Court in these sensitive matters of the First Amendment was that the State must show a compelling interest.

The government possesses a compelling interest to protect the public from unprotected false speech. The First Amendment standard for review of speech for distinguishing unprotected speech from protected speech is established by the U.S. Supreme Court in *Speiser v. Randall*, 357 U.S. 513 (1958), a case which dealt with taxation statutes that regulate First Amendment expression. In *Speiser*, specific analysis of the speech is necessary for the adequate determination required by the First Amendment.

This Court in its effort to dismiss the requirement of specific analysis as asserted by defendant has revealed that *Speiser*, supra, is contained in the case of *American Library Association, Inc. v. United States*, 201 F.Supp.2d 401, 479 (E.D.Pa. 2002), where the District Court cited *Bantam Books v. Sullivan*, 372, U.S. 58, 66, (1963), a pornography case where the High Court relied on the First Amendment standard of the tax case of *Speiser*. Therefore, whether it is a case dealing with pornography or a case regarding taxation there is only one standard of review regarding First Amendment suppression.

Therefore, in its Order and supporting Memorandum (Doc. 91 p. 11) this Court was in error in failing to apply the standards of *Ashcroft v. Free Speech Coalition*, 535 U.S. ____, 122 S.Ct. 1389 (2002) and *American Library Association, Inc.*, supra, which are consistent with *Speiser* requiring specific analysis of the speech that is to be suppressed.

Error in Analysis and Determination of Regulations

The Court erred by constructing its ruling on the words of the Statute §861(a) while completely ignoring the fact that Defendant's actual speech was regarding the regulations for §861(b). This is in direct violation of the standard for review of tax regulations pursuant to *Koshland v. Helvering*, 298 U.S. 441, 446-447 (1936) and *Chevron Corporation v. Commissioner*, 104 T.C. 719 (1995), citing *National Muffler Dealer Associaction, Inc. v. United States,* 440 U.S. 472, 488 (1979).

The Court has erred in determining that Plaintiff's unfounded claim that Defendant's argument of the regulations of §861(b) is "frivolous because its is frivolous" (November Transcript "N.T." p. 51) is adequate determination as the standard of review requires, since there was no substantive explanation of Defendant's speech of the regulations for §861(b) to support the government's assertion that Defendant's speech is frivolous.

Presently, this Court's determination is in error of law as it was made without any apparent regard for the standards of review of tax law that the Judicial Branch is to follow, as set forth by the U.S. Supreme Court in *U. S. v. Whitridge*, 231 U.S. 144, 149 (1913) and *Chevron Corporation*, supra, which requires consideration of "…the legislature's revealed design.", citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

While this Court examined only the Statutes, the subject of the Defendant's Speech is the regulations for §861(b), as adopted by the Congress through publication in the Federal Register as the explanation of the Statute and intended design of the law according to the Secretary of the Treasury. Treasury Decision 8687 published in 1996 (Def. Exhibit 21 p.2) refers to the history of a law as a consideration in the writing of regulations, and the High Court has even upheld the regulations of the Secretary which had reasonable basis in statutory history even against "logical force" in *Fulman v. United States*, 434 U.S. 528, 536 (1978), cited by *National Muffler supra*, at, 488.

The High Court has upheld readings of the regulations that "fill in gaps and define terms in a way that is reasonable in light of what the legislature's revealed design.", *Chevron U.S.A.,* supra, at 842. This is furthermore significant in consideration of the fact that the reading of a regulation by a Taxpayer that accurately takes the construction of the law into consideration along with facts meets the definition of substantial authority in the Regulations promulgated by the Secretary (26 C.F.R. §1.6661-3(b)(3).

The Supreme Court in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955) stated that the definition of gross income has not changed since its adoption as it ruled upon language of the statute regarding an "item" of gross income. Thus the standard for review of tax law has remained the same, even in regards to regulations as in *Chevron* and *Chevron U.S.A.*, supra.

By embracing the regulations (26 C.F.R. §1.861-4) this Court recognizes that the Congress by enacting 26 U.S.C. §7805(a) gave the primary statutory interpretation power to the Secretary. The Judicial Determination of the Constitutionality of the Regulations (consistent with the standards set forth in *United States v. Correll*, 389 U.S. 299, 305 (1967)

and *Chevron U.S.A.*, supra, at 843 , n.11 (1984) was already decided in *Chevron Corporation,* supra, and is therefore res judicata. Thus this Court, in its determination in the case at bar violated the established standard for review of First Amendment expression by making a ruling without consideration of the Regulations (26 C.F.R. §1.861-8 et. seq.) which Defendant was specifically arguing.

