



The Law Office of
Robert G. Bernhoft

207 East Buffalo Street, Suite 600 • Milwaukee, Wisconsin 53202
(414) 276-3333 telephone • (414) 276-2822 facsimile • rgbernhof@voyager.net

The Honorable William B. Moran
Administrative Law Judge
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Mail Code 1900L, Ariel Rios Building
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

November 14, 2003

Via Facsimile and Federal Express

Re: *Director of Professional Responsibility v. Banister, Complaint No. 2003-2*

Dear Judge Moran:

Enclosed herewith for filing in the above-referenced matter please find three copies each of "Respondent's Brief in Opposition to the IRS's Motion in Limine to Exclude Evidence From the Hearing" and "Certificate of Service".

Thank you for your assistance, and please do not hesitate to correspond with me at any of the contact points above should the need arise.

Respectfully yours,

A handwritten signature in black ink, appearing to read "R. Bernhoft", with a long horizontal line extending to the right.

Robert G. Bernhoft
Attorney and Counselor at Law

enclosures

cc: Jay J. Kessler, Esquire (via facsimile and Federal Express)
Joseph R. Banister (via e-mail attachment)

**UNITED STATES OF AMERICA
THE DEPARTMENT OF THE TREASURY**

DIRECTOR OF PROFESSIONAL)	
RESPONSIBILITY,)	
)	
Complainant,)	
)	
v.)	Complaint No. <u>2003-2</u>
)	
JOSEPH R. BANISTER,)	
)	
Respondent.)	
<hr style="width:45%; margin-left:0;"/>		

**RESPONDENT’S BRIEF IN OPPOSITION
TO THE IRS’S MOTION IN LIMINE
TO EXCLUDE EVIDENCE FROM THE HEARING**

The respondent, Joseph R. Banister (“Banister”), by and through his attorneys, The Law Office of Robert G. Bernhoft, S.C., hereby opposes the IRS’s Motion in Limine. That motion seeks to exclude any evidence or argument relating in any way, directly or indirectly, to the “reasonableness, merits, or sincerity” of Banister’s “positions” and “beliefs” – all of which form the very basis of the IRS’s complaint.

The IRS’s motion should be denied because it impermissibly denies Banister’s constitutional right to present and cross examine evidence and testimony – rights protected by the IRS’s own regulations, and secured by both the Administrative Procedures Act and time-honored First and Fifth Amendment principles. Indeed, the IRS’s improvident motion reflects its own continued misunderstanding of the elements of the offenses charged against Banister and its burden of proof on those necessary elements.

The evidence and testimony the IRS seeks to exclude go directly to both the elements of the offenses charged and the affirmative defenses Banister raised in his

pleadings. For all these reasons, as explicated more fully below, the court should deny this unprecedented attempt to deprive Banister of his fundamental constitutional rights.

I. Procedural Posture

The IRS charged Banister with “disreputable” conduct consisting of four separate allegations: “grossly incompetent” client representation of Frank Coleman; “grossly incompetent” client representation of Walter Thompson; failure to conduct “due diligence” for either client; and “willful failure to file a return.” (Compl.) On the eve of the hearing, the IRS now moves to deny all discovery and exclude all evidence and argument, relating directly or indirectly, to the “reasonableness, merits or sincerity” of Banister’s “positions” and “beliefs.” In addition, the IRS seeks to cast moral and legal aspersions on Banister by impermissibly and gratuitously labeling him a “tax protestor” – unseemly *ad hominem* attacks which are well beneath basic rules of fairness and professional decorum.

II. Evidence Relating to Banister’s Beliefs Cannot be Excluded because it Bears Directly on the “Willfulness” Element of Failing to File a Return.

The IRS charged Banister with willful failure to file a return, and by its own admission the IRS must prove the “voluntary, intentional violation of a known legal duty.” (*See* Complainant’s Mot, for Summary Judgment, 32.) The U.S. Supreme Court has recently clarified the required elements of such “willfulness”:

Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty. *United States v. Cheek*, 498 U.S. 192, 201 (1991).

