

# TAX DEFIERS AND THE TAX GAP: STOPPING “FRIVOLOUS SQUARED” BEFORE IT SPREADS

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## I. INTRODUCTION

Ever since the Sixteenth Amendment was ratified over ninety-five years ago and then upheld by the Supreme Court three years later,<sup>1</sup> the central debate over income taxation has focused on what will be taxed, how much it will be taxed, and for how long it will be taxed. Over those many years, Americans have legitimately protested the “what,” the “how much,” and the “how long.” These “tax protestors” have sought change by working within the system, advocating tax legislation before Congress, commenting on proposed IRS regulations interpreting the tax laws, and arguing before the Tax Court and other federal courts about the meaning and application of particular tax laws. These “tax protestors” do not question the underlying legitimacy of the United States’ tax system but channel their protest to the details of the taxes themselves.

Over the last fifty years, the term “tax protestor” has devolved from describing those individuals engaged in legally valid and protected conduct to those individuals engaged in illegitimate tax defiance, who deny the legal underpinnings of the tax system itself. This “tax defier” conduct has taken many forms, including filing frivolous returns or no returns at all, flooding the IRS and courts with meritless arguments and positions that courts have uniformly

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1. *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1 (1916).

rejected for decades, and trying to pay off their tax debts with fictitious financial instruments, such as comptroller warrants, sight drafts and bills of exchange. The tax defiers have evolved their distribution network for their positions over the years, from initially peddling their products to a relatively small audience in books, then audiotapes, videotapes, and DVDs, to reaching out to mass audiences through websites and blogs on the Internet that can be accessed with the click of a mouse.

The irony of the tax defiers' situation is that the very system that they reject pays for their ability to live in and reject that system. While tax defiers refuse to pay their fair share of taxes, they have no problem accepting their fair share of the benefits paid for by that tax system, including the courts they litigate in, the roads they drive on, the police and fire departments they call during emergencies, the military that defends them, the sanitation trucks they rely on to pick up their garbage, and the regulators they count on to ensure the safety of the food they eat, the water they drink, and the air they breathe. These tax defiers seemingly do not believe that, as Justice Oliver Wendell Holmes once said, "[T]axes are what we pay for civilized society."<sup>2</sup> They simply assume that someone else will bear that burden. To them, their cost to live in a "civilized society" is essentially nothing.

But any "civilized society," and in particular America's "civilized society" is enormously expensive to operate—over \$2.65 trillion annually at current count.<sup>3</sup> To raise these funds through a voluntary self-assessment tax system, tax defiers' arguments must be promptly addressed and effectively defeated to ensure maximum compliance with the law. Such maximum compliance among the nation's over 138 million taxpayers filing over 235 million returns annually<sup>4</sup> can only be achieved if honest taxpayers, who represent well over eighty-five percent of all taxpayers,<sup>5</sup> have trust in the overall fairness of the system. Maintaining maximum compliance and a high level of trust in the system's fairness are crucial, in turn, in addressing the Tax Gap—the gap between the amount of tax owed and collected on an annual basis. All efforts to ameliorate

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2. See *Compania General De Tabacos De Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).

3. Office of Management and Budget, *The Budget for Fiscal Year 2008, Budget Totals at 151*, available at <http://www.whitehouse.gov/omb/budget/fy2008/summarytables.aspx>.

4. INTERNAL REVENUE SERV., INTERNAL REVENUE SERVICE DATA BOOK 4 (2007), available at <http://www.irs.gov/pub/irs-soi/07databk.pdf>.

5. See INTERNAL REVENUE SERV. OVERSIGHT BD., 2007 TAXPAYER ATTITUDE SURVEY 2 (2008), available at [http://www.treas.gov/irsob/reports/2008/2007\\_Taxpayer-Attitude-Survey.pdf](http://www.treas.gov/irsob/reports/2008/2007_Taxpayer-Attitude-Survey.pdf) (stating that over ninety-five of taxpayers completely or mostly agree that it is every American's civic duty to pay their fair share of taxes, and over eighty-nine of taxpayers completely or mostly agree that everyone who cheats on their taxes should be held accountable).

the Tax Gap are premised on the bedrock belief in the tax system's legitimacy. Should such legitimacy come into question, the Tax Gap could well spiral upwards, rather than trend downwards.

This Article will address the impact of the conduct of illegitimate "tax defiers,"<sup>6</sup> as opposed to legitimate "tax protestors," on the Tax Gap.<sup>7</sup> To understand this impact, the Article will first identify the arguments tax defiers have promoted and then highlight the consistent responses that the courts have had rejecting these arguments. Second, the Article will focus on the potential impact tax defiers may have on the Tax Gap. Finally, the Article will detail the National Tax Defier Initiative recently promulgated by the United States Department of Justice's Tax Division to combat current and future tax defier conduct.