This Court's error in failing to make a determination of the regulations asserted by the Defendant, and their History (Exhibits 7-17) fails to place Defendant's speech regarding the regulations on trial. This failure of this Court to comport its determination to the standard of review of the speech of the Defendant and the Regulations also appears to be a denial of established due process of law.

Defendant's speech pertained to the regulations themselves the Court must *actually* consider, analyze and make a determination on the regulations prior to ordering the Defendant's speech to be silenced.

Error of Law and Fact

The following points reveal how the Order against the Defendant is confusing, inconsistent, lacks factual support, and is therefore unenforceable:

1. This Court has failed to identify, which of the "the Section 861" or "U.S. Sources" arguments that Defendant is enjoined from making, for there are at least five different arguments that mention §861:

Argument I - *Solomon v. Commissioner*, 66 T.C.M. 2000-370, 2000 WL 1800520, aff'd 2001 WL 1414315 (7th Cir. 1994) (Plaintiff's Exhibit I) Mr. Solomon claimed that his **income from Illinois was from outside of the United States.**

Argument II -*Aiello v. Commissioner*, T.C. Memo. 1995-40 (1995) (Plaintiff's Exhibit H) Plaintiff claims that this case rejected the "argument **under I.R.C. section 861 that only foreign corporations and nonresident aliens can be taxed**".

Argument III- *Aiello,* supra -It was once proffered by the Plaintiff in the IRS Notice 2001-40 (Defendnat's Exhibit F) that *Aiello* also is a case "rejecting the claim that section **861 lists the only sources of income relevant for purposes of section 61**."

Argument IV - *Williams v. Commissioner*,114 T.C. 136 (2000) (Plaintiff's Exhibit G) the Tax Court rejected "the claim that **income was not subject to tax because it was not from any of the sources listed in Treas. Reg. sec. 1.861-8(a)**"

Argument V - *Furniss v. Commissioner*, 81 T.C.M. (CCH) 1741, 2001 WL 649000(2001) (Plaintiff's Exhibit F) "Petitioner contends that **income is defined only by section 911 and the regulations under section 861**"

In light of the above, there is no singular "Section 861" or "U.S. Sources" argument. There are at least five different and distinct arguments, the Defendant's argument of 26 C.F.R. §1.861-8(f)(1) and 1.861-8T(d)(2)(ii)(A) being the sixth, and to date there is no case law that has been shown to specifically address Defendant's arguments regarding the above mentioned regulations.

2. Neither the Plaintiff nor this Court in its January 10, 2003, Memorandum has specifically set forth any language in which the Defendant has made any of the above five arguments. For the Plaintiff to claim, and this Court to use, any of the above cases as "an adequate determination" regarding Defendant's speech it must show Defendant's speech precisely espousing one of the arguments as previously rejected, and cannot merely dismiss his speech because he mentions §861.

3. The court, on page 7 and 8 of its January 10, 2003 Memorandum, erred in applying the case of *In re Clark*, 2001 WL 1807509 (Bankr. E.D. N.Y. 2001) to support discredit the Defendant's argument and claim that Defendant's argument of the application of the U.S. Source Rules to U.S. Citizens is frivolous. In *In re Clark* the Bankruptcy Court ruled that §861 is only applicable for "non resident aliens and foreign corporations."

The result in the *Clark* case is incompatible with the words of the regulations themselves and in complete disregard of over 123 years of Federal Rulings on Statutory Construction (*Connecticut National Bank v. Germain*, 503 US 249, 253-254, 117 L. Ed 2nd 391(1992), as the word "citizen" is mentioned in the regulations no less than nine times, and sections of law regarding Citizens no less than six times. No conclusion other than §861 being applicable to U.S. Citizens can be reasonably drawn.

Additionally, the Court's ruling on page 8 of its January 10, 2003 Memorandum is inconsistent in so far as it determined that the regulation section 26 C.F.R. §1.861-4 applies to U.S. Citizen's wages. If section §861 applies to U.S. Citizens then it applies. If it does not apply it does not apply.