Thus there are three separate elements to the offense: (1) the law imposed a duty on Banister to file a return for the years in question; (2) Banister knew of the legal duty to file a return; and (3) Banister voluntarily and intentionally violated the known legal duty.

Significantly, the IRS failed to allege elements two and three, above – much less facts in support of those necessary elements – which failure underpinned Banister’s motion to dismiss the Amended Complaint. (Am. Answer, ¶ 8.d.) Instead, in derogation of elementary civil procedure rules, the IRS simply made conclusory legal assertions in its amended complaint which were insufficient to state a claim upon which relief could be granted. The Complaint’s glaring defects might also arguably deprive the court of specific subject matter jurisdiction in this matter. Oddly, the IRS seeks to prohibit any of Banister’s defenses on necessary elements it failed to allege in the Complaint.

In particular, the IRS seeks exclusion of any evidence or argument relating to the “merits and reasonableness” of Banister’s “positions” and “beliefs,” as well as the “sincerity” with which he might hold them. Such an unprecedented prohibition, however, flies squarely in the face of controlling federal authority, first set down by the Supreme Court in *Cheek v. United States*, 498 U.S. 192 (1991). As the Court held there, a necessary element of willfulness is “awareness” of the duty at issue, and the IRS cannot prove that element if the defendant held any “good faith” belief that he had no such duty. *See Cheek*, at 202. Consequently, the trier of fact must be “free to consider any admissible evidence from any source” to determine the credibility and sincerity of Banister’s beliefs. *See id.*

The Court went on to overturn the defendant’s conviction for willful failure to file, instructing that:

[I]f Cheek asserted that he truly believed that the Internal Revenue Code did not purport to treat wages as income, and the jury believed him, the Government would not have carried its burden to prove willfulness, however unreasonable a court might deem such a belief. Of course, in deciding whether to credit Cheek's good-faith belief claim, the jury would be free to consider any admissible evidence from any source. We thus disagree with the Court of Appeals' requirement that a claimed good-faith belief must be objectively reasonable if it is to be considered as possibly negating the Government's evidence purporting to show a defendant's awareness of the legal duty at issue. Knowledge and belief are characteristically questions for the factfinder, in this case the jury. Characterizing a particular belief as not objectively reasonable transforms the inquiry into a legal one and would prevent the jury from considering it...it is not contrary to common sense, let alone impossible, for a defendant to be ignorant of his duty based on an irrational belief that he has no duty.

Cheek, at 202-203.

The Court further and significantly held that even if Cheek's belief was "irrational," it would defeat the Government's indictment as long as the factfinder found the testimony and evidence to be credible. On this last score, the Court opined that "any" evidence from "any" source should be considered by the trier of fact to ascertain the sincerity of the defendant's belief. *See id.*

Here, all the evidence relating to the Banister's employment history and interactions with IRS go directly to the "sincerity" issue of Banister's understanding of tax return filing requirements, and similarly, all of the exhibits the IRS would exclude from the hearing and record directly bear on whether Banister held certain beliefs in good faith. Not only did the *Cheek Court* hold that evidence of good faith belief must always be admitted by the trial court, the Court further admonished regarding jury instructions that:

It was therefore error to instruct the jury to disregard evidence of Cheek's understanding that, within the meaning of the tax laws, he was not a person required to file a return or to pay income taxes and that wages are

not taxable income, as incredible as such misunderstandings of and beliefs about the law might be.

Cheek, at 203.

The essential holding of *Cheek* is therefore twofold: a trial court must admit evidence and testimony regarding a defendant's good faith beliefs about an alleged "tax" duty, and a trial court cannot direct a verdict on the essential willfulness element by instructing the jury to disregard such evidence. And that is precisely what the IRS's motion in limine seeks; e.g., a directed verdict against Banister on its allegation of willful failure to file tax returns.