## II. TAX DEFIERS' FRIVOLOUS CONSTITUTIONAL ATTACKS ON THE TAX SYSTEM

Since the 1950s, tax defiers have unsuccessfully utilized a variety of constitutional arguments to attempt to undermine the legitimacy of the income tax system. These constitutional attacks have spanned from direct attacks on the Sixteenth Amendment to the invocation of the First, Fifth, Eighth, Ninth, Thirteenth and Fourteenth Amendments in support of their contentions. All such arguments have met been met with uniform and consistent rejection by the tax courts, district courts, and appellate courts that have addressed them.

### A. *Sixteenth Amendment Frivolous Claims*

A starting point for many tax defiers' constitutional claims has been the Sixteenth Amendment itself. Ratified in 1913, the Sixteenth Amendment states: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and

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6. Others have used the term "tax deniers" to describe those who attempt to rationalize and justify their refusal to accept indisputable historical facts concerning the constitutionality of the income tax system. *See, e.g.*, Daniel Evans, The Tax Protestor FAQ, <http://evans-legal.com/dan/tpfaq.html>. While "tax deniers" fall within the subset of "tax defiers," tax defiance conduct goes well beyond merely denying the legitimacy of the tax system to include affirmative actions taken against the government in pursuit of misguided beliefs (*e.g.*, filing false tax returns, recording fraudulent liens on government personnel, submitting bogus bills of exchanges to pay for tax debts).

7. As part of the Internal Revenue Service Restructuring and Reform Act of 1998, the IRS was prohibited from tracking "tax protestors" in its databases. 26 U.S.C. § 6651 (2008). For those tax defiers who file tax returns with tax defier positions in them or fail to file tax returns at all based on these arguments, the IRS classifies them as "frivolous non-filers."

without regard to any census or enumeration.” The Sixteenth Amendment arose, in part, in response to the Supreme Court’s two decisions in *Pollock v. Farmers’ Loan and Trust Co.*,<sup>8</sup> which overturned Congress’ efforts to tax income deriving from property by finding such tax to be a non-apportioned “direct tax” in violation of Article I, Section 9 of the Constitution.<sup>9</sup> Tax defiers have challenged the validity of the Sixteenth Amendment with arguments ranging from alleging its improper ratification to asserting that it did not cure the problem of income taxes being impermissible non-apportioned “direct taxes” on property.

With respect to the ratification argument, tax defiers posit that the Sixteenth Amendment was never properly ratified and therefore not part of the Constitution. They contend that thirty-four out of the thirty-eight states ratified an amendment that contained errors of diction, capitalization, punctuation and spelling; since at least three-fourths of the states did not approve exactly the same text, they proclaim that the amendment did not go into effect.<sup>10</sup>

As the courts have discussed, this argument is not new but was considered by Secretary of State Philander Knox in 1913 when he certified that the amendment had been ratified. In *United States v. Thomas*, the court noted that the Supreme Court follows the “enrolled bill rule” which means that if a legislative document was authenticated in regular form by the appropriate officials, the court treats that document as properly adopted.<sup>11</sup> Since Secretary Knox declared that a sufficient number of states had ratified the Sixteenth Amendment, and his decision was not “transparently defective,” such a decision “is now beyond review.”<sup>12</sup>

With regard to the impermissible “direct tax” argument, many tax defiers have held that federal income taxes are unconstitutional because, notwithstanding the Sixteenth Amendment, they are “direct taxes” that must be apportioned among the states in accordance with the census. They rely on the language of Article I, Section 9, Clause 4 of the Constitution, which predated the Sixteenth Amendment, mandating that “direct taxes” be apportioned in order to be constitutional. Because income taxes are not so apportioned among the states, tax

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8. 157 U.S. 429 (1894), *on reh’g*, 158 U.S. 601 (1895).

9. Article I, Section 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.” The *Pollock* Court ruled that a tax on the income, that is, rents from real property is the same as a tax on the value of the property itself; as such, the Court concluded that it was a “direct tax” that was unconstitutional unless apportioned. *Pollock*, 157 U.S. at 580-81. On rehearing, the Court further decided that a tax on dividends, interest, and other income from personal property was also a “direct tax” requiring apportionment. *Pollock*, 158 U.S. at 637.

10. Improper ratification is one of the central tax defier argument promulgated by W. Benson and M. Beckman in their 1985 book, *The Law That Never Was*.

11. 788 F.2d 1250, 1253-54 (7th Cir. 1986)

12. *Id.*

defiers conclude that the income tax laws violate the Constitution and should be unenforceable.

