DE FACTO

OFFICER

DOCTRINE

by

VALIANT LIBERTY

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De facto

In fact, in deed, actually. As found in Black's law Dictionary, Fifth Edition, on page 375.

De jure

Description of a condition in which there has been total compliance with all requirements of law. Of right; legitimate; lawful; by right and just title. In this sense it is the contrary of *de facto* (q.v.) … As found in Black's law Dictionary, Fifth Edition, on page 382.

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Word from the author:

This dissertation will explore Texas law relating to the *de facto* and *de jure* varieties of public officers. If the reader lives in a state other that Texas, he should research the relevant statutes and case law on this subject for his respective state. If he wishes to test this doctrine and is unable, unwilling, or just too lazy to research his own state's laws concerning the *de facto* officer doctrine, he might consider getting to Texas as fast as he can. As always, the authors strongly recommend that anyone that might consider using the information contained herein do their own research to confirm everything stated here. VALIANT LIBERTY is not an attorney and does not give advice, legal or otherwise. The following information and research is provided by semi-literate amateurs and is not intended as a course of action.

DE FACTO OFFICER DEFINED

There are three types of public officers, *de jure*, *de facto*, and usurpers. A *de jure* officer is one who one who has been in total compliance with all requirements of law and holds title to the office by right. *See*, Black's Law Dictionary, Sixth Edition. Texas law recognizes a distinction between holding an office by title and holding it by sufferance. Bickford v. Cocke, 54 Tex. 482 (1881) and see: Tom v. Klepper, 172 SW 721 (1915). A *de facto* officer is one who, while in actual possession of the office, is not holding such in a manner prescribed by law. *See*, Black's Law Dictionary, Sixth Edition. A *de facto* officer's authority cannot be collaterally challenged and his acts generally have the same force and effect as a *de jure* officer. An usurper of a public office is one who either intrudes into a vacant office or ousts the incumbent without any color of title, or is one who is attempting to fill a pretended office not created by law. *See*, Black's Law Dictionary, Sixth Edition, and Norton v. Shelby Co, *infra*. A good definition of a *de facto* officer is found in Texas Jurisprudence, 3d, Vol. 60, Sec. 344, at page 583:

> A public official becomes an officer *de facto* by exercising his or her duties:
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> (1) without a known appointment or election, but under circumstances of reputation or acquiescence that were calculated to induce people, without inquiry, to submit to or invoke his or her action supposing him or her to be the officer he or she assumed to be.
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> (2) under color of a known and valid appointment or election, but where the officer fails to conform to some precedent, requirement, or condition, as to take and oath, give a bond, or the like:
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> (3) under color of a known election or appointment, void because the officer was not eligible, because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, the ineligibility, want of power, or defect being unknown to the public; or
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> (4) under color of an election or an appointment by, or pursuant to, a public unconstitutional law, before the law is so adjudged.

THE OFFICE MUST HAVE LEGAL EXISTENCE

The law requires public officials, appointed and elected, both state and federal, to be properly qualified for office before the officer enters the office and the office must exist as a matter of law. It has been held that: "A *de facto* body cannot create a *de jure* officer." von Nieda v. Bennett, 106 ALR 1320, 117 NFL 231, 187 A 629. If the officer is not qualified under the law, the officer is an officer *de facto*. The law requires that the office legally exist. "There can be no

incumbent *de facto* of an office if there be no office to fill." Norton v. Shelby County, (1886) 118 U.S. 425, 441, 6 S. Ct. 1121. The court held:

> But it is contended that if the act creating the board was void, and the commissioners were not officers *de jure*, they were nevertheless officers *de facto*, and that the acts of the board as a *de facto* court are binding upon the county. This contention is met by the fact that there can be no officer, either *de jure* or *de facto*, if there be no office to fill. As the act attempting to create the office of commissioner never became a law, the office never came into existence. Some persons pretended that they held the office, but the law never recognized their pretensions, nor did the supreme court of the state. Whenever such pretensions were considered in that court, they were declared to be without any legal foundation, and the commissioners were held to be usurpers. The doctrine which gives validity to acts of officers de facto, whatever defects there may be in the legality of their appointment of election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices, and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until, in some regular mode prescribed by law, their title is investigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question. But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an 'officer' who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that such existence is not essential, and that it is sufficient if the office be provided for by any legislative enactment, however invalid. Their position is that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet it by any argument beyond this statement: An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed. Norton v. Shelby Co., *supra.*

The Texas courts have recognized this common sense principle just as the U.S. Supreme court has:

> The position of policeman or patrolman was unknown to the common law, and, being a creation of municipal governments by ordinance, the establishment of such office in a valid manner must be shown to entitle a patrolman to recover against a city for the salary of the officer....Under San Antonio charter, providing that the city council shall have power, by ordinance, to establish a police force, and to create any office deemed necessary, the position of policeman must be created by ordinance, and neither a resolution approving the appointment of one as policeman, nor acquiescence by the city in his appointment and payment of his salary, will make him the legal occupant of that position....Where the city council of San Antonio, which was authorized to provide for a police department by ordinance, adopted an ordinance declaring that the police force should consist or one chief marshal and such patrolmen as the mayor and city council might deem necessary, the council cannot, by resolution, create the office of patrolman; the ordinance not specifying the number and not creating the office. City of San Antonio v. Coultress (1914) 169 SW 917 at headnotes 3, 4, 5.
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> The selection of a *de jure* deputy marshal results only when the office is in being, one qualified to hold the office is properly appointed or elected, and the selection is approved as required by law and without a compliance with the first requirement, compliance with the other two is unimportant. Miller v. City of Alamo Heights (1955) 282 SW2d 264, 265.
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> By terms of this statute [VATS 998a] there can be no doubt that an organized police reserve unit with authority to make arrest in the City of Dallas can only be legally established by ordinance or other action of the City Counsel in compliance with the existing charter....Therefore, in absence of action by City Council the Dallas Police Reserve unit has not been established as a *de jure* "organized police reserve or auxiliary unit with the authority to make arrest."...There being no office *de jure*, plaintiffs were not officers *de facto* in the sense that they could recover emoluments for unexpired terms. There could be no unexpired terms of offices having no legal existence. Jones v. State Board of Trustees of Emp. Retire. Sys., (1974) 505 SW2d 361, at 365.

It could be very interesting to investigate whether or not the city counsel for your local CITY OF CORRUPTION has properly enacted ordinances which create the office for each and

every police officer, dog catcher, code enforcement officer, and etc. The odds that they did not are probably exponentially better than the odds of winning the lottery. As in Norton, *supra*, if there is no office properly created by constitution, statute or ordinance, there can be no officer, not even a *de facto* officer and one purporting to hold the office is a mere usurper. There is an organization out in West Texas called the "Trans-Pecos Drug Task Force" that is made up of officers of various sheriffs' departments, city police departments, and other law enforcement agencies. Who created them? Can a man holding the office of deputy sheriff also hold an office in the "Trans-Pecos Drug Task Force?" Are they just "good ole boys" out on the Interstate on their days off shaking down the unlucky and unwary travelers looking to gratify their sociopathic[1] personalities and make an extra buck at he same time? Can a deputy sheriff hold two offices? The latter two of these questions were answered by the Texas Court of Criminal Appeals in 1944 when it held that: "A city policeman and a deputy sheriff are "officers" within the meaning of the constitutional provision [Art. XVI, Sec. 30a] that no person shall hold or exercise at the same time more than one civil office of emolument. A city policeman receiving compensation for services rendered as such could not under the Constitution, at the same time be deputy sheriff *de jure* or *de facto*." Irwin v. State, 177 SW2d 970. As to the former question, who knows?