Furthermore, federal courts uniformly recognize a defendant's right to present evidence as essential to due process. *See Chambers v. Mississippi*, 410 U.S. 284 (1973). Following the direction of the Supreme Court, courts routinely reverse convictions where a district court excludes a defendant's testimony or evidence going to elemental intent. For example, in *United States v. Bowen*, 421 F.2d 193 (4th Cir. 1970), the trial court excluded evidence relating to Bowen's possible reasons for why he didn't report for the draft, and the Fourth Circuit reversed his conviction on that basis:

Although the record is replete with evidence of willfulness on the part of defendant in failing to report for induction, **we think that he should not have been deprived of the opportunity to deny it, or to offer any possible explanation for his conduct.** In short, while the right to answer the question posed to him may have availed him little, he should not have been denied that right.

Bowen, at 197 (emphasis added).

Thus, any evidence that could "offer any possible explanation" for Banister's conduct must be admitted because he has "the right to answer the question posed to him." *Id.* Clearly, Banister's reasons, the merits of Banister's positions, and the sincerity of

Banister's beliefs are directly relevant to the "willfulness" element on which the IRS bears the burden of proof, and the IRS's motion in limine must fail.

A similar result was reached in *United States v. Sanders*, 862 F.2d 79 (4th Cir. 1988), where Sanders was charged with forcibly rescuing property seized by the IRS. Although Sanders was permitted to testify that he thought his lawyer had given instructions that the property recovery was legally permitted and had been approved by a bankruptcy court, the appellate court held the excluded testimony of Sanders' daughter regarding a phone call she received from the lawyer reversible error. In *United States v. Detrich*, 865 F.2d 17, 21 (2nd Cir. 1988), a dentist's conviction for importing heroin was reversed due to the erroneous exclusion of defense evidence. Detrich offered to prove that he had no knowledge of his heroin possession because he simply brought back from India what he thought was merely a wedding suit. *See id.* His effort to introduce a co-defendant's statement regarding a wedding the following month was excluded, and in reversing, the court held that: "We cannot find it harmless to exclude a statement that would have supported the main theory of the defense." *Id.*

A tax evasion conviction was at issue in *United States v. Popenas*, 780 F.2d 545 (6th Cir. 1985). There, an attorney had prepared the tax returns at issue and denied personal culpability on the stand, but the defense offered an affidavit executed by the attorney which acknowledged incompetence. *See id.* The exclusion of this critical impeachment evidence was held reversible error. *See id.* This particular case emphasizes the relevance of any reliance defense, including reliance on the conduct of another professional or the agency involved. In this instance, Banister's prior involvement with the IRS led him to draw certain conclusions, and he relied on the IRS's own conduct and

omissions to come to those conclusions. The evidence of that reliance, including all evidence underpinning that reliance, are clearly relevant and must be admitted.

In *United States v. Lueben*, 812 F.2d 179, 181 (5th Cir. 1987), the defendant was prosecuted and convicted of submitting false loan applications to various banks. In its case, the prosecution submitted evidence in the form of expert testimony to show how the false statements had a tendency to defraud a bank. To rebut this testimony, the defense called an expert for the purpose of showing that this false information simply would not have misled any bank; this testimony was excluded. The appellate court held such exclusion to be reversible error: “We find it difficult to understand why this testimony would not confuse the jury when offered by the government but would confuse the jury when offered by the defendant.”

In *United States v. Roark*, 753 F.2d 991 (11th Cir. 1985), a bank teller was tried and convicted of robbing the bank she worked at, and the confession Roark gave the day after the robbery was used against her at trial. *See id.* In rebuttal, the defense offered testimony from an expert to explain critical factors regarding the confession, but that evidence was excluded and the conviction reversed on appeal. *See id.*; *see also United States v. Cohen*, 888 F.2d 770, 777 (11th Cir. 1989) (“trial court's discretion does not extend to exclusion of crucial relevant evidence”).

In *Commonwealth v. Capitolo*, 471 A.2d 462 (Pa.Super. 1984), several individuals were arrested for trespassing upon property owned by a nuclear power plant. At trial, the defendants offered to submit evidence of a factual nature regarding the reasons why they engaged in the trespass. In reversing the convictions of these parties, the court stated:

By limiting appellants' evidence to their own testimony of their reasons for committing the trespass, the trial court -- as it recognized it was doing -- effectively denied appellants the opportunity to prove justification

And they could not prove their reasonableness without proving what in fact 'the harm or evil sought to be avoided' was ... But without any basis in fact these beliefs cannot be reasonable. **By rejecting appellants' offer of the expert testimony and documentary evidence summarized in their offer of proof, the trial court precluded appellants from proving that their beliefs did have a basis in fact.** Thus the court precluded appellants from proving that their beliefs were reasonable.