This argument has long been addressed and rejected by the Supreme Court. In 1916, a unanimous Supreme Court in *Brushaber v. Union Pacific Railroad Co.* ruled the income tax law, promulgated after the ratification of the Sixteenth Amendment, constitutional because “the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived.”<sup>13</sup> The Court explicitly acknowledged that the Sixteenth Amendment was drawn for the purpose of “doing away for the future with the principle upon which the Pollock Case was decided [in 1894 and 1895],” namely that a tax on the income received and emanating from property was the same as a direct tax on property itself requiring apportionment among the states to be constitutional.<sup>14</sup> Thus, from almost the genesis of the Sixteenth Amendment, the Supreme Court has emphatically rejected the “direct tax” constitutional argument.

Yet, tax defiers have continued over the years to beat their heads against the walls of this judicial rejection of their argument. Frustrated with such frivolous arguments, courts have exacted sanctions from tax defiers for their insistence in repeatedly raising them. For instance, in 1989, the Ninth Circuit upheld a \$2,500 sanction against criminal defense counsel Lowell Becraft, Jr. for advancing the “direct tax” argument in a petition for rehearing after the panel affirmed his client’s tax convictions. The court held:

[Becraft’s] position can fairly be reduced to one elemental proposition: The Sixteenth Amendment does not authorize a direct non-apportioned income tax on resident United States citizens and thus such citizens are not subject to the federal income tax laws. We hardly need comment on the patent absurdity and frivolity of such a proposition. For over 75 years, the Supreme Court and the lower federal courts have both implicitly and explicitly recognized the Sixteenth Amendment’s authorization of a non-apportioned direct income tax on United States citizens residing in the United States and thus the validity of the federal income tax laws as applied to such citizens.<sup>15</sup>

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13. *Union Pacific R.R. Co.*, 240 U.S. 1, 18 (1916).

14. *Id.*

15. *In re Becraft*, 885 F.2d 547, 548 (9th Cir. 1989) (footnote omitted); *see also* *United States v. Gerads*, 999 F.2d 1255, 1256 (8th Cir. 1993) (affirming \$1,500 in sanctions for raising various frivolous tax defier arguments, including the “direct tax” argument). A variant on this tax defier argument has been that wages are property; a tax on them is a property tax; and since that tax has not been apportioned, it is unconstitutional. This argument has been summarily rejected whenever brought. *See, e.g.*, *Connor v. Commissioner*, 770 F.2d 17, 20 (2d Cir. 1985) (imposing \$2,000 in sanctions against tax defier, holding “as we and innumerable other courts have repeatedly explained, wages are income, and income taxes do not have to be apportioned”).

*B. Free Exercise Clause of First Amendment and Ninth Amendment*

Claiming protection under the Free Exercise Clause of the First Amendment, certain tax defiers have refused to pay taxes based on their religious objections to military expenditures or other types of spending by the government. Over twenty-five years ago, the Supreme Court addressed this argument squarely in *United States v. Lee*,<sup>16</sup> holding that the First Amendment's Free Exercise Clause does not afford members of a religious sect a right to avoid payment of social security taxes. The Court concluded that because "the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."<sup>17</sup> Since then, courts have uniformly rejected this tax defier First Amendment argument whenever raised.<sup>18</sup>

Despite the decades of rejection, tax defiers have continued to tweak this argument, adding claims under the Religious Freedom Restoration Act of 1993 ("RFRA")<sup>19</sup> and the Ninth Amendment. The courts have not hesitated in rejecting these claims and, in certain cases, imposing sanctions on the tax defiers who make them. For instance, in *United States v. Jenkins*,<sup>20</sup> the tax defier challenged the collection of the portion of his taxes to be used for military spending on the grounds that the First and Ninth Amendment as well as RFRA protected the free exercise of his religious beliefs to oppose funding the war through his taxes. While the court did not doubt the sincerity of the tax defier's religious convictions, the court noted that it was "well settled that the collection of tax revenues for expenditures that offend the religious beliefs of individual taxpayers does not violate the Free Exercise Clause of the First Amendment."<sup>21</sup> Similarly, the court found that it was "well settled" that RFRA did not afford a right to avoid payment of taxes for religious reasons.<sup>22</sup>

The *Jenkins* court also dismissed the tax defier's Ninth Amendment claim.

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16. 455 U.S. 252, 255-57 (1982).

17. *Id.* at 260.

18. *See, e.g.,* *Browne v. United States*, 176 F.3d 25 (2d Cir. 1999) (holding that taxpayers cannot withhold the portion of their taxes that they calculate will be for military purposes); *Adams v. Comm'r*, 170 F.3d 173 (3d Cir. 1999) (holding that the government need not accommodate taxpayers whose religious beliefs lead them to oppose military funding); *United States v. Ramsey*, 992 F.2d 831, 833 (8th Cir. 1993) (holding that the First Amendment does not give right to avoid federal income tax on religious grounds); *Jenney v. United States*, 755 F.2d 1384 (9th Cir. 1985) (holding that taxpayers cannot withhold taxes based on conscientious objection to war).

19. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2006).

20. *United States v. Jenkins*, 483 F.3d 90 (2d Cir. 2007).

21. *Id.* at 92.

22. *Id.* (citing *Browne*, 176 F.3d at 26 (rejecting RFRA claim on the ground that "voluntary compliance is the least restrictive means by which the IRS furthers the compelling governmental interest in uniform, mandatory participation in the federal tax system"))).

While acknowledging that the Ninth Amendment was not an independent source of rights, but provided a “rule of construction,” the tax defier had attempted to recast his rejected First Amendment argument as one permitted under the Ninth Amendment’s “rule of construction.”<sup>23</sup> The court held that the tax defier could not “bolster or enhance an unavailing First Amendment argument merely by presenting it in the dress of a Ninth Amendment claim.”<sup>24</sup>

Given that the tax defier’s possibility of success on the merits of his arguments was “squarely foreclosed by long-settled case law,” the *Jenkins* court affirmed the Tax Court’s imposition of a \$5000 penalty on the tax defier for making “frivolous” and “groundless” claims under 26 U.S.C. § 6673(a)(1).<sup>25</sup>

### C. Fifth Amendment Due Process and Self-Incrimination Frivolous Arguments

Tax defiers have utilized the Fifth Amendment to argue that income tax laws represent an illegal taking by the government without due process, and that compelling income tax reporting constitutes a violation of the tax defiers’ right against self-incrimination. With regard to the takings argument, courts have regularly upheld summary IRS tax collection proceedings provided there was an opportunity for subsequent post-collection judicial review.<sup>26</sup>

With respect to the self-incrimination argument, since 1927 the Supreme Court has categorically stated that taxpayers have no Fifth Amendment right to refuse to file an income tax return on the grounds that making statements on the return violates their right against self-incrimination.<sup>27</sup> While a taxpayer may properly assert a Fifth Amendment objection to a specific question on a return where the answer may tend to incriminate the taxpayer (*e.g.*, not revealing that the source of the income was from an illegal activity), a blanket assertion of the Fifth Amendment to all questions on a return is not permitted.<sup>28</sup>

### D. Thirteenth Amendment

Contending that taxation is “slavery” or “involuntary servitude,” tax defi-

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23. *Jenkins*, 483 F.3d at 93.

24. *Id.* at 94; *see* *Barton v. Comm’r*, 737 F.2d 822, 823-24 (9th Cir. 1984).

25. *Jenkins*, 483 F.3d at 94.

26. *See, e.g.*, *Phillips v. Comm’r*, 283 U.S. 589, 595-97 (1931); *Lojeski v. Boandl*, 788 F.2d 196, 199-200 (3d Cir. 1986); *Todd v. United States*, 849 F.2d 365, 369 (9th Cir. 1984).

27. *United States v. Sullivan*, 274 U.S. 259, 263-64 (1927).

28. *See, e.g.*, *Marchetti v. United States*, 390 U.S. 39, 41-42 (1968); *Sullivan*, 274 U.S. at 264; *United States v. Neff*, 615 F.2d 1235, 1240-41 (9th Cir. 1980); *United States v. Schiff*, 612 F.2d 73, 77-83 (2d Cir. 1979); *United States v. Oliver*, 505 F.2d 301, 308 (7th Cir. 1974).

ers have tried to use the Thirteenth Amendment's prohibitions of slavery and involuntary servitude as a sword to defeat their income tax obligations. Courts have quickly dispensed with such "far-fetched, indeed frivolous" arguments,<sup>29</sup> finding that the requirements of the tax laws are not the "kind of involuntary servitude referred to in the Thirteenth Amendment."<sup>30</sup>

#### E. Other Frivolous Constitutional and Statutory Arguments

In trying to limit the reach of the federal income tax code, tax defiers have resorted to taking absurd interpretations of constitutional and Tax Code provisions. For example, tax defiers have argued that since Section 8, Paragraph 17 of Article I of the Constitution gives Congress the power of "exclusive Legislation" over the District of Columbia and other places purchased with the consent of the state legislatures for "Forts, Magazines, Arsenals, Dock-Yards and other needful Buildings," this clause limits the powers of Congress to assess income taxes only to citizens living in these "federal areas." Courts have readily rejected these arguments, as they are based on the false premise that the power of Congress does not extend to the states.<sup>31</sup> From the Supreme Court's early ruling in *Hylton v. United States* in 1796 affirming the imposition of a tax on a citizen of Virginia for carriages held for private use,<sup>32</sup> the courts have held that the power of Congress "to lay and collect taxes, duties, imposts, and excises" found in Section 8, Article I of the Constitution "may be exercised and must be exercised, throughout the United States."<sup>33</sup>