In this inconsistency Defendant cannot ascertain which speech regarding §861 and Citizens was enjoined by this Court, as this Court is unable to provide any specific and unambiguous determination regarding the law to show that Defendant is misrepresenting the law. Lacking any clear and specific analysis that addresses Defendant's claim that §861et. seq. applies to U.S. Citizens, and the opinion of the Court per *In Re Clark* being inconclusive at best, there is no adequate determination regarding Defendant's speech.

4. This Court has adjudged (Doc. 91, Supporting Memorandum, pp. 7 and 8) and agrees with the case of *In re Clark*, supra, and says that §861 (and its regulations) "do not define gross income." and therefore made an error of law.

This Court's reliance upon *In Re Clark*, supra, failed to acknowledge the fact that the definition of gross income as revealed in §22 of the 1939 Internal Revenue Code (Defendant's Exhibit 7), as focused upon by the High Court in *Glenshaw*, supra, is substantively unchanged to date. This Statute reveals that the substance of §861 has been inextricably connected and intertwined with the definition of gross income at §61 since at least 1939. *Clark* also ignores the construction of the law as revealed by Defendant's Exhibit 8 which are the definitions of 'items' of gross income, and 'sources' as set forth by Tax Law Professor Richard Westin, which affirms the language of §61 that 'items' come from a 'source,' and also ignores 26 C.F.R. §1.1-1(b) that sources within the U.S. (§861) and sources without the U.S. (§862), as well as sources in §§863-865, are the sources from which Citizens are taxed.

The Court in *Clark* appears to be in error by ignoring the established standard for review of a regulation, which is the specific analysis of the Statutory History of the two laws and their historical connection (*Whitridge* and *Chevron*, supra,) in trying to determine the purpose and function of §61. If there was not, the connection between §§61 and 861 as spoken of by Defendant, the Exhibits 7-17 as he has offered, would have been addressed as fraudulent.

Furthermore, *Clark* fails to recognize the clear construction of §61 defining "gross income" to be reliant upon every exclusionary and exemption provision of Subtitle A and the Internal Revenue laws. (26 U.S.C. Section 61(a); 26 C.F.R. §1.61-1(a)

The Subtitle that contains section 61 is Subtitle A, and within Subtitle A is §861, and pursuant to *Koshland*, supra, as §61 is general and illustrative (26 C.F.R. §1.61-1(a) in function, the Secretary promulgated regulations to which the following sections of law exist and govern regarding "exempt" "items" and "sources" (all components of §61(a) to then lead to the definition of "exempt income" in relationship to income from within the U.S. (26 CFR § 1.861-8(a)(4), 26 C.F.R. §1.861-8(b)(1), 26 C.F.R. §1.861-8T(d)(2)(ii)(A)

5. The *Clark* case claiming that §861 is only regarding allocation and apportionment as this Court asserts on page 7 of its Memorandum in support (Doc. 91), is refuted by the specific analysis in *Chevron Corporation*, which states as follows:

> "Sections 861 thorough 864 determine the sources of income for purposes of the income tax… Sections 861(b)…state in general terms how to determine taxable income of a taxpayer from sources within ….the Unites States after gross income from such sources has been determined." *Chevron Corporation*, supra, (emphasis added)

This case reveals that the source determination function precedes the allocation and apportionment function of the law (*Chevron Corporation*, supra).

In consideration of the cogent determination of *Chevron Corporation*, supra, the Tax Court complied with the standard of review providing specific analysis of the law and therefore provided an adequate determination of 26 C.F.R. §1.861-8et. seq. On the other hand, *In re Clark* failed those standards and merely stated a conclusion. Thus *Clark* yields authority to *Chevron Corporation*, supra, for any purpose of reviewing 26 C.F.R. §1.861-8 et. seq. pursuant to the definition of substantial authority in the Regulations (26 C.F.R. §1.6661-3(b)(3).

6. This Court on page 6 of Doc. 91 offers the Tax Court case of *Christopher v. C.I.R.*, 2002 WL 71029 *3 (Tax Ct. 2002) in support of its position that:

> "The source rules do not exclude from U.S. Taxation income earned by U.S. Citizens within the United States."