Id. at 467-68 (emphasis added).

Miller v. United States, 120 F.2d 968, 970 (10th Cir. 1941) further amplified the requirement of admitting evidence of a defendant's intent and motive:

Whenever the belief of a person or the motive of his act or conduct is material, he may not only directly testify that he had no intent to defraud, but he **may buttress such statement with testimony of relevant circumstances, including conversations had with third persons or statements made by them, tending to support his statement that he had no intent to defraud.**

Id. (emphasis added)

These unequivocal evidence admission requirements regarding reliance, good faith belief, intent, and motive are particularly true in tax cases, as made clear in *United States v. Powell*, 955 F.2d 1206 (9th Cir. 1991). There, the court reversed a tax conviction on grounds that evidence offered by a defendant regarding his intent was erroneously excluded. *See id.* Moreover, courts repeatedly have held that evidence relating to a defendant's reliance upon representations made by government officials, whether judges or executive department officers and agents, must be admitted. *See Moser v. United States*, 341 U.S. 41 (1951) (reliance on government conduct could constitute a defense to actions taken by the government); *see also Raley v. Ohio*, 360

U.S. 423 (1959), *Cox v. Louisiana*, 379 U.S. 559 (1965), *United States v. Laub*, 385 U.S. 475 (1967), and *United States v. Penn. Industrial Chemical Corp.*, 411 U.S. 655 (1973).

The Ninth Circuit has spoken directly to this issue of a defendant's reliance on Government acts or conduct – important here because of Banister's equitable estoppel and Fifth Amendment due process affirmative defenses relating to his IRS employment and separation from same. *See United States v. Tallmadge*, 829 F.2d 767, 775 (9th Cir. 1987). There, the defendant was prosecuted for allegedly being a convicted felon in possession of firearms. In defense, Tallmadge demonstrated that a licensed arms dealer, held to be a government agent, represented to him that it was lawful for him to acquire firearms. *See id.* Tallmadge relied upon the word of this government agent, and the court therefore held that:

The prosecution and conviction of Tallmadge for the receipt and possession of firearms, after he was misled by the government agent who sold him the weapons into believing that his conduct would not be contrary to federal law, violated due process.

See id.; *see also United States v. Albertini*, 830 F.2d 985 (9th Cir. 1987).

In addition to ample and uncontroverted federal authority, it also bears noting that a defense of reliance on Government statements, acts, conduct, or omissions is recognized under state law. *See Schiff v. People*, 141 P.2d 892 (1943) (conviction reversed where police instructed defendant to simply retain possession of property thought to be stolen); *People v. Markowitz*, 223 N.E.2d 572 (1966) (conviction vacated where public officials told defendant that no permit was required to sell merchandise at Yankee Stadium; *State v. Ragland*, 233 A.2d 698 (1967) (conviction vacated where that he drove care without a license upon a police order); *Connelly v. State*, 351 S.E.2d 702 (1987) (conviction reserved where defendant relied on a misleading driver's license form;

and *State v. Chiles*, 569 So.2d 45 (La.App. 4 Cir. 1990) (reliance on local sheriff's policies justified reversing record keeping violation conviction.)

All evidence that supports or substantiates Banister's reliance and beliefs – including his record of special achievement recognized by the IRS itself – is not only relevant, but critical to Banister's defense. Consequently, all such evidence and counsel's arguments relating to the merits and sincerity of Banister's beliefs should be admitted, in conformity with the unequivocal state and federal authority discussed herein. Anything less would constitute a violation of Banister's fundamental right to due process of law. Banister has a right to defend himself with all evidence at his disposal, and the brazen IRS attempt to gag a former IRS whistleblower at his own hearing should be denied.