Over the last decade, another tax defier argument has emerged, which claims that based on Section 861 of the Internal Revenue Code only income earned outside the United States qualifies as taxable income. To make this argument, tax defiers turn the Internal Revenue Code on its head. Section 61(a) of the Code defines "gross income"—which is the beginning point for the cal-

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29. *Abney v. Campbell*, 206 F.2d 836, 841 (5th Cir. 1953); *see also* *Anderson v. Comm'r*, 1 F.3d 1240 (6th Cir. 1993); *Fox v. Comm'r*, 969 F.2d 951, 952 (10th Cir. 1992); *Ginter v. Southern*, 611 F.2d 1226, 1227 (8th Cir. 1979).

30. *Porth v. Brodrick*, 214 F.2d 925, 926 (10th Cir. 1954). Plaintiff Arthur Porth, a building contractor in Wichita, Kansas, is credited with being one of the first tax defiers, penning and peddling a book entitled *A Manual for Those Who Think That They Must Pay An Income Tax*, and serving time in prison after being convicted on various tax evasion charges. *See* Anti-Defamation League Publication, Tax Protest Movement, [http://www.adl.org/learn/ext\\_us/TPM.asp](http://www.adl.org/learn/ext_us/TPM.asp).

31. *See, e.g.,* *United States v. Mundt*, 29 F.3d 233, 237 (6th Cir. 1994) (finding "completely without merit and patently frivolous" a tax defier's claim that he is solely a resident of the state of Michigan and not a resident of a "federal zone" thereby making him not subject to federal taxation).

32. *Hylton v. United States*, 3 U.S. (1 Dall.) 171 (1796).

33. *Loughborough v. Blake*, 18 U.S. (Wheat) 317, 318-19 (1820).



culuation of taxable income—as “all income from whatever source derived.” The general rule is then that all income is included in gross income, regardless of its source, unless specifically excluded or excepted.<sup>34</sup> Section 861 and its regulations address sources of income for foreign corporations and nonresident aliens to determine in these narrow cases the exclusion, credit, deduction or taxable income for these sources of income. Since nonresident aliens and foreign corporations are only taxed on their gross income derived from sources within the United States and effectively connected with a trade or business within the United States, Section 861 was required to deal with these unique taxpayers’ situations. For the vast majority of American taxpayers, including U.S. citizens and resident aliens, the provisions of Section 861 are irrelevant since they are taxed on their worldwide income. Indeed, the provisions of Section 861(a)(3) explicitly state that dividends, interest, and compensation for labor or personal services performed in the United States are deemed to be from sources in the United States.

Tax defiers assume that “taxable income” and its “sources” can only be determined by Section 861 and its regulations, rather than Section 61. Since most taxpayers’ income does not fall under the list of foreign “sources” identified in Section 861 and Treasury Regulation 1.861-8(f), tax defiers assert that most taxpayers’ income is not taxable.<sup>35</sup> The Tax Court has described this argument as “frivolous.”<sup>36</sup> Purveyors of the Section 861 argument have been convicted of tax crimes and imprisoned,<sup>37</sup> and have been enjoined from spreading its absurdity.<sup>38</sup>

### III. COURTS’ BALANCING THE NEEDS OF LEGITIMATE TAXPAYERS WITH THE HARM CAUSED BY TAX DEFIERS

In dealing with tax defier arguments, courts have had to strike a balance

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34. See Treas. Reg. § 1.1-1(b) (2008) (“In general, all citizens of the United States, wherever resident, and all resident alien individuals are liable for the income taxes imposed by the Code whether the income is received from sources within or without the United States.”).

35. See, e.g., *Furniss v. Comm’r*, 81 T.C.M. (CCH) 1741 (U.S. Tax Ct. 2001).

36. *Solomon v. Comm’r*, 66 T.C.M. (CCH) 1201 (U.S. Tax Ct. 1993), *affirmed without opinion*, 42 F.3d 1391 (7th Cir. 1994).

37. See, e.g., *United States v. Marston*, 517 F.3d 996, 999 (8th Cir. 2008) (rejecting defendant’s defense under Section 861 that his domestically earned income was not taxable since Section 861 only authorizes taxes upon foreign sources of income, not domestic—twenty-six months); *United States v. Clayton*, 506 F.3d 405 (5<sup>th</sup> Cir. 2007) (sentenced to sixty months imprisonment for filing false returns and failing to file returns based on the 861 argument).