When investigating whether or not the office of your local police officer exists, one should first look to the City Charter, which can usually be obtained at the office of the City Secretary. The City Charter for the City of Midland, contains two sections relating to police officers and the police department.

> The City of Midland shall have power by ordinance to establish and maintain a police department and to prescribe the duties of the members of said department, and regulate their conduct and fix their salaries or fees of office, or both. The head of the police department shall be know as 'chief of police,' and the other members thereof shall be know as 'policemen'; all of whom shall be appointed by the city council. Article III, Sec. 24, City of Midland Charter.
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> All officers of the city, whether elective or appointive, shall qualify by taking the oath prescribed by the constitution of this state and by executing such bond as may be required under the provisions of this Charter and the ordinances and resolutions of

[1]Sociopath – A person, as a psychopathic personality, whose behavior is antisocial or sexually deviant. Psychopathic personality – A type of personality characterized by amoral and antisocial behavior, lack of ability to establish meaningful personal relationships, extreme egocentricity, etc The Random House College Dictionary, Rev.Ed, 1974.

the city." Article IV, Sec. 8, City of Midland Charter.

Your authors are here to tell you that since those provisions for the establishment of the police department and office of "policeman" were first discovered a few years ago, that not one single certificate of appointment for a single "policemen" has been found. Neither has any ordinance nor other official act of the city council can be found that created a police department. At the insistence of a couple of 'nuts' that believe that the police are not above the law, the hours and hours that have been spent by two different city secretaries scouring the archives have proved to be futile. The legal existence of the ordinance or resolution creating the City of Midland Police Department is as elusive as a unicorn, yet the actual existence of the police department and its officers is evident enough.

THE OFFICE IS CONCLUSIVELY PRESUMED TO EXIST

The foregoing seems straight forward enough on its face, but things are not so simple. Apparently the state legislature, recognizing the many frauds and omissions of their incorporated subdivisions, enacted a new law in 1999 fabricated for the purpose of aiding and abetting the municipalities in their ability to maintain the fraud and keep the fountains of revenue flowing. In the Local Government Code, it is now the law in Texas that:

51.003 MUNICIPAL ACT OR PROCEEDING PRESUMED VALID

(a) A governmental act or proceeding of a municipality is conclusively presumed, as of the date it occurred, to be valid and to have occurred in accordance with all applicable statutes and ordinances if:

(1) the third anniversary of the effective date of the act or proceeding has expired; and

(2) a lawsuit to annul or invalidate the act or proceeding has not been filed on or before that third anniversary. Texas Local Government Code, Sec 51.003, Added by Acts 1999, 76th Leg., ch. 1338, § 1, eff. June 19, 1999.

This statute, if its validity is ever properly challenged, cannot stand Constitutional muster. There is a "constitutional infirmity" in the statute. In the opinion of the authors, the statute violates the 5th and 14th Amendments of the federal constitution and probably violates the state constitution at Article I, Sec. 19 because of due process violations. The legislature has attempted to create an irrefutable or "conclusive" presumption contrary to the U.S. Supreme

Court's holding in Heiner v. Donnan, *infra*, where the court held:

> ..it is hard to see how a statutory rebuttable presumption is turned from a rule of evidence or of substantive law as the result of the later statute making it conclusive. In both cases it is a substitute for proof; in the one, open to challenge and disproof, and in the other conclusive. However, whether the latter presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made, to exist in actuality, and the result is the same..." This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut violates the due process clause of the Fourteenth Amendment. For example, a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by a direct enactment.
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> If a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantive law. Heiner v. Donnan, 285 U.S. 312, (1932)

For those worried about the applicability of the Fourteenth Amendment, the high court further held that:

> Nor is it material that the Fourteenth Amendment was involved in the Schlesinger Case, instead of the Fifth Amendment, as here. The restraint imposed upon legislation by the due process clauses of the two amendments is the same. Heiner v. Donnan, *supra*.
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> And see: the heading "Presumptions" in "The Secret Maritime Jurisdiction of the United States Exposed", also by this author.

ADDITIONAL REQUIREMENTS FOR QUALIFICATION

If the existence of the office can be confirmed, some of the other steps required for qualifying for public office are found in Texas Government Code, Sec. 601.001 *et seq*. Officers are required to have a certificate of election or appointment, state and county officers are to be commissioned by the governor, each county clerk is to deliver an election certificate for every elected officer to the secretary of state no later than January 1 after the election. Under Local Government Code, Sects 87 and 88 the officer must give a bond were the bond is required by law. The oath of office is required of all elected and appointed officials by Texas Constitution,

Article XVI, Sec. 1. All these requirements are to be met before the officer enters the office.

TIME PRESCRIBED FOR QUALIFYING

There is some authority in Texas where courts have held that when an officer did not qualify for office in the time prescribed by law, the officer would become ineligible to enter the office. Sometimes the obvious is invisible, so your authors will take liberty to point out the obvious, "....all elected officers, before they enter upon the duties of their offices shall take the following Oath or Affirmation..." Texas Const., Art. XVI, Sec. 1(a); and "...all appointed officers, before entering upon the duties of their offices , shall take the following Oath or Affirmation:..." Article XVI, Sec. 1(c). The operative words are before and shall. Should an elected or appointed officer neglect or refuse to timely qualify for office, it might be construed by the courts that such a "constitutional infirmity" (*See*, Ridout v. State and Cream v. State, infra) might be grounds sufficient for a successful challenge to the authority of a *de facto* officer. Some authority, albeit somewhat antiquated still stands as follows:

> "The time prescribed by statute within which a person elected to an office shall qualify has been held to be directory in of the states, and so to be in this case upon former appeal. These rulings were no doubt made to cover such cases as might arise in which a person could not, for some good reason beyond his own control, qualify within the prescribed time, in order that the right of the person to qualify might not be destroyed without wrong upon his part, and that the wish of the people might not be lightly defeated; but it is not believed that the rule can be extended to cases in which there is neglect upon the part of an elected person. The statute requiring a party elected to office to qualify within a prescribed period of time, will be construed as directory only in a case where, from reasons beyond his control, he cannot qualify within the time allowed; but such construction will not be given in a case of neglect or refusal to qualify." Flatan v. State, (1877) 56 Tex. 93 at 98, 99.
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> A notary public who did not qualify for office by taking oath and making bond within the legally prescribed time could not be a *de facto* officer because when the appointment became void, "nothing that she did...could in any manner resuscitate it." See: Faubion v. State, Tex.Crim.App. (1926) 282 SW 597 at 598.
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> "It may be that, if a newly elected trustee [of a school board] should fail to qualify withing the prescribed time, under some circumstances the county superintendent would be justified in treating such conduct as an intentional abandonment of the office, and be authorized to treat the same as vacant, and to proceed to appoint an incumbent." Buchanan v. State, (1904) 81 SW 1237, at 1239.
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> We find no procedure to comply with article XVI, Section 1 retroactively. Tex.