This quote from the Tax Court is partially true as 26 C.F.R. §1.861-8(f)(1) and 1.861-8(f)(1)(iv) (F), (G) and (H) specifically list income earned from Guam, Puerto Rico, and the U.S. Virgin Islands as U.S. Domestic Sources in the law governing income earned within the U.S. Yet, on the other hand this ruling makes no mention whatsoever about the definition of "exempt income" at 26 C.F.R. §1.861-8T(d)(2)(ii)(A), supra, as argued by the Defendant. Therefore this Court has erred in making its determination in this case without specific analysis and adequate determination of Defendant's speech.

7. The determination of this Court citing *C.I.R. v. Schleier*, 515 U.S. 3232, 327-328 (1995) (citing *C.I.R. v. Glenshaw Class Co.*, 348 U.S. 426, 429 (1955); United States v. Burke, 504 U.S. 229. 233 (1992); *Helvering v. Clifford*, 309, U.S. 331, 334 (1940) in support of §61 being seen as having a "sweeping scope" is moot, since not only are those cases regarding 26 U.S.C. §61(a) and its components in §861(a), but also this Court, as well as the Tax Court in *Solomon* and *Furniss*, have already applied §61 and §861 concurrently, and this Court on page 8 of its Memorandum applied 26 C.F.R. §1.861-4 regarding an item of gross income to Citizens.

The regulations reveal at 26 C.F.R. §1.61-1(a) that the list of items is merely illustrative, and the terms "including but not limited to" in referring to "the following items" makes the governance of sweeping scope to be only about "items". Yet, the Court opened the door to the concurrent applicability of the §861 to §61, but made no determination or mention of "source", which is significant as the High Court has ruled that the law is specific and must be seen in its actual state and the words heeded. (Smietanka v. First Trust & Sav Bank, 257 U.S. 602, 606 (1922).

Since the above cases do not address the speech of the Defendant regarding "source," they are not relevant for making any determination of Defendant's Speech. Even the case of *Madge v. C.I.R.*, 23 Fed Appx. 604, 2001 WL 1212315 *1 (8th Cir. 2001) the Tax Court and 8th Circuit only addressed §61, and never 26 C.F.R. §1.861-8 et. seq., and therefore it also falls within the scope of this off issue argument never raised by the Defendant.

8. This Court presents the case of *Loofbourrow v. C.I.R.*, 208 F.Supp2.d 698, 709-10 (S.D. Tex. 2002) as a case that constitutes an adequate determination, but the Court offers no logical or well constructed cognitive explanation as to how the argument of Defendant regarding the regulations implementing §861(b) "takes the regulations out of context."

9. This court claims that Defendant the made the following arguments of law as set forth on page 3 of the Court's Memorandum:

> "domestically earned wages of U.S. Citizens are not taxable because such wages are not specifically mentioned in the list of items of gross income that "shall be treated as income from sources within the United States."
>
> "..such wages are not taxable because certain regulations promulgated under section 861…create an applicable exemption."

The Plaintiff has failed to provide any evidence that Defendant ever uttered or published such these specific words making the above frivolous arguments about "wages" to justify any injunction against the Defendant, and this Court has failed to reference any such evidence.

Defendant Objects to these allegations as they are not facts in evidence. Defendant's actual First Amendment expression is on trial here. There can be no trial on hearsay or general summations of the Plaintiff, or the Court, that are then falsely attributed to the Defendant. There must be actual sworn evidence, and neither the Plaintiff has presented, nor has this Court specifically referenced where the Defendant made these frivolous arguments.

Additionally, pursuant to Doc. 36, Exhibit C, pp. 46-47, the Evidence of Record actually proves the speech of the Defendant to be, in fact, opposite to the naked assertions of this Court on page 3 of its Memorandum.

10. The Court is not specific nor in any way clear as to how Defendant's speech regarding the sections of regulations 26 C.F.R. §§1.861-8(a)(4), 1.861-8(b)(1) and 1.861-8T(d)(ii)(2)(A) could be deemed false and unprotected speech in light of his Exhibits O, P, and V, as submitted to this Court. These Exhibits which reveal the specific N.I.T.E. argument when asserted by Mr. Gene Webb, before Federal District Court Judge Ann Conway, the U.S. Department of Justice, the IRS, and his probation officer, was accepted by the Plaintiff. Exhibit O reveals initial claims of frivolity against Mr. Webb's returns and lines 16 to 25 of Page 2 of Exhibit P Assistant U.S. Attorney clearly states that Mr. Webb's returns were accepted by the IRS and the Court, and that the U.S. Department of Justice had no argument against his claims, which are the N.I.T.E. argument.