38. See, e.g., *United States v. Bosset*, No. 8:01-CV-2154-T-26TBM, 2003 WL 1735481 (M.D. Fla. Feb. 27, 2003).

between welcoming honest taxpayers with legitimate tax claims into the courts and spurning tax defiers with rejected, meritless tax claims. Legitimate tax claims and legitimate tax protesters follow a hallowed tradition in American history, from the Boston Tea Party and Whiskey Tax Rebellion to those seeking through legislative channels to replace our current Internal Revenue Code with a flat tax or value-added tax. Perceived overall fairness of the tax system by taxpayers demands that courtroom doors stay wide open for such claims. However, fairness equally dictates that the courtroom doors slam shut on tax defiers advocating patently meritless and ridiculous positions and engaging in obstructionist and illegal conduct.

The sensitivity and frustration courts have had in striking an appropriate balance and dealing with “frivolous,” “absurd,” and “preposterous” tax defier arguments was best summed up by the Fifth Circuit in *Crain v. Commissioner* in 1984:

We are sensitive to the need for the courts to remain open to all who seek in good faith to invoke the protection of law. An appeal that lacks merit is not always—or often—frivolous. However, we are not obliged to suffer in silence the filing of baseless, insupportable appeals presenting no colorable claims of error and designed only to delay, obstruct, or incapacitate the operations of the courts or any other governmental authority. Crain’s present appeal is of this sort. It is a hodgepodge of unsupported assertions, irrelevant platitudes, and legalistic gibberish. The government should not have been put to the trouble of responding to such spurious arguments, nor this court to the trouble of ‘adjudicating’ this meritless appeal.<sup>39</sup>

Dismissing tax defier lawsuits, granting summary judgment against their claims, imposing substantial monetary sanctions against their obstructionist conduct, approving civil injunctions to stop the spread of their fraudulent messages, meting out lengthy sentences of incarceration to deter their illegal behavior—these judicial actions represent important tools for combating tax defier conduct. But reactive judicial measures must be joined with proactive and comprehensive prosecutorial strategies and targeted legislative action to prevent tax defier conduct from spreading and influencing, among other things, the Tax Gap.

#### A. Tax Defiers’ Impact on the Tax Gap

What impact has tax defier conduct had on the Tax Gap? Since 2005, when the IRS reported its results from the National Research Program, which analyzed taxpayer data collected for the 2001 year, and determined there was a gross \$345 billion “Tax Gap,”<sup>40</sup> the question of how to close this Tax Gap has

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39. *Crain v. Comm’r*, 737 F.2d 1417, 1418 (5th Cir. 1984).

40. Press Release, Internal Revenue Serv., New IRS Study Provides Preliminary Tax

dominated much discussion in the tax compliance and enforcement world. In its report, the IRS defined the “Tax Gap” as “the aggregate amount of true tax liability imposed by law for a given tax year that is not paid voluntarily and timely. True tax liability for any given taxpayer means the amount of tax that would be determined for the tax year in question if all relevant aspects of the tax law were correctly applied to all of the relevant facts of that taxpayer’s situation.”<sup>41</sup>

Breaking down this definition, the IRS stated that a “voluntary” payment was one where a tax liability was paid “without direct IRS intervention.” To be “timely,” a tax liability must be paid in full on or before the date on which all payments for the given tax year were legally due.

The IRS report focused on three forms of taxpayer noncompliance that resulted in accurate returns not being voluntarily made and timely payments not being received: (1) not filing the required returns on time (nonfiling); (2) not reporting one’s full tax liability on a timely filed return (underreporting); and (3) not timely paying the full amount of tax reported on a timely return (underpayment). Underreporting (in the form of unreported receipts and overstated expenses) constituted 82 percent of the gross Tax Gap; underpayment represented nearly 10 percent; and nonfiling embodied almost 8 percent of the gross Tax Gap (not including legitimate nonfilers who have no obligation to file).

Out of the \$345 billion gross Tax Gap, individual income underreporting represented approximately \$197 billion, or about 57 percent of the overall Tax Gap.<sup>42</sup> Taking individual income tax and self-employment tax together, individual underreporting constituted approximately 68 percent of the overall Tax Gap.<sup>43</sup>

Tax defiers mostly fall in the underreporting or nonfiling categories. Their typical playbook includes, among other actions, not filing any returns, filing returns with only zeros and/or Fifth Amendment claims on them, and claiming vastly overstated deductions or underreporting much of their income. While the portion of the Tax Gap that results from their personal underreporting or nonfiling remains small, their potential impact on the Tax Gap derives from their attack on the legitimacy of the system itself. If honest taxpayers were to become

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Gap Estimate, IR-2005-38 (Mar. 29, 2005), *available at* <http://www.irs.gov/pub/irs-news/ir-05-038.pdf>. This Tax Gap gross number of \$345 billion is most likely outdated and a low estimate for use in 2008-09 since it was based on 2001 figures and a number of conservative assumptions and did not include illegal source or international income. *See* U.S. DEP’T OF TREASURY, INTERNAL REVENUE SERV., REDUCING THE FEDERAL TAX GAP: A REPORT ON IMPROVING VOLUNTARY COMPLIANCE (2007), *available at* [http://www.irs.gov/pub/irs-news/tax\\_gap\\_report\\_final\\_080207\\_linked.pdf](http://www.irs.gov/pub/irs-news/tax_gap_report_final_080207_linked.pdf) [hereinafter TAX GAP REPORT]. Indeed, the IRS estimates the net Tax Gap after collection and enforcement actions to be \$290 billion for 2001.

