

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

DIRECTOR OF PROFESSIONAL)	
RESPONSIBILITY,)	
)	
Complainant,)	
)	
v.)	Complaint No. 2003-2
)	
JOSEPH R. BANISTER,)	
)	
Respondent.)	
_____)	

**RESPONDENT'S OBJECTION TO VENUE
AND REQUEST FOR A PUBLIC HEARING**

The respondent, Joseph R. Banister ("Banister"), by and through his attorneys, The Law Office of Robert G. Bernhoft, S.C., hereby formally requests a public hearing in a more appropriate venue.

The respondent always assumed this hearing would be open to the public, as all such hearings must be, with very limited limited exceptions. *See Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002). The court, in the teleconference of November 24, 2003, first informed Respondent's counsel that no member of the public or the press would be allowed at the hearing. When any proceeding "closely parallels the judicial mode of decision making," however, then the First Amendment requires that such a proceeding must be open to the public. *See Detroit Free Press*, 303 F.3d at 699. Open hearings and open records are required to advance fairness to the parties, protect the public right to access adjudicative hearings, promote the freedom of speech, and insure the integrity of the proceedings. *See id.* Such openness enhances the quality of the hearings and legitimates the process. *See id.* Otherwise, "democracies die" behind closed doors. *See id.*

It is axiomatic that what the Constitution mandates, the IRS regulations cannot deny. Of note, no applicable statute or IRS regulation requires a closed hearing. The IRS's untenable position is apparently that an administrative law judge can deny a public hearing and that all hearings are presumed closed unless demanded by one of the parties, regardless of the public requests or the interest of the press. Surely, many defendants would welcome closed hearings, as would the government in select cases like this one. But the parties cannot deny a right owned by the public. Nor can IRS regulations prohibit what the Constitution guarantees. To interpret 31 CFR 10.71 as closing all hearings except when expressly requested by a party would render the regulation unconstitutional. To interpret 31 CFR 10.71 as closing all hearings except when granted in the discretion of an administrative judge would render the regulation unconstitutional. The only interpretation consonant with the Constitution requires that all hearings are open to the public, except upon a special showing by the government to close the hearing. In this case, the IRS has not even attempted such a showing. There is no compelling interest for which a closed hearing would be the narrowly tailored remedy.

As the IRS acknowledges, the public has a significant interest in this case. The public outcry concerning this hearing evidences their interest. The court, itself, apparently received calls from individuals and the press interested in the proceeding. Finally, as the respondent's counsel stipulated in the administrative conference on November 24, 2003, the respondent already stipulated to protecting the confidentiality of taxpayers, the only issue raised by the IRS for closing this hearing to the public.

The government can cite no "compelling state interest" which necessitates closing the complete hearing – a hearing that only addresses the sanction the court can impose. Already, the respondent was denied an opportunity to achieve compliance with any

purported rules violations. Then, the respondent was denied any opportunity for any discovery. Further, the court denied the respondent the opportunity for a public hearing to cross examine the evidence against him and challenge his accusers in open court. Now, the IRS asks the court to deny a public hearing and even suggested the court hold no hearing at all.

The rules of Constitutional law mandate an open public hearing in this matter. The regulatory rules further require such a public hearing whenever requested where the respondent stipulates to protecting the confidentiality of taxpayer, as has been done here. *See* 31 C.F.R. 10.71. Finally, simple fairness and due process mandate an open hearing, where the IRS cannot hide its deeply suspect agenda behind closed doors. If the IRS has nothing to hide, then there is no reason to have a closed hearing in secret away from the press and public. The IRS hid their documents from discovery, hid their witnesses from depositions, and hid their agents from cross-examination. Hiding this hearing from the public would strip this proceeding of the last remaining cloth of due process covering it.

The respondent similarly objects to the selection of this secure military facility as the venue for this administrative hearing. The respondent never agreed to the Coast Guard Island as the venue for this proceeding. On the eve of the hearing, the court informed the respondent that no one could appear at the hearing without disclosing their name, address, and car license number in advance. In addition, the venue may foreclose public participation. Hence, this venue is inappropriate under the rules. In fact, the proceeding was originally scheduled for San Jose or Oakland, but was changed without approval of the Respondent.

31 C.F.R. 10.71 (e) requires consent of the respondent for a hearing on a military island away from Washington D.C.:

(c) Location. The location of the hearing will be determined by the agreement of the parties with the approval of the Administrative Law Judge, but, in the absence of such agreement and approval, the hearing will be held in Washington, D.C.

As the court's order of September 26, 2003, acknowledged, the hearing was set and scheduled for "a courtroom in San Jose" with a "courtroom in Oakland" as a backup. *See Notice of Hearing September 26, 2003.* The parties never agreed to, nor did the Court even mention in that order, the possibility of a military island for a hearing location.

After the motion deadline passed, the court, only a few weeks before the hearing, changed the location of the hearing to the military island without the agreement of the respondent. Then, just a week before the hearing, the court informed the respondent the real significance of this location -- no members of the press or public would be allowed, and even witnesses would not be admitted unless the court obtained the license plate numbers of the witnesses prior to the hearing.

The court, in the Administrative conference on November 24, 2003, imposed the new requirement that that the Respondent and his legal team must also provide the auto license numbers of anyone who will appear or testify at the hearing. This latter information request is beyond the capacity of the respondent to procure on such short notice, would intimidate potential witnesses and would impermissibly invade the privacy of the public. Finally, the selection of a military island for a mere administrative proceeding unjustly intimidates the respondent and subjects him to a hostile, unfair environment for his adjudication.

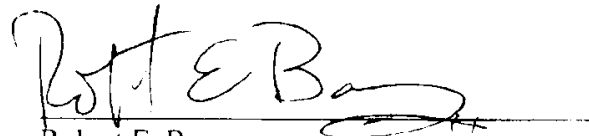
Therefore, venue should be moved to a public courtroom in San Jose or Oakland, as was the original understanding of the Respondent. The hearing should be open to the press and public, and not secreted away to a military island cordoned off from the public.

For all the foregoing reasons, the respondent respectfully requests a public hearing at a public courtroom in San Jose or Oakland, California.

Respectfully submitted this 25th day of November, 2003.

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

By:



Robert E. Barnes

Wisconsin State Bar No. 1038252

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