The Court has known (N.T. p. 37 lines 13-21) about this evidence of a res judicata matter that the Defendant was relying upon to help Members of NITE to seek equal protection and application of the law and hearing regarding Defendant's argument of law that Mr. Webb asserted. Nevertheless, this court did not in any way address it, nor attempt to distinguish it, in its determination in this case.

Defendant's reliance upon the concurring opinions of the IRS, the U.S. Department of Justice, the Internal Revenue Service who accepted the returns and determined refunds, a Federal Judge who knows what a frivolous return looks like, and their acceptance of Defendant's argument of law, not some other argument that was already determined to be *res*

judicata frivolous, is reasonable cause for Defendant's actions as an Activist in regards to §861(b) and its regulations.

11. The Court is unclear in specifying what of Defendant's speech regarding §861(b) applying to U.S. Citizens is false. Defendant has asserted that this section of law and its regulations apply to U.S. Citizens. Defendant merely posted these regulations for all Citizens to see and posted his commentaries. Yet, this Court has nakedly claimed its authority and all of the above authorities state that Defendant is wrong.

To date there have been eleven cases cited in these proceedings that allegedly address Defendant's speech. Of these cases, five are cases that Defendant understands to say that §861 and its regulations apply to U.S. Citizens:

Solomon, supra - Tax Court (1994)
Chevron Corporation, supra - Tax Court (1995)
Aiello, supra - Tax Court (1995)
U.S. v. Gene Webb - (USDC M.D. Fla) (2000) Exhibits O and P
Furniss, supra - Tax Court (2001)

There is also an IRS Alert which states that it is wrong to claim that the U.S. Source Rules DO NOT apply to U.S. Citizens:

IRS NOTICE 2001-18 (Government Exhibit 21)

The next list of six cases (three of which have been ruled upon after the filing of suit) that the Defendant understands to say that §861 is NOT applicable to U.S. Citizens and entities are as follows:

Great-West Life Assurance Co. v. Unites States, 678 F. 2d 180, 183 (Ct. Cl. 1982)
Williams, supra - Tax Court (2000)
Madge, supra - Tax Court and 8th Cir. (2001)
In Re Clark, supra – Bankruptcy (2002)
Christopher, supra - Tax Court (2002)
Loofbourrow, supra – (S.D. Tex. 2002)

The Court in the instant case has been just as inconsistent as the afore said Judicial history, as on page 7 and 8 of its Memorandum the Court stated that the statute does not apply to Citizens and then turned right around and applied a regulation of the Statute (26 C.F.R. §1.861-4) to U.S. Citizens.

This clear inconsistency of the Courts, including this Court, reveals that no injunction can issue in relationship to any speech regarding the applicability of §861 to U.S. Citizens, for there is no consistent determination that can be used against Defendant's speech on this matter.

Commercial Speech

The Order of this Court is in error, as the action of deeming Defendant's Speech and Activism as "commercial" or a business in order to censor it, is in direct violation of the Defendant's First Amendment Rights (Near v. Minnesota, 283 U.S. 697, 720 (1931)

As previously stated to the Court when Defendant cited *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 560 (1980) (Justices Stevens and Brennan concurring) citing Farber, Commercial Speech and First Amendment Theory, 74 Nw. U. L. Rev. 372, 382-383 (1979) and *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 762 (1976), the mere receipt of money does not make commercial activity; the nature of the speech must be analyzed. It depends upon the particular circumstances *Speiser*, supra at 521.