41. TAX GAP REPORT, *supra* note 40, at 6.

42. *Id.* at 9.

43. *Id.* at 11.

convinced that either (i) the income tax system violated the articles or amendments of the Constitution, or did not statutorily require them to file a tax return or pay the tax due and owing; or (ii) there was a class of taxpayers making these arguments with impunity, then the voluntary compliance component necessary for the nation's tax system to properly operate would be jeopardized and the Tax Gap would be in danger of growing significantly.

*B. The National Tax Defier Initiative: A Strategic and Comprehensive Program to Defeat Tax Defiance Conduct*

How then can the government best address this tax defier phenomenon, a small but potentially destructive infection in the body of the nation's tax system that has mutated its attacks over the last 50 years? Commentators have struggled with various solutions. Any solution rests in large part on seeking a balance in fairness between permitting taxpayers with legitimate good faith claims a full opportunity to air these claims administratively and before the courts, and excluding, deterring, and punishing tax defiers espousing illegitimate positions brought to undermine the tax system itself.

Stating that "neither civil penalties nor criminal prosecution have slowed the growth of the tax protestor movement" and searching for a different approach "to compensate the system for the costs imposed by tax protestors' frivolous arguments and to deter others from converting to the tax protestor movement," one commentator advocates the use of nondiscretionary, significant civil penalties on tax defiers.<sup>44</sup> Such a solution, while representing an extra arrow in the government's quiver in the fight against tax defiers,<sup>45</sup> will not by itself shut down or enjoin tax defier operations that spread their baseless tax positions every year, nor will it incarcerate those who engage in this conduct at a criminal level.<sup>46</sup>

Instead, a national strategic approach, combining all enforcement tools available, presents the best opportunity to stop, deter, and prosecute tax defier malfeasance. Toward that end, in April 2008, the Tax Division launched the National Tax Defier Initiative (TaxDef Initiative). At the press conference an-

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44. Danshera Cords, *Tax Protestors and Penalties: Ensuring Perceived Fairness and Mitigating Systemic Costs*, 2005 BYU L. Rev. 1515, 1555-68 (2005).

45. *See id.* at 1566 ("When the legal system depends on honest compliance as much as the income system does—and when disobedience is potentially rewarding to those affected by the rule—it is often necessary to impose steep penalties on those who refuse to comply." (quoting *Coleman v. Comm'r*, 791 F.2d 68, 69 (7th Cir. 1986))).

46. The commentator herself acknowledges the limited effectiveness of civil penalties on tax defier behavior, noting that some tax defiers engage in multiple litigation, undeterred by failed prior litigation and assessed penalties. Cords, *supra* note 44, at 1564 & n.252 (citing cases).

nouncing the TaxDef Initiative, several goals of the program were presented. The first two goals were to strengthen and expand the coordination among the Tax Division, the Internal Revenue Service, and the ninety-four U.S. Attorney's offices around the nation to ensure that both criminal and civil enforcement tools were being maximized and most efficiently used to counter tax defier conduct. Too often, tax enforcement agencies had combated tax defier schemes through ad hoc, reactive, local or regional strategies. Such provincialism did not allow the government to take advantage more fully of its expertise developed in a particular case and apply it in related cases. By attacking the tax defier problem from a national perspective, successful investigative and prosecutorial strategies (*e.g.*, use of undercover informants, analysis of databases recovered in search warrants, motions in limine to preclude certain types of irrelevant evidence, jury instructions vetted by the courts, sentencing briefs outlining the harms to the tax system posed by tax defier conduct) used in one case can quickly be adopted in similar cases.

To enhance these goals, legislation needs to be passed to further deter tax defiers. Recently, Congress has considered creating an aggravated non-filer felony to address those who repeatedly fail to file their returns over many years. Presently, if a tax defier knowingly and willfully fails to file a required return, the Tax Code criminalizes this action as a misdemeanor under 26 U.S.C. § 7203. Under the proposed aggravated non-filer provisions, if a tax defier knowingly and willfully fails to file a required return in three out of the last five years with an aggregate tax due and owing of more than \$100,000, then the tax defier will be guilty of a felony with a five year maximum term of incarceration and a maximum \$500,000 fine (\$1,000,000 for corporations). Such laws coupled with active enforcement will send a strong deterrent message to tax defiers and honest taxpayers alike that engaging in tax defier conduct comes with a heavy price.