Atty.Gen.Op, No. DM-381 (1996)

OFFICIAL BONDS

Official bonds are required for certain officers by statute only. "The requirement that certain public officials secure an official bond is statutory; the Texas Constitution contains no reference to or requirement of official bonds. The purpose served by official bonds is nothing more than a form of insurance to protect parties who may be injured by the wrongful actions of officials." Texas Practice, Vol. 35, Sec. 7.5 at page 206. However, there is some authority that seems to require all public officers to make official bond whether or not a bond is required by constitution or statute. "Although it has been held that judicial and legislative officers are not required to give bond, the filing of an official bond is generally regarded as a necessary prerequisite to full title to an office and is a condition precedent to the right of the person elected or appointed to be inducted into office; and without such bond one is not entitled to the office and may not legally hold or discharge its functions." 67 CJS, Officers, Sec. 47, at page 320. And at note 84 on the same page, it is found that: "Public policy requires that security be given as condition precedent to qualification for public office and for assumption of responsibility thereof, and, if office holder is unwilling or unable to give security, he cannot properly enter office in discharge of his duty." Jones v. Hadfield, Ark, 96 SW2d 959. How many municipal police officers do you know of who have made official bond?

THE TERM OF OFFICE

It should also be observed that a public officer must qualify for each term of office, and by the authority of the Texas Constitution, Article 16, Section 30(a) Duration of Offices, "The duration of all offices not fixed by this Constitution shall never exceed two years." Of course, the constitution fixes the terms of office for many state and county offices for terms longer than two years, for example, the governor's term is four years, Supreme and Appellate Court judges is for six years, the county sheriff's term is four years, and so on. Many people who have unsuccessfully attempted to challenge the authority of a municipal police office have based their challenges on the following authority:

> "It has also been settled that, since the Constitution limits the terms of all officers not otherwise fixed to two years, this provision will be construed to fix the tenure at the constitutional term, subject to the provision of removal for cause during that time....it follows, also, that the proposition urged by appellant, that, as no term of office was fixed, the plaintiff held at the will of the appointing power is without merit." City of Houston v. Estes, (1904) 79 SW 848, at 850.

Things are not always as they appear. Statutes have since been enacted and the Constitution has been amended. According to former Attorney General Dan Morales:

> A city policeman's term of office is not fixed. The term limits of appointed under a municipal civil service system established by statute or charter if appointment to and removal from office are governed by civil service provisions.[2] Law enforcement personnel with civil service protection under chapter 143 of the Local Government Code have no set term of office and may be removed only for reasons and under procedures governed by the statute....The oath and filing requirements of article XVI, Section 1 of the Texas Constitution would apply when these individuals are appointed as city police officers. A police officer would not need to file the statement and take the oath again unless he was appointed again, for example, if he left his position with one civil service city and was hired as a police officer by another civil service city. Atty.Gen.Op. DM-381, (1996)

However, some police officers and some sheriff's deputies may hold offices whose term is limited by the Constitution to two years. Mr. Morales also points out that:

> At least some city police officers, sheriff's deputies, and security officers do not hold civil service offices. Whether a particular police officer, deputy, or school district security officer held a civil office depended on the resolution of factual issues and therefore could not be determined n an attorney general opinion. Atty.Gen.Op. DM-212 (1993)

VALIDITY OF ACTS

Under the heading of "Basis and application of doctrine" of Texas Jurisprudence 3d, Vol. 60, Sec. 345, at page 583 it is found that:

> The law validates the acts of de facto officers as to the public and third persons on the ground that, though not officers in law, they are in fact officers whose acts, public policy requires, should be considered valid. (Pyote I.S.D. v. Estes, 390 SW2d 3, 1965)

Where the public or third persons are not deceived by the color of authority,

[2]Since a fixed term of office helps protect the officer's independence, (see: Atty.Gen.Op. DM-114, 1992), one effect of Article, Section 30b is that civil service police officers may be made subject to various statutory controls, which can be enforced by removing the police officer from employment with the city. A city police officer is moreover, licensed by the state, and is subject to having the license suspended or revoked for violating the licensing statute or a rule adopted there under. (See: Government Code, Ch. 415 establishing Texas Commission on Law Enforcement Officer Standards and Education and defining its powers and duties).

there is no basis for applying the doctrine. (Manning v. Harlan, 122 SW2d 704, 1938)

In Ryder v. U.S., 115 S.Ct.2031, 515 U.S. 177, 132 L.Ed.2d 136, (1995) the court held that the "'*de facto* officer doctrine' confers validity upon acts performed by person acting under color of official title even though it is later discovered that legality of that person's appointment or election to office is deficient."

In Corpus Juris Secundum, Vol. 67, Sec. 276, at page 812, it is found that:

> The acts of an officer *de facto* are as valid and effectual where they concern the public or the rights of third persons, until his title to the office is judged insufficient, as though he were an officer de jure, especially where the existence of the office *de jure* cannot be challenged, such rule is based on considerations of public policy, necessity, justice, or convenience. The authority of such an officer cannot be attacked collaterally in a proceeding to which he is not a party. However, in a suit to which one exercising public office is a party, he cannot justify his acts on the grounds that he was a *de facto* officer. The rule cannot be invoked for the advantage of the officer himself, or of one who is fully advised of his status, or who is chargeable with knowledge of the defect in the incumbent's title to the office. In order to be valid, the acts of a *de facto* officer must comply with the requirements of law to the same extent and in the same manner as valid acts of *de jure* officers.

At footnote 85 under the forgoing section on page 812, the Supreme Court of Missouri succinctly defines the '*de facto* officer doctrine" and the following would appear to be the authoritative and controlling case regarding state officers:

> The foundation stone of the whole doctrine of a de facto officer, as gathered from all the authorities, seems to be that of preventing the public or third persons from being deceived to their harm by relying in good faith on the genuineness and validity of acts done by a pseudo-officer. However much color of authority may clothe the person who assumes to perform the function of an office and discharge its duties, yet if the public or third persons are not deceived thereby, if they know the true state of the case, the reason which gives origin or existence to the rule which validates the act of an officer *de facto* ceases, and with it ceases, also, all of its ordinary validating incidents and consequences. State v. Perkins, Mo. S.Ct., 40 SW 650, at 652, 1897; as cited in: Manning v. Harlan, *supra*, Tex.Civ.App., 122 SW2d 704, at 708, 1938; and: Gambill v. City of Denton, Tex.Civ.App., 215

SW2d 389, at 391, 1948.