The Court also failed to provide any analysis of the facts that:

all of the information on §861(b) regulations was provided to the public free to all who wanted to read and publicly discuss the Defendant's findings and opinions;

the National Institute for Taxation Education and operation of the Website www.nite.org was an effort to create an Activist First Amendment organization in the

realm of tax law and due process, not unlike the National Association for the Advancement of Colored People (N.A.A.C.P.) or the American Civil Liberties Union (A.C.L.U.), which also publish their beliefs and ideas on and off the Internet, discuss issues, promote their Organizations, lobby, aid and advocate the assertion and litigation of rights, and operate pursuant to donations, Membership Dues, and sale of materials. All of these activities are protected by the First Amendment, pursuant to the U.S. Supreme Court in *N. A. A. C. P. v. Button*, supra, at 419, 428-430, 437, 440, 442 443, 445 (1963);

Historically, the issue of taxation appears to be the MOST POLITICAL issue that speech can address in America and was the primary political issue expressed which lead to the dissolution of the political bonds of this land to the British Crown and to the birth of this Nation and its law. (*Grosjean v. American Press Co.,* 297 U.S. 233, 246-247 (1936)) Thus the legal activism of the Defendant, telling the People of §861(b) regulations and the right to make contentions of factual nature on the IRS forms (*United States v. Sullivan*, 274 U.S. 259 (1927) by use of the 4852 and 8275 forms for the making of legal argument to initiate and exhaust the administrative process, cannot be avoidance or evasion of the income tax pursuant to 26 U.S.C. §6661(b)(2)(C)(ii) to be a "tax shelter" (*U.S. v. Kaun*, 827 F.2d. 1144, 1147 (7th Cir. 1987) and such a regulatory law cannot be used to suppress the institution of the administrative process to assert legal rights and a first impression legal argument, as where there is Right there must be Remedy. As well, Defendant's speech is not mere promotion of a product, but is speech on the issue of taxes, the foundational political issue of America and Public Interest.

The over broad use of the term "commercial speech" in the manner applied by this Court will logically and ultimately extend its application to all political organizations.

Court's analysis on pages 1-3 of its Memorandum in support of its Order (Doc. 91), regarding Defendant's "career" advocating the rights of U.S. Citizens can never justify the over broad application of its authority pursuant to 26 U.S.C. §§7402, 7408, 6700, and 6701 to stop First Amendment expression that looks into the eventual institution of litigation (*Button*, supra, at 431- 438).

In order to dismiss the Activist nature of Defendant's First Amendment Activities, Plaintiff has charged in N.T. pp. 9-10, that Defendant's arguments regarding Due Process of law, the procedural violations displayed in his Exhibit 1, including the right to confront and cross-examine witnesses for the government in IRS Examination Hearings, is also frivolous. Yet, in the recent case of *Lunsford v. Commissioner of Internal Revenue*, 117 T.C. No. 16, Docket No. 18071-99L, pp.14-15 concurring opinion of Judge Halpern (November 30, 2001) (Exhibit 22) the Tax Court stated that IRS administrative procedures are to be reviewed under the Administrative Procedures Act (APA).

Application of Due Process through the IRS Examination process appears to conform greatly to the substance of Title 5 §§554 (b), (c), and (d), 555 (b), (c), (d), as well as 556(d) which mentions confrontation and cross-examination of witnesses, all of which has been advocated by Defendant from the start..

Order is Constitutionally Overbroad

Neither the Government nor this Court have evidenced where Defendant's speech is false, nor has this Court addressed Defendant's Speech regarding the Regulations for §861(b), thus the Order of this Court is Unconstitutional as the letter that Defendant is

Ordered to send to every member of his political organization is the compelling of belief as prohibited by the First Amendment (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) Furthermore, the Order that Defendant cease activities denies him any opportunity to combat the naked assertion of the government against him "and to assert dissident views" (*West Virginia State Board of Education,* supra).

This Order of this Court is also unconstitutional as it requires that Defendant to disclose to the Plaintiff the name and address of every person that he has had contact with regarding his discussion of 26 U.S.C. §861, and thus violates the foundational premise of our government that every citizen shall have the right to engage in political expression and association as enshrined in the First Amendment of the Bill of Rights, and believe that which he wants regarding matters the Government fails to address.

This Order compelling disclosure of the names of those affiliated with the Defendant and the Group he leads, constitutes an effective restraint on freedom of association in direct violation of the First Amendment as seen by the High Court in *Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 544 (1963) and *Button*, supra, at 431; *P.&B. Marina Limited Partnership v. Logrande* 136 F.R.D. 50 (E.D. N.Y. 1991); *NAACP v. Alabama*, 357 U.S. 499 at 462, 78 S.Ct. 1163 at 1171, 2 L.Ed. 2d 1488 (1958); *Black Panther Party v. Smith*, 661 F.2d 1243, 1265 (D.C. Cir.1981), vacated mem. Sub nom., *Moore v. Black Panther Party*, 458 U.S. 1118, 102 S.Ct. 3505, 73 L.Ed.2d 1381 (1982); *Savola v. Webster*, 644 F.2d 743, 645-47 (8th Cir. 1981).