III. Excluding Evidence of Banister's Beliefs would Violate Cherished First Amendment Speech Principles.

In a seminal case cited in the IRS's own filings, the Court observed that: “[i]t is not the purpose of the law to penalize frank difference of opinion.” *Spies v. United States*, 317 U.S. 492, 496 (1943). Yet that is precisely what the IRS seeks to do here with its disbarment action. The IRS wishes to exclude all evidence relating to Banister's history as an IRS whistle-blower and all evidence of agency misconduct he uncovered. Banister contended by affirmative and special defense that the IRS is punishing him for his exercise of important First Amendment speech rights. (Answer, ¶ 26; Am. Answer, ¶ 8.) Banister's employment history with IRS as a well-regarded and decorated Criminal Investigation Division Special Agent – including his record of achievement, concerns over agency practices he viewed as unconstitutional, and the agency's sudden decision to demand his resignation after Banister brought these concerns to IRS policy officials –

directly relate to the impermissible retaliation defense Banister has a right to present. Therefore, and particularly in light of the IRS's own pre-hearing exchange and admissions, evidence relating thereto should be admitted.

The IRS itself does not hide their effort to prosecute Banister criminally, in part for purely political beliefs and private conduct. The IRS, in its own pleadings, filings, and exhibits, references Banister's political publications as the foundation of their complaint against him. Indeed, the IRS readily concedes it monitors Banister's talk radio appearances and inquired into Banister's purely private and political conduct based on these political appearances. The IRS offers no explanation as to why one of their lead trial attorneys monitors the political appearances and statements of a former decorated employee. Moreover, the IRS itself has introduced evidence by pre-hearing exchange of Banister's political commentary in this disbarment proceeding, including his political texts, statements on talk radio, and a "Sixty Minutes" appearance.

This disbarment action implicates powerful First Amendment rights and the strong public interest in protecting political speech. Banister exercised this right to unimpeded political speech, and alleged by affirmative defense that the IRS has impermissibly targeted him for punishment because of that protected speech and its implications. Consequently, as a matter of law, the IRS attempt to bar Banister from practicing before the agency is subject to special and strict scrutiny by the judiciary. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

First, Banister's private life and political positions are wholly separate from his mere advocacy before the agency, and his actions did not, as admitted by the Agency, constitute incitement to imminent lawless action. (Complainent's Opp'n to Resp't Mot. to Dismiss, p. 12.) With that background of IRS admissions, it is startling that the agency

would bring this type of disbarment action and then cite *Brandenburg v. Ohio* in support for their position. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In *Brandenburg*, the Court overturned its improvident holding of *Whitney v. California*, 274 U.S. 357 (1927), observing in the process that the *Whitney* court had simply permitted the sanction of “ideas which the majority of the Court deemed unsound and dangerous.” *Brandenburg*, 395 U.S. at 447.

Overtuning decades of already thoroughly discredited law, the *Brandenburg Court* articulated a new standard for measuring protected speech and conduct, striking down the Ohio Criminal Syndicalism Act (the “Act”) on grounds it was facially unconstitutional under the First Amendment:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

See *id.* at 447.

The Act criminalized advocating, among others things, teaching the duty of violence to accomplish political reform. See *id.* at 448. A Ku Klux Klan leader was convicted under the Act for telling a crowd, in so many words, that they must kill “Niggers” and “Jews” to restore the country. *Id.* at 445-47.

Tax cases offer no exception, as *Brandenburg’s* rule is the controlling First Amendment doctrine, evidenced by the thoughtful Ninth Circuit decision in *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983). There, the defendants were charged criminally under 26 U.S.C. § 7206 for promoting a tax avoidance trust scheme, and were convicted in the district court below. See *id.* The appeals court, however, overturned their convictions on First Amendment grounds:

Nothing in the record indicates that the advocacy practiced by these defendants contemplated imminent lawless action. Not even national security can justify criminalizing speech unless it fits within this narrow category; certainly concern with protecting the public fisc, however laudable, can justify no more.

Id. at 1428.