RISKS AND RESPONSIBILITY OF THIRD PARITIES AFFECTED

All of this probably means that it is up to the third party to know that the *de facto* officer is acting without being qualified for office because the law presumes that all officers are *de jure*. Don't let the *de facto* rat fool you. The third party is responsible for challenging the authority of any public officer that is about to act against him, acting against him, or has acted against him, directly as a collateral challenge is not effective.

The U.S. Ninth Circuit Court of Appeals plainly puts the responsibility and burden of knowing whether or not the officer acting is *de jure* or *de facto* squarely on the party against whom the officer is acting or about to act. According to the following Ninth Circuit Court's holding it may be presumed that the courts have recognized that government officers are often liars and thieves who routinely and regularly engage in the custom and usage of racketeering.

> Persons dealing with the government are charged with knowing government statutes and regulations and they assume the risk that government agents may exceed their authority and provide misinformation. Lavin v. Marsh, (Ninth Cir., 1981), 644 F. 2d 1378, 1383.

> All persons in the United States are chargeable with the knowledge of the Statutes at Large and it is well established that anyone who deals with the government assumes the risk that the agent acting in the governments behalf has exceeded the bounds of his authority. Bollow v. Federal Reserve Bank of San Francisco, (Ninth Cir, 1981), 650 F.2d 1093.

The U.S. Supreme Court has apparently endorsed the people's right to inquire into the authority of government agents with whom they have dealings and demand proof of their claimed authority and proof of the title claimed to the office which they are holding. To say this in another way, it is every individual's responsibility not to be deceived, or **caveat emptor!** Just as the Missouri court in State v. Perkins, *supra*, held, "…yet if the public or third persons are not deceived thereby, if they know the true state of the case, the reason which gives origin or existence to the rule which validates the act of an officer de facto ceases, and with it ceases, also, all of its ordinary validating incidents and consequences." In **Federal Crop Insurance Corp v. Merrill** the high court has held:

> Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rulemaking power. And this is so even though, as here, the agent himself

may have been unaware of the limitations upon his authority. See, e.g., Utah Power & Light Co. v. United States, 243 U. S. 389, 409; United States v. Stewart, 311 U. S. 60, 70, and see generally 74 U. S. 7 Wall. 666. Federal Crop Ins. Corp v. Merrill, 332 U.S. 380 (1947).

ATTACKS MUST BE DIRECT

As stated in Andrade v. Lauer, the *de facto* officer must be challenged directly:

> The '*de facto* officer doctrine' distinguishes between collateral attacks, in which plaintiffs attack government action on the ground that the official who took the action were improperly in office, and direct attacks, in which plaintiffs attack the qualifications of the officer, rather than the actions taken by the officer; doctrine holds that collateral attacks pose too great a threat that the attacked 'officials' past actions would be subject to wholesale invalidation which would interfere with the government's ability to take effective action, and only direct attacks are permissible. Andrade v. Lauer, 729 F2d 1475, C.A.D.C., (1984)

A Tennessee court sheds more light on this issue:

> Acts of officers *de facto* are valid as to third persons and the public, and the competency, eligibility, or authority of a public officer exercising his office in fact, although not a de jure officer, may not be collaterally attacked or inquired into by third parties affected. Ridout, *infra.*
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> The rule that a *de facto* officer's acts are valid as to third parties is subject to exception, where the attack is direct on the right of the person acting or affected; where the legality of the court held by a de facto judge is denied; where the original entry of the office was forcible or fraudulent; where the act, or exercise was single, continuity being lacking; where the assumption of office was in bad faith, with knowledge of infirmity of authority by the person undertaking to act and by the public; and where an officer de jure was in actual present possession and occupancy of the office, in fact functioning in discharge of its duties. Ridout v. State, 71 ALR 830, 161 Tenn. 248, 30 SW2d 255.

This same doctrine of collateral attack being invalid is applicable to federal as well as state officers:

> A person actually performing the duties of an office under color of title is an officer *de facto*, and his acts as such officer are valid so far as the public or

> third parties who have interest in them are concerned; and neither his eligibility to appointment nor the validity of his official acts can be inquired into except in a proceeding brought for that purpose. United States ex rel. Doss v. Lindsley, 158 ALR 525, 148 F2d 22.

So the question must arise, how does one make a proper direct attack against a *de facto* officer? Looking to the Supreme Court for an answer in a case wherein a direct challenge was upheld, the court held:

> ...petitioner's claim is that there has been a trespass upon the constitutional power of appointment, not merely a misapplication of a statute providing for the assignment of already appointed judges. One who makes a timely challenge to the constitutionality of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred. Glidden Co. v. Zdanok, 370 U.S. 530, 536 . Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments. Ryder v. U.S., *supra.*
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> ...petitioner challenged the composition of the Coast Guard Court of Military Review while his case was pending before that court on direct review. Unlike the defendants in Ball, McDowell, and Ward, petitioner raised his objection to the judges' titles before those very judges and prior to their action on his case. And his claim is based on the Appointments Clause of Article II of the Constitution - a claim that there has been a "trespass upon the executive power of appointment. Ryder, *supra.*
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> ...we declined to invoke the de facto officer doctrine in order to avoid deciding a question arising under Article III of the Constitution, saying that the cases in which we had relied on that doctrine did not involve basic constitutional protections designed in part for the benefit of litigants.... We think that one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred. Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments. Ryder, *supra.*

REQUIREMENT FOR CONSTITUTIONAL INFIRMITY

In Texas, the courts have held that there must be a 'constitutional infirmity', and where such a constitutional infirmity if absent, the only method of directly attacking the authority of a *de facto* public officer is by the common law writ of *quo warranto*. The Texas courts have held that:

> Absent some constitutional infirmity, the proper method to attack a judge's qualification is through *quo warranto*. Cream v. State, 768 S.W.2d 323 (Tex.App. Houston [14th Dist.] 1989
>
> It has been the consistent holding of this Court, as well as the courts of other jurisdictions, that a collateral attack upon the qualifications of a district judge, such as by habeas corpus, cannot be sustained. While he is in possession of the office under color of title, discharging its ordinary functions, a judge's official acts are conclusive as to all persons interested and cannot be attacked in a collateral proceeding, even though the person acting as judge lacks the necessary qualifications and is incapable of legally holding the office." Ex parte Lefors, 171 Tex.Cr.R. 229, 347 S.W.2d 254 (1961). If the appellant desires to challenge such authority, he must bring a direct action through a *quo warranto* proceeding. Keen v. State, 626 S.W.2d 309 (Tex.Cr.App.1981). See also: Archer v. State, 607 S.W.2d 539 (Tex.Cr.App.1980); Tart v. State, 642 S.W.2d 244 (Tex.App.-Hous. (14 Dist.) 1982).
>
> Appellants' reliance on French v. State, Tex.Cr.App., 572 S.W.2d 934, is misplaced. In French, it was held that without the taking of the oath prescribed by the Constitution of this State, one cannot become either a *de facto* or *de jure* judge, and his acts as such are void. In the instant case, there is no question presented concerning Schreiber taking the oath of office when he was appointed in 1976. Further, it is undisputed that Schreiber was acting under color of office at the time he signed the search warrant.
>
> In Snow v. State, 134 Tex.Cr.R. 263, 114 S.W.2d 898, it was held that when a judge is holding office under color of title by appointment and discharging the duties of the office, the only way his title to office could be determined was by a direct proceeding instituted for that purpose in a court of competent jurisdiction.
>
> Thus, in Ex Parte Lefors, 171 Tex.Cr.R. 229, 347 S.W.2d 254, this Court declined to address the merits of the petitioner's contention that the judge who presided over his theft trial was not qualified to be in office. *See*, Archer

v. State, Tex.Cr.App., 607 S.W.2d 539.