Additionally, this Order has been issued by the Court without it having first ruled on Defendant's First, Fourth, and Fifth Amendment objections to the government's earlier attempts to discover the names and addresses of the Members of N.I.T.E. This matter is still

under *in camera* review, and for the Court to Order the Copies of letters sent to all members to be sent to the Plaintiff is tantamount to the surrendering of the Member list of N.I.T.E. without the Court having first ruled on Defendant's Objections to Discovery. This provision of this Order constitutes an effective restraint on freedom of association, in violation of Defendant's Due Process of law.

The U.S. Supreme Court has stated and reaffirmed in *Button*, supra, at 439, citing in *Louisiana ex rel. Gremillion v. N.A.A.C.P.*, 366 U.S. 293, 297 that regulatory measures cannot be employed for the purposes to stifle or penalize the exercise of First Amendment Rights.

Finally, the January 10, 2003 Order for Preliminary Injunction against the Defendant appears to be overbroad and vague thus making it potentially unconstitutional, as it bars the Defendant from:

> "Further engaging in any conduct that interferes with the administration and enforcement of the internal revenue laws."

This statement is so broad that it unconstitutionally enjoins the Defendant from Activism in helping individuals exhaust the administrative process before the IRS, which the Congress has statutorily subjugated the people's redress and due process rights pursuant to 26 U.S.C. §7422(a) and (d). These expressions and actions are clear components of the right "…to vindicate the legal rights of members…" (*Button*, supra, at 431).

Thus, this order is in violation of the First Amendment rights of the Defendant and the members of N.I.T.E., as it acts as previous restraint:

> "Judge Cooley has laid down the test to be applied: 'The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.' 2 Cooley's

Constitutional Limitations (8th Ed.) p. 886." Grosjean v. American Press Co., 297 U.S. 233, 250 (1936)

As well, this Order is so vague that Defendant is intimidated by its language and requests that this Court clarify what it precisely means, as there are matters of litigation that he and the Institute were assisting in pressing, even at the level of State Judicial process, and this Order appears to be reaching those First Amendment expressions as they are regarding the specific argument of the Defendant that this Court claims to have addressed but has failed to actually address with any of the required specificity and established procedures.

Injunction is Unconstitutional

This Court has established that it has decided upon the Preliminary Injunction against the Defendant pursuant to the four components of (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction.

Success on Merits

In consideration of the standard as set forth in *Speiser*, *Castrol*, *Pittsburgh Press*, and *Chevron Corporation*, supra, requiring a specific analysis and adequate determination of the Regulations, and the requirement that there be a "subordinating interest which is compelling" (*Bates v. Little Rock* and *Button*, supra) there can be no justification of Defendant's speech being seen or adjudged to be frivolous as the points 1-11 above show, since there has been no specific analysis of Defendant's speech, the case law is inconsistent as to whether §861 applies to Citizens or not, this Court's Ruling is inconsistent in the same respect, and there is

no evidence that the Defendant made speech regarding any of the five arguments that have been so far labeled by the Plaintiff to be the frivolous §861 argument.

Lacking demonstration of any violation of law, Defendant's speech suggesting U.S. Citizens apply the regulations of §861(b) to their remuneration has not been shown to constitute any "incitement to imminent lawless action," (Brandenburg v. Ohio, 395 U.S. 444 (1969) for the law has not been made clear by this Court. Therefore, any injunction on this matter is previous restraint (*Near v. Minnesota*, supra), and an Unconstitutional Order in violation of the First Amendment.

Irreparable Injury to Movant

Plaintiff is required by the U.S. Constitution, the statutes of the Internal Revenue Code, the internal revenue regulations, and the Internal Revenue Manual, to provide meaningful due process of law in regards to claims of refund in matters of legal and factual argument which have not been specifically adjudged by the Courts to be frivolous and lacking in legal or statutory merit.