Significantly, the *Brandenburg* test does not rise and fall on the actions of listeners, but on the actual conduct of the speaker:

Even if the defendants knew that a taxpayer who actually performed the actions they advocated would be acting illegally, the first amendment would require a further inquiry before a criminal penalty could be enforced. With the exception of Durst, no defendant actually assisted in the preparation of any individual tax return. Rather, they merely instructed an audience on how to set up a particular tax shelter.

Id. at 1428 (citing *Brandenburg*, 395 U.S. at 444).

If the First Amendment protected Dahlstrom and his co-defendants, who actually advocated aggressive participation in a tax avoidance scheme which they knew could result in criminal and civil penalties against investors, then Banister's mere advocacy for several clients asking nothing more than a hearing must be protected from government attempts to silence his political speech and advocacy. As Justice Douglas eloquently expressed in his *Brandenburg* concurrence:

The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts. The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded movie theatre. This is, however, a classic case where speech is brigaded with action Apart from [those types of] rare instances **speech is, I think, immune from prosecution.** Certainly there is no constitutional line between advocacy of abstract ideas as in *Yates* and advocacy of political action as in *Scales*. **The quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of belief and conscience.**

Brandenburg, 395 U.S. at 456 (citations omitted).

Examining the instant case in *Brandenburg's* light, Banister's private life and political positions are clearly political speech protected by the First Amendment, because all of Banister's statements on talk radio, Sixty Minutes, and in his political writings provided by IRS in pre-hearing exchange clearly constitute political speech. Regarding Banister's advocacy before the IRS, Banister followed accepted procedures on behalf of his clients by petitioning the IRS to settle certain client-related tax matters. He requested a Collection Due Process Hearing – a hearing the IRS never allowed his client to have.

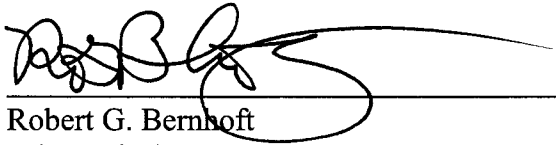
As the IRS admits, Banister's actions did not lead to imminent lawless action. (Complainant's Opp'n to Resp't Mot. to Dismiss, p. 12.) And indeed, if the Government cannot proscribe the publication of books that teach how to build bombs or recommend racist death threats against whole groups of people, then Banister's whistle-blowing activities and his public reports on those activities must warrant protection from state intrusion. In the same vein, Banister's mere petitioning the IRS for a simple administrative hearing on behalf of a client with a tax problem must be equally protected speech.

CONCLUSION

For all the foregoing reasons, the IRS's motion in limine should be denied in its entirety, and Banister should be able to present all evidence submitted by pre-hearing exchange and call all witnesses listed therein.

Respectfully submitted this 14th day of November, 2003.

THE LAW OFFICES OF ROBERT G. BERNHOFT, S.C.
Attorneys for the Respondent

By: 
Robert G. Bernhoft
Wisconsin State Bar No. 1032777

207 East Buffalo Street, Suite 600
Milwaukee, Wisconsin 53202
(414) 276-3333 telephone
(414) 276-2822 facsimile
rgbernhoft@bernhoftlaw.com

**UNITED STATES OF AMERICA
THE DEPARTMENT OF THE TREASURY**

DIRECTOR OF PROFESSIONAL)
RESPONSIBILITY,)
)
Complainant,)
)
v.)
)
JOSEPH R. BANISTER,)
)
Respondent.)
_____)

Complaint No. 2003-2

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that true and correct copies of the foregoing "Respondent's Brief in Opposition to the IRS's Motion in Limine to Exclude Evidence From the Hearing" and "Certificate of Service" were served on counsel for the Director of Professional Responsibility, by both courtesy facsimile transmission on this very date and by placing the same in the custody of Federal Express, a next-day delivery service courier, on November 14, 2003, addressed as follows:

Jay J. Kessler, Esquire
333 Market Street
Suite 1200
San Francisco, California 94105



Daniel J. Treuden
207 East Buffalo Street
Suite 600
Milwaukee, Wisconsin 53202
(414) 276-3333