> We find that the appellants' grounds of error represent an impermissible collateral attack upon Schreiber's authority to hold office. If the appellants desire to challenge such authority, they must bring a direct action through a *quo warranto* proceeding. See Saenz v. Lackey, 522 S.W.2d 237 (Tex.Civ.App.-Corpus Christi, 1975, writ ref'd. n.r.e.). Appellants' grounds of error are overruled. Keen v. State, 626 S.W.2d 309 (Tex.Crim.App. 1981).

QUO WARRANTO

A *quo warranto* action is a common law action to remove a *de facto* officer. "An information in the nature of *quo warranto* is a proceeding to try the title to an office. It is designed for the protection of public interest as opposed to private rights. It is provided by statute (V.A.T.S., Article 6253) that under certain circumstances, the attorney general, or the district or county attorney of the proper county, either of his own accord or at the instance of any individual relator, may present a petition to the district court for leave to file an information in the nature of *quo warranto* in the name of the State of Texas. The proceeding is used primarily to test the right of a public officer to hold his or her office and to determine the legal existence of a public or private corporation." (Texas Jurisprudence PL and PR Forms, Sec. 210:1). The remedy availed of is to prevent the exercise of a power that has not been conferred by law. *Quo warranto* is the exclusive legal remedy afforded to the public by which it may protect itself against the usurpation or unlawful occupancy of a public office by a legal occupant, at the instance of one who has makes no claim to the office, and it has been intimated that it is the proper and only mode of questioning the official authority of a person who is exercising the judicial functions. However, a *quo warranto* is not the sole and exclusive remedy by which a right and title to a public office may be raised. The right to a public office may generally be tried and determined not only in a *quo warranto* proceeding, but also in an election contest, Gray v. State (1899) 92 Tex. 396; 49 SW 217; Shaw v. Taylor (1940) 146 SW2d 452, or in an ordinary suit between the parties. McAllen v. Rhodes (1886) 65 Tex. 348; Gray v. State, (1898) 49 SW 699; Perez v. McHazlett; (1979) 588 SW2d 807. (See: Generally, Texas Jurisprudence 3d, Vol. 38, Extraordinary Writs, Section 246 *et seq*.).

ATTACKING A *DE FACTO* JUDGE

In the published cases where a judge's *de facto* status has been successfully challenged, it will be found that the challenge was timely made and that the judge had never taken the oath of office at the time the challenge was made.

When a direct attack is properly made, the *de facto* officer's authority should be

effectively neutered as stated in State v. Perkins, *supra*: "However much color of authority may clothe the person who assumes to perform the function of an office and discharge its duties, yet if the public or third persons are not deceived thereby, if they know the true state of the case, the reason which gives origin or existence to the rule which validates the act of an officer *de facto* ceases, and with it ceases, also, all of its ordinary validating incidents and consequences."

The odds of winning the Texas Lottery are probably better that those of persuading an Attorney General, District, or County Attorney to file a *quo warranto* action against one of their judge cronies. A private individual cannot bring an action in the name of the State. A *quo warranto* action is seemingly impossible. If it is possible to recuse a *de facto* judge, or to have his acts vacated as void, it will have to be because of some Constitutional infirmity such as the judge never took the oath of office. If he did not take the oath of office for his current term, but did take the oath for a previous term, there is no infirmity. See: Keen, *supra*. If you are up against a *de facto* judge, you should probably learn to live with it. When one looks objectively at any give situation, he should realize that the judge is usually not the enemy. He is just there to enforce a presumption of a maritime contract for an agent or officer of the STATE who has brought a maritime claim into his court of chancery. The real enemy is the *de facto* public law enforcement officer or other agent that is dragging you into the court of chancery. If the officer bringing the claim has no authority to bring the claim in the first place, what need is there to challenge the authority of the judge?

But if the reader is hell-bent on recusing a *de facto* judge, or having the acts of a *de facto* judge declared void, the Texas Court of Criminal Appeals, seemingly recognizing the age old maxim that the law cannot demand an impossibility, provides instruction on how to accomplish the matter. In 1998 the Supreme Court may have relaxed the rules a little bit for challenging a *de facto* judge by allowing procedural irregularities to be challenged before trial, the court held:

> It is clear to us now, however, that the rule of Keen and Archer must be abandoned as unworkable. *Quo warranto* proceedings are governed by statute. Under Texas Civil Practices and Remedies Code §§ 66.002(a), only the "attorney general or the county or district attorney of the proper county" may bring an action in the nature of *quo warranto*. That statute must be understood to mean what it plainly states. Boykin v. State, 818 S.W.2d 782, 785 (Tex.Crim.App. 1991). Therefore, it is not realistic to require a defendant to initiate a quo warrantor proceeding.
>
> How, then, may a defendant challenge the authority of a trial Judge, who is otherwise qualified, to preside pursuant to an expired assignment? We hold that such a defendant, if he chooses, may object pretrial; if he does not, he may not object later or for the first time on appeal.

> This holding is consistent with our prior holding that, in general, all but the most fundamental evidentiary and procedural rules (or "rights") are forfeited if not asserted at or before trial. See Marin v. State, 851 S.W.2d 275, 278-280 (Tex.Crim.App. 1993). A timely objection in the trial court will afford both the trial Judge and the State notice of the procedural irregularity and an adequate opportunity to take appropriate corrective action. See Zillender v. State, 557 S.W.2d 515, 517 (Tex.Crim.App. 1977).