As shown by this case and *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) likelihood of success on merits is the determinative factor in the issuance of an injunction, and since there is no evidence that Defendant is involved in false speech by telling people that §61 is subject to the source determination process of §861, §861 applies to U.S. Citizens, 26 C.F.R §1.861-8(a)(4) contains the U.S. Source Determination process, and §1.861-8T(d)(2)(ii)(A) contains the definition of "exempt income" in relationship to U.S. Sources, Plaintiff is not damaged by people asserting the above provisions of law on the Form 8275 and making contentions of factual nature on IRS Forms 4852 when filing returns that the government believes that they must file.

Additionally, the fact that the Plaintiff possesses the means to address this argument of the regulations of 26 U.S.C. §861(b) through the Administrative process, as well as address same in Alternative Dispute Resolution procedures pursuant to Executive Order 12988 (Exhibit 23), Plaintiff possesses multiple courses of reasonable action resolve any dispute that Defendant has raised without further expense of litigation and Administrative costs.

Substantial Harm to Others

Injunction against the Defendant for speech, activism, and First Amendment expression regarding the Internal revenue laws and the aiding of others in the assertion of their Administrative Due Process Rights before the IRS, is effectively the creation of a precedent against the rights of all Citizens to publicly discuss, display, advocate, and litigate regarding a matter of governance that is supposed to be open to public discussion to all citizens.

Lacking the determinative factor of an adequate determination of the Defendant's actual speech, and specific analysis thereof, injunction is "previous restraint," an infringement of the First Amendment rights of all citizens, and is an irreparable injury sufficient to justify relief. *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality)

Public Interest

The Public has an interest in the preservation of the free exercise of the First Amendment, especially in matters of governance, which includes the subject of law and taxes.

The First Amendment prevents the evil of any government action that might prevent the free and general discussion of public matters absolutely essential to prepare the people for

an intelligent exercise of their rights as citizens. (*Grosjean*, supra) The Supreme Court is certain in this as in *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966) it stated that there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs and thus embraces the right to clamor for change.

Additionally, mere speech is not all that is protected as "Advocacy and belief go hand in hand. For there can be no true freedom of mind if thoughts are secure only when they are pent up." (*Brandenburg*, supra, at 536)

Since "'The liberty of opinion keeps governments themselves in due subjection to their duties.' (*Grosjean*, supra citing Erskine's Speeches, High's Ed., vol. I, p. 525. See May's Constitutional History of England (7th Ed.) vol. 2, pp. 238-245.) it is clear that speech free of previous restraint, even when regarding a subject embarrassing to the government, is of the public interest, as government is the business of the Public, and the issue of taxes and tax law are the speech that founded this Nation's Government:

> "taxes constituted one of the factors that aroused the American colonists to protest against taxation for the purposes of the home government; and that **the revolution really began when, in 1765, that government sent stamps for newspaper duties to the American colonies**." (emphasis added)
>
> "…the adoption of the English newspaper stamp tax and the tax on advertisements, revenue was of subordinate concern; and that the dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs." Grosjean, supra, at 246-247

Lacking the first element of merit demonstrating an actual violation of law and evidence that Defendant has misconstrued any regulations of §861(b), as well as evidence that Defendant has claimed that all domestic income of U.S. Citizens is "tax-free" (Plaintiff's

February 3, 2003 Response to Defendant's Motion to Stay, p. 3), the three subsequent elements used to determine whether or not an injunction shall issue cannot stand. Since no wrong has been evidenced there is no wrong for injunction to correct, no law has been violated by Defendant for this Court to Order that he now comply with, as violation of a law is the first required element for injunction to issue. (*Kaun*, supra, at 1148) Thus, this injunction cannot stand for it is defamatory making the Defendant appear lawless and infamous in the public eye, and is unconstitutional.

CONCLUSION

The Court should Stay all elements of its Preliminary Injunction Order of January 10, 2003, until such time that the Plaintiff comes forth with a specific and adequate determination regarding the Defendant's Specific Speech of 26 U.S.C. §861(b) and its regulations including but not limited to 26 C.F.R. §1.861-8(a)(4), 1.861-8(b)(1), 1.861-8(f)(1), and 1.861-8T(d)(2)(ii)(A), are false.

Respectfully submitted this 14 th day of February, 2003

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