The third goal of the TaxDef Initiative was to expand the government's efforts to enjoin tax defier activity. Civil injunctions have played a key role over the last several years in the enforcement arsenal to stop tax defier activity, because in many cases the injunctions can be obtained well before the conclusion of a criminal investigation. Since 2001, the Tax Division has obtained over 360 civil injunctions against fraudulent tax preparers and tax promoters, about a third of which involve tax defier activity. The Tax Division's estimate is that over \$600 million in taxes have been collected, which otherwise would not have been, as a result of the injunctions obtained against those propagating tax defier schemes.

The fourth and fifth goals of the TaxDef Initiative were to maximize the government's use of technology to detect and prosecute cases, and then use that technology to educate the public about the falsity of tax defier claims and the consequences of engaging in such activity. The explosion of the Internet in the last decade has greatly facilitated tax defier activity. It has turned what was

once a paper-based, local, or regional enterprise into a click-and-download national operation. The government's response must equally take advantage of the powerful resources of the Internet and similar media to bring enforcement efforts directly to the door of the tax defiers and the taxpaying community. Toward that end, the Tax Division has worked to better alert taxpayers through the Internet and mass media about the civil and criminal prosecutions of tax defiers, from the conviction and four-year sentence of Sherry Peel Jackson, a former IRS employee-turned-tax-defier-promoter,<sup>47</sup> to the 162 month sentence of imprisonment and permanent injunction issued against Irwin Schiff, one of the deans of the tax defiance movement.<sup>48</sup> The IRS has published on its website—a website that is one of the most trafficked business websites in the world—an analysis debunking the most common tax defier arguments entitled “The Truth About Frivolous Tax Arguments.”<sup>49</sup>

While these combined efforts will take time to reach fruition, two results should be achieved in the short term: (1) tax defiers will know that the Department of Justice will proceed against them, using civil injunctions and criminal prosecutions, wherever and whenever they engage in tax defier activity throughout the nation; and (2) of equal importance, honest taxpayers will know that there will be serious consequences for those who follow in the tax defier path.

#### IV. CONCLUSION

As President John F. Kennedy once said, “For voluntary self-assessment to be both meaningful and productive of revenues, the citizens must not only have confidence in the fairness of the tax laws, but also in the uniform and vigorous enforcement of these laws.”<sup>50</sup> The American multi-trillion dollar, voluntary self-assessment tax system is unique in the world, if not human history. Its laws emanate from a constitutional amendment almost 100 years old and have been intricately developed over time through hundreds of thousands of hours of effort and analysis from all three branches of government—legislative, executive and judicial. Tax defiers scoff at this system and have tried to undermine it with constitutional and statutory arguments that the courts have labeled ridiculous,

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47. See Press Release, Dep't of Justice, Four Year Prison Sentence Affirmed for Georgia Tax Defier (Sept. 11, 2008), *available at* <http://www.usdoj.gov/tax/txdv08812.htm>.

48. See Press Release, Dep't of Justice, Tax Defier Irwin Schiff Sentenced to 11 Additional Months in Prison for Criminal Contempt (Sept. 8 2008), *available at* <http://www.usdoj.gov/tax/txdv08789.htm>.

49. <http://ftp.irs.treas.gov/taxpros/article/0,,id=159932,00.html>.

50. John F. Kennedy, U.S. President, Special Message to the Congress on Taxation (Apr. 20, 1961), *quoted in* Cords, *supra* note 44 at 1515 n.1.

absurd, frivolous, and “frivolous squared.”<sup>51</sup> If not responded to forcefully and effectively, tax defier attacks threaten to significantly increase the current Tax Gap, because they would result in taxpayers no longer trusting the fairness of the system, which, in turn, may substantially affect their voluntary compliance in filing accurate returns and paying taxes due and owed. To combat this small, vocal, but potentially large problem, the Tax Division’s National Tax Defier Initiative has harnessed the civil and criminal prosecutorial tools of the national government to strategically shut down, deter and prosecute tax defier conduct throughout the nation. Uniformly and vigorously enforcing America’s tax laws is particularly crucial at this time to maintain the confidence and trust that citizens have in the fairness of the country’s tax system—the linchpin to all efforts to lower the Tax Gap.

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51. *United States v. Cooper*, 170 F.3d 691 (7th Cir. 1999) (commenting that tax defier arguments, “frivolous when first made, have been rejected in countless cases. They are no longer merely frivolous; they are frivolous squared.”).