However, in a separate and concurring opinion, the above holdings by the majority are seriously disputed by at least one judge:

> The majority also holds that a defendant may preserve error by objecting pretrial to a procedural irregularity in the assignment of a trial Judge who is otherwise qualified. I disagree.
>
> In Miller v. State, 866 S.W.2d 243 (Tex. Crim. App. 1993), we explained that a party may preserve error concerning the challenge to the authority of a special Judge by objecting at trial. We distinguished special Judges from duly-elected or retired Judges, however, saying that: "*Quo warranto* is ... the only means to challenge the authority of a duly-elected district Judge or an appointed retired district Judge. (citations omitted.) However, special Judges, unlike duly-elected Judges or retired Judges, are not office holders subject to *quo warranto*. A duly-elected Judge or a retired Judge is a Judge in his or her own right."
>
> Thus, although the authority of a special Judge was at issue in Miller, the clear implication is that an objection is not sufficient when a party wishes to challenge the authority of a duly-elected or retired Judge.
>
> We have also stated that, "in matters which concern the public, the officer's title to his office (he being in the exercise of its duties) cannot be questioned unless in a direct proceeding having for its object the contestation of his right to hold office." Snow v. State, 114 S.W.2d 898, 900 (Tex. Crim. App. 1938) (opinion on rehearing) An attack on the Judge's authority at the trial of a case over which he is presiding is considered a collateral attack, which is not permitted. *See*, Archer v. State, 607 S.W.2d 539, 544 (Tex. Crim. App. 1980), cert. denied 452 U.S. 908, 101 S.Ct. 3037, 69 L.Ed.2d 410 (1981). As this case involves the assignment of a retired Judge rather than a special Judge, an objection would not have preserved error.
>
> The only recognized method for attacking the validity of a retired Judge's

assignment is a *quo warranto* proceeding. It is true that the defendant cannot file a *quo warranto* proceeding, and therefore, cannot effectively challenge the trial Judge's authority. However, the courts have recognized that some types of error or misconduct cannot be remedied in a defendant's criminal trial but must be remedied through other means. House v. State, 947 S.W.2d 251, 252-253 (Tex. Crim. App. 1997)(disciplinary proceeding before the State Bar is the only method for remedying disciplinary rule violations); Hobby v. United States, 468 U.S. 339, 346 (1984)(no remedy for criminal defendant for discrimination in selection of grand jury foreman where discrimination did not affect the composition of the grand jury and foreman's duties were only ministerial); Arizona v. Evans, 514 U.S. , 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995)(exclusionary rule does not require suppression of fruits of arrest on warrant that had been quashed where court employees failed to notify law enforcement that warrant had been quashed).

Just such a situation is presented here. As long as the Judge presiding over a case is a Judge in his own right, a defendant suffers no actual harm merely because the Judge is not entitled to act as a Judge in that particular case. The State of Texas is the party harmed when a person acts as one of its officers without authority. A criminal defendant simply has no standing to challenge a Judge's qualifications. *See*, Snow, 114 S.W.2d at 901.

An official who holds office under color of title (such as an elected or retired Judge) is considered to be a *de facto* official, even if all of the legal requirements for holding the office have not been met. The reason for conferring *de facto* status is to protect the public and individuals who have dealings with the official by ensuring that the official's acts will subsequently be recognized. Hence, "[a] Judge *de facto* is a Judge *de jure* as to all parties except the state, and his official acts, before he is ousted from office, are binding on third persons and the public." (*quoting*, 33 C.J. pp. 932 and 933).

Holding that an objection preserves a complaint in these circumstances is contrary to the entire body of civil case law on the subject. And, there is something odd about the idea of allowing a challenge to a Judge's authority by means of an objection made to that same Judge. **If the court has no authority to act, then it has no authority to rule -- up or down -- on the objection**. So, another reason to maintain the status quo regarding *quo warranto* is that it brings the issue before a tribunal that is authorized to rule. Alfred Woodrow Wilson v. the State of Texas, 977 SW2d 379, No. 0585-97, 10/14/98 (Tex.Crim.App. 1998).

When the title to office of the official challenged is a judge, it would appear that the *quo warranto* is the exclusive remedy, unless the judge has never taken the oath for the office that he is holding when he acted *de facto*. As stated above it would appear that:

> While he is in possession of the office under color of title, discharging its ordinary functions, a judge's official acts are conclusive as to all persons interested and cannot be attacked in a collateral proceeding, even though the person acting as judge lacks the necessary qualifications and is incapable of legally holding the office." Ex parte Lefors, 171 Tex.Cr.R. 229, 347 S.W.2d 254 (1961). If the appellant desires to challenge such authority, he must bring a direct action through a *quo warranto* proceeding. Keen v. State, 626 S.W.2d 309 (Tex.Cr.App.1981). See also Archer v. State, 607 S.W.2d 539 (Tex.Cr.App.1980). Tart v. State, 642 S.W.2d 244 (Tex.App. Hous. (14 Dist.) 1982).

If the reader is now thoroughly confused regarding the matter of challenging a *de facto* judge, he is in good company, so are your authors. But how can one argue with the profound logic elucidated in the Wilson opinion, *supra,* when it stated, "**If the court has no authority to act, then it has not authority to rule**?" How could a properly challenged *de facto* order himself to be recused? When one enters the realm of a court of chancery, either as a plaintiff or as a defendant, the party is surely going to submit pleadings asking the judge to do something for him. Why would anyone start making attacks on the judge when he is asking him to do something for him? Anyone who observes human behavior will notice that when one is asking some else to do something for him, he stands a much better chance of obtaining what is asked for if he is courteous and doesn't anger the one who is being asked. The judge is not the enemy. The rat that made the complaint and dragged you into court is the enemy. For the most part, but some exceptions surely exist, but most judges will follow the law to the best of their ability and understanding of it. It will not be argued that incompetent and corrupt judges sit on the bench, but you authors believe that to be the exception and not the rule. If one wishes to make attacks on *de facto* officers, the attack should be directed where one would have the best chance of succeeding and at the true enemy. The judge in any court proceeding is there to referee the dispute and judge the law and sometimes the facts. He is not there to be made a party to the controversy. --And that is only your authors humble opinion interspersed with a few observations and words of wisdom.

CHALLENGE A COP

A *de facto* law enforcement officer or other government agent could be an entirely different matter though. The right to a public office may generally be tried and determined not only in a *quo warranto* proceeding in an ordinary suit between the parties. See: McAllen v.

Rhodes; Gray v. State; and Perez v. McHazlett, *supra*. This could leave the option of filing an original suit against the officer for false imprisonment, trespass, invasion of privacy or other appropriate tort if the suit was filed timely, or better yet, if the officer made some criminal charge with or without an arrest, the officer's title to his office might be directly attacked by filing a counter-claim in admiralty based on a Constitutional infirmity or other defect in the officer's qualifications for office. The counter-claim might be especially effective if the *de facto* officer was challenged for his authority in writing before the encounter which resulted in charges or arrest. Of course this might be impractical as an encounter with a cop on the street is probably not the best place to challenge his authority because he has a gun and a radio with which he can summon scores of his buddies for assistance, and victim probably doesn't. On the other hand, if one is not deceived by the *de facto* status of the officer, why couldn't he serve notice on the head of the law enforcement agency in question and thereby give notice to all the officer in the agency to preempt future confrontations? While visiting the White House, Ariel Sharon, Prime Minister of Israel recently stated on national TV that "When the enemy rises up to kill us, we will preempt it, and we will rise up and kill him first." Then he immediately returned to his country to do just that. Whatever one thinks of Ariel Sharon, one must admire the man's sense of self-preservation! Too bad more Americans and Christians don't have the same sense of self-preservation. This paper is certainly not written to induce anyone to commit an act of violence, in fact such acts are to be strongly discouraged, but no one can be the subject of criticism if he uses a lawful means to preempt a confrontation. Of course this is a theory yet to be tested, so *caveat emptor*!

Therefore, it might be deduced that to make a successful direct challenge to a *de facto* officer, one must:

(1) Challenge that there "has been a trespass upon the constitutional power of appointment, not merely a misapplication of a statute providing for the assignment of already appointed judges;" *See*, Ryder, *supra*;

(2) Make timely Challenge that the trespass on the title of office while the case is pending, that is to say, before trial and before the officer acted; *See*, Ryder, *supra*;

(3) The challenge must raise basic constitutional protections or constitutional infirmities designed for the benefit of litigants; *See*, Ryder, and Cream, *supra*;

(4) In the absence of a constitutional infirmity, or if the officer is a judge, the only proper direct challenge is by *quo warranto. See*, Cream, Tart and Keen, *supra*.

(5) The challenge must be timely, i.e., before the officer acts; *See*, Ryder, *supra*;

(6) The challenge must challenge the officer's title to the office; *See*, U.S. v. Jones, *supra*;

(7) The challenge should show that the third party is not deceived by the officer's *de facto* status and color of authority and that he knows "the true state of the case;" *See*, State v. Perkins, *supra*;

(8) The challenge should show that the *de facto* officer's act are affecting the rights of the third person, e.g., where the attack is direct on the right of the person acting or affected, *See*, U.S. v. Jones, *supra* and Ridout v. State;

(9) The challenge must be made directly to the officer; *See*, Ryder, *supra*.

(10) The challenge should attack the existence of the office if its existence is questionable.

(11) Most importantly, the challenge should question the existence of the presumed maritime contract that is binding upon the party that requires him to perform in a certain way, or prohibits the party from doing acts specified by the contract.

It is the firm belief of the authors of this dissertation that all acts of the "officers" of all law enforcement agencies, regulation agencies, licensing agencies and tax collection agencies, be they state or federal, are predicated on a maritime contract that either prohibits an act or compels an act. Whenever the STATE, the UNITED STATES, or a government agency of any kind is throwing some penal *lex* at someone and is the plaintiff in a suit, there must be a judicially enforceable maritime contract in place or presumed to be in place. The presumption of the contract always silently arises in such a case, otherwise the "officers" will have had no authority to have had acted and the court will have no authority to act on the subject matter jurisdiction. If the presumption is not controverted with evidence, the presumption becomes the fact. When a direct challenge to the *de facto* officer is made, one of the most relevant points would be to compel the officer to prove up the maritime contract that he is allegedly enforcing by bringing the written contract into evidence, or in the absence of a written contract, or at least parol evidence of a written contract, to identify the benefits that the party is presumed to have accepted. Therefore, when one is dragged into a court of Chancery for the enforcement of a maritime contract containing clauses for penal forfeitures, the contract, once challenged, must be proven by the party invoking the jurisdiction of the court, and if it is not proven the court can only dismiss the case for want of subject matter jurisdiction. These points of law are *stare decisis* and so well established that case authority should not need be cited. Absent the contract and absent probable cause for the officer to believe that one is under contract to perform according to the government's statutes, even a *de jure* officer will not have jurisdiction to act.

(For more on this subject, see: The Secret Maritime Jurisdiction of the United States Exposed, by VALIANT LIBERTY.)

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[Note: The following was provided by the late Dan Meador. In our opinion, Dan left two of the most important things to ask for, namely (1) WHERE IS THE CONTRACT? and (2) if there is no written contract, PLEASE IDENTIFY THE BENEFITS THAT I AM PRESUMED TO HAVE ACCEPTED OR OTHER GOOD AND VALUABLE CONSIDERATION THAT MAKE ME LIABLE FOR THE TAX.]

(VALIANT LIBERTY had no input in the creation of the following information as provided below, and takes no credit for it, and is just forwarded along for the reader's information.)

We had the opportunity to smoke test this in a one day forum. The client was scheduled for an audit examination on Wednesday. On Tuesday afternoon, the request was sent to the IRS officer via FAX & certified mail. On Wednesday morning, prior to business hours, the examination officer called to cancel the appointment.

Dan Meador

Direct Challenge to Personal Authority

January 28, 2002

Ima Crook, Revenue Officer
Internal Revenue Service
55 N. Robinson
Oklahoma City, Oklahoma 73102

PURPOSE: Verify authenticity of your authority

RE: Letter 2202 (DO), originating with Sam Slick, Director of Compliance for Area 6 proposed examination for tax year 1999

Dear Ms. Crook:

After considerable review of the Internal Revenue Code, Treasury regulations and published Internal Revenue Service policy, including the Internal Revenue Manual, I am persuaded that the proposed examination of my financial records exceeds venue and subject matter jurisdiction of the Internal Revenue Service and that you may be operating under color of authority of Government of the United States. I will address the bulk of the issues giving rise to concern for your authority in a decision request to be submitted to Stuart Brown, the Chief Counsel for the Internal Revenue

Service, and a more comprehensive protest and rebuttal letter to you. However, two examples are useful here.

If you will consult § [5.1] 11.9 of the Internal Revenue Manual, which is currently posted on the Internal Revenue Service web page, you will find that IRS does not have delegated authority to execute Form 1040, 1041 & 1120 substitute returns under provisions of 26 U.S.C. § 6020(b). It follows that if IRS does not have delegated authority to unilaterally execute these returns, Form 1040, 1041 and 1120 returns are not mandatory.

Next, consider the Pocket Commission Handbook, located in Chapter 3 of Internal Revenue Manual § 1.16.4. Exhibit [1.16.4] 3 1, Authorized Pocket Commission Holders, lists IRS personnel who are authorized to have pocket commissions. By cross referencing to the delegation of authority to issue summonses, it appears that all IRS personnel authorized to issue summonses are under the Assistant Commissioner (International). If that is the case, your proposed examination would be a sham proceeding as to the best of my knowledge; I have never received income from sources and activities subject to jurisdiction of the Assistant Commissioner (International).

Given these evidences, I concluded that it would be prudent to further investigate the extent of your authority, sources and activities it applies to, and what you are entitled to investigate in the examination process. The investigation necessarily begins with your personal standing and authority.

Per Ryder v. United States, 115 S.Ct. 2031, 132 L.Ed.2d 136, 515 U.S. 177, I am required to initiate a direct challenge to authority of anyone representing himself or herself as a government officer or agent prior to the finality of any proceeding in order to avoid implications of de facto officer doctrine. When challenged, those posing as government officers and agents are required to affirmatively prove whatever authority they claim. In the absence of proof, they may be held personally accountable for loss, injury and damages. See particularly, the former 26 U.S.C. § 7804(b), now published in notes following § 7801. Per 26 U.S.C. § 7214, if and when IRS personnel exceed authority prescribed by law, or fail to carry out duties imposed by law, they are criminally liable.

Per § 2 of 31 CFR Part 1, Appendix B of Subpart C, I am entitled to directly request evidence of authority and/or liability:

Internal Revenue Service procedures permit the examination of tax records during the course of an investigation, audit, or collection activity. Accordingly, individuals should contact the Internal Revenue Service employee conducting an audit or effecting the collection of tax liabilities to gain access to such records, rather than seeking access under the provisions of the Privacy Act.

Please provide me with certified copies of the following:

1. Your constitutional oath of office, as required by 5 U.S.C. § 3331;

2. Your civil commission as agent or officer of Government of the United States;

3. Your affidavit declaring that you did not pay for or otherwise make or promise consideration to secure the office (5 U.S.C. § 3332); and

4. Either your personal surety bond or the surety bond of the principal officer responsible for your appointment.

These documents should all be filed as public records. See 5 U.S.C. § 2906 for requirements concerning filing oaths of office.

The following is a reasonably concise list of causes for challenging and requiring you to verify your authority. The list includes authority references sufficient to provide notice and enable you to make inquiry reasonable under the circumstance.

1. After review of my financial affairs and reasonably comprehensive study of application of internal revenue laws of the United States, I do not believe I am liable for any federal tax that requires me to keep books and records and file returns. In spite of a diligent search, I have been unable to locate taxing and liability statutes that apply to my income sources and activities. See the Good Faith and Reasonable Cause Standard at 26 CFR § 1.6664 4 and the Substantial Authority Standard at 26 CFR § 1.6662 4.

2. Court documents and published district and circuit court decisions verify that the Internal Revenue Service is agent of the [federal] United States of America, not Government of the United States (See 26 U.S.C. § 7402: "The district courts of the United States at the instance of the United States shall have jurisdiction). For distinction between the "United States"

and the "United States of America" as unique and separate governmental entities, see historical and revision notes following 18 U.S.C. § 1001 and Attorney General delegation orders to the Director of the Bureau of Prisons, 28 CFR §§ 0.96 & 0.96b. Until proven otherwise, Internal Revenue Service personnel will be considered and treated as hostile agents of a foreign government and all Internal Revenue Service claims will be construed as claims of a government foreign to the United States and States of the Union.

3. It appears that the Internal Revenue Service operates in an ancillary or other secondary capacity under contract, memorandum of agreement or some comparable device to provide services under an umbrella of authority vested in the Treasury Financial Management Service or some other bureau of the Department of the Treasury, and that such services extend only to government employees and employers, as defined at 26 CFR §§ 3401(c) & (d). The authorization is essentially intragovernmental in nature; it does not extend to private sector enterprise in States of the Union.

4. The Internal Revenue Service is not the delegate of the Secretary of the Treasury, as that term is defined at 26 U.S.C. § 7701(a)(12)(A).

5. Prior to any adverse action to collect contested delinquent tax debts (properly assessed liabilities), the current general agent of the Treasury and the Attorney General must authorize such action. See particularly, Executive Order #6166 of June 10, 1933, as amended, 5 U.S.C. § 5512, and 26 U.S.C. § 7401. (The General Accounting Office is listed as general agent of the Treasury in notes following 5 U.S.C. § 5512, but appears to have delegated certification of obligations to Government of the United States, most probably to the Treasury Financial Management Service or a subdivision thereof)

6. Any statutory lien arising under § 6321 of the Internal Revenue Code is inchoate (unperfected) until there is a judgment lien secured in compliance with the Federal Debt Collection Procedures Act (See Chapter 176 of Title 28, particularly 28 U.S.C. § 3201). Therefore, notices of federal tax lien, notices of levy and other such instruments utilized to encumber and convert private property are uttered instruments unless perfected by a judgment from a court of competent jurisdiction. See also, Fifth Amendment due process clause, clarified by relation back doctrine (United States v. A Parcel of Land, Buildings, Appurtenances and Improvements, known as 92 Buena Vista Avenue, Rumson, New Jersey, (1993), 507 U.S. 111; 113 S.Ct.

1126; 122 L.Ed. 2d 469)

7. All Internal Revenue Service seizures where there is not a judgment lien in place are predicated on the underlying presumption that a drug related commercial crime specified in 26 CFR § 403.38(d)(1) has been committed and that the seized property was being used in connection with or was the fruit of the crime. See particularly, Delegation Order 157, Rule 41 of the Federal Rules of Criminal Procedure, and 26 U.S.C. § 7302 (property used in violation of internal revenue laws). The in rem action is admiralty in nature and presumes that there is a maritime nexus. See 26 U.S.C. § 7327 concerning customs laws.

8. Internal revenue districts have not been established in States of the Union, as required by 26 U.S.C. § 7621 and Executive Order #10289, as amended. Therefore, Internal Revenue Service incursion into States of the Union for purposes authorized by Chapter 78 of the Internal Revenue Code are beyond venue prescribed by law. See also, 4 U.S.C. § 72.

9. Collateral issues (nature & cause of action, standing of the Internal Revenue Service, venue and subject matter jurisdiction generally) are matters that must be documented in record when challenged. Therefore, the mandate for disclosure falls within substantive rights that cannot be avoided or otherwise passed over through procedural technicalities or silence. U.S. Supreme Court decisions verifying these requirements are too numerous to list in this context.

10. The Administrative Procedures Act and the Federal Register Act require publication of organizational particulars and procedure in the Federal Register. See particularly 5 U.S.C. § 552. The Internal Revenue Service appears not to be in compliance with these mandates. Therefore, IRS personnel engaged in federal tax administration have a duty to affirmatively resolve organizational and other collateral issues and procedural issues when they are raised in the administrative forum.

11. Umbrella grievances are that Internal Revenue Service personnel are operating under color of authority of Government of the United States and that by either exceeding or refusing to fulfill duties imposed by law, they abridge or threaten to abridge substantive and procedural due process rights.

12. Internal Revenue Service personnel acts not authorized by law and

omission of duties imposed by law are criminal in nature (26 U.S.C. §§ 7214(a)(1), (2) & (3)), and whether knowingly or unknowingly, IRS personnel operating in States of the Union, except with the possible exception of authority for enforcing drug related customs laws (26 CFR § 403), are involved in a seditious conspiracy and racketeering enterprise. Where IRS personnel operate under color of authority of the United States when in reality they are agents of a government foreign to the United States, offenses may be construed as treason and conspiracy to commit treason.

The constitutional oath of office is important enough that the first official act of Congress in 1789 set requirements for the oath in place. See 1 Stat. 23. The Constitution of the United States mandates a constitutional oath of office in Article VI, Clause 3. The requirement for civil commissions is in Article II § 2, Clause 2 of the Constitution. Requirements for civil commissions were particularized in Marbury v. Madison, 5 U.S. 137, 2 L.Ed. 60, 1 Cranch 137 (1803). Requirements for surety bonds arise from common law doctrine and statutory law. Collateral issues other than the four requests intended to document your personal standing will be addressed separate from this request.

You may provide the three requested items within a reasonable period of thirty calendar days from receipt of this request. In the alternative, you may recuse yourself from this case so long as you provide written notice. In the event you do not formally recuse yourself, you may be considered a party to any past or subsequent adverse action. You may withdraw any and all claims, demands and/or encumbrances issued directly or indirectly within the scope of your alleged administrative authority.

Regards,

John Doe