

POLICY DOCUMENT: RETIREMENT AND PENSIONS



DEDICATION

humans really could
have had a beautiful
little existence on
earth just creating art
and eating fruit.
instead we have credit
scores and taxes

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1 Introduction

This document briefly summarizes the SEDM position on retirement in general and military retirement in particular of compliant Members. We welcome constructive comments about how to improve it.

If, after reading this memorandum, you would like to use it to apply for military retirement, we provide a sample letter for doing so at:

[DOD Retirement Pay Request Letter](https://sedm.org/product/dod-retirement-pay-request-letter-form-04-227/), Form #04.227** (Member Subscriptions)
<https://sedm.org/product/dod-retirement-pay-request-letter-form-04-227/>

2 Summary of our position

The only audience this site is permitted to address are “nonresident aliens”. This answer PRESUMES the person posting has this civil status. If you do NOT intend to comply with the requirement to file as a nonresident alien, then disregard EVERYTHING in the remainder of this document and DO NOT use ANY of the “tax information and services” found ANYWHERE on this site or post additional questions to this thread about how to be a compliant “taxpayer”.

2.1 General taxability of pensions

Earnings from “pensions” are expressly included in STATUTORY “gross income” in 26 U.S.C. §61(a)(10):

[26 U.S. Code § 61 - Gross income defined](#)

(a) General definition

Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

[. . .]

(10) Pensions;

26 U.S.C. §871 further describes the taxability of the above in the case of “nonresident aliens”. For a nonresident alien:

1. Pensions are listed on the 1040-NR Form under block 5a in the context of ONLY “trade or business” earnings subject to deductions under 26 U.S.C. §162 and appearing in 26 U.S.C. §871(b):

| | | | | | | | | |
|---------------------------|----|-----------------------------------|----|--|---|--------------------------|----|--|
| withheld. | 4a | IRA distributions | 4a | | b | Taxable amount | 4b | |
| If you did not get a Form | 5a | Pensions and annuities | 5a | | b | Taxable amount | 5b | |
| | 6 | Reserved for future use | | | | | 6 | |

2. Pensions are also listed on the Schedule NEC (Not Effectively Connected) in block 7 and appearing in 26 U.S.C. §871(a)(1)(A):

| | | | | | | | |
|---|--|---|--|--|--|--|--|
| 6 | Real property income and natural resources royalties | 6 | | | | | |
| 7 | Pensions and annuities | 7 | | | | | |
| 8 | Social security benefits | 8 | | | | | |
| 9 | Capital gain from line 18 below | 9 | | | | | |

2.2 Nonresident alien taxability of retirement

I.R.C. Section 872 for nonresident alien individuals states that income DERIVED from sources within the United States is included in gross income. This is the same language we see in I.R.C. Section 61 and in the 16th Amendment, and which SCOTUS analyzed in the Eisner v. Macomber case where it defined income as a profit or gain derived from a source, and stated that Congress had no power to redefine the term “income”.

“In order, therefore, that the [apportionment] clauses cited from article I [§2, cl. 3 and §9, cl. 4] of the Constitution may have proper force and effect . . . [I]t becomes essential to distinguish between what is an what is not ‘income,’ . . . according to truth and substance, without regard to form. Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone, it

derives its power to legislate, and within those limitations alone that power can be lawfully exercised... [pg. 207]...After examining dictionaries in common use we find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of 1909, *Stratton's Independence v. Howbert*, 231 U.S. 399, 415, 34 S.Sup.Ct. 136, 140 [58 L.Ed. 285] and *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 185, 38 S.Sup.Ct. 467, 469, 62 L.Ed. 1054..."

[*Eisner v. Macomber*, 252 U.S. 189, 207, 40 S.Ct. 189, 9 A.L.R. 1570 (1920)]

"This court had decided in the *Pollock Case* that the income tax law of 1894 amounted in effect to a direct tax upon property, and was invalid because not apportioned according to populations, as prescribed by the Constitution. The act of 1909 avoided this difficulty by imposing not an income tax, but an excise tax upon the conduct of business in a corporate capacity, measuring, however, the amount of tax by the income of the corporation...*Flint v. Stone Tracy Co.*, 220 U.S. 107, 55 L.Ed. 389, 31 Sup.Ct.Rep. 342, Ann. Cas."

[*Stratton's Independence v. Howbert*, 231 U.S. 399, 414, 58 L.Ed. 285, 34 Sup.Ct. 136 (1913)]

"...Whatever difficulty there may be about a precise scientific definition of 'income.' it imports, as used here, something entirely distinct from principal or capital either as a subject of taxation or as a measure of the tax; conveying rather the idea of gain or increase arising from corporate activities."

[*Doyle v. Mitchell Brothers Co.*, 247 U.S. 179, 185, 38 S.Ct. 467 (1918)]

Income means CORPORATE PROFIT rather than EVERYTHING YOU MAKE as someone who is NOT a corporation:

"... 'income' as used in the statute should be given a meaning so as not to include everything that comes in, the true function of the words 'gains' and 'profits' is to limit the meaning of the word 'income'"

[*So. Pacific v. Lowe*, 238 F. 847, 247 U.S. 30 (1918)(U.S. Dist. Ct. S.D. N.Y. 1917)]

"The Sixteenth Amendment declares that Congress shall have power to levy and collect taxes on income, "from [271 U.S. 174] whatever source derived," without apportionment among the several states and without regard to any census or enumeration. It was not the purpose or effect of that amendment to bring any new subject within the taxing power. Congress already had power to tax all incomes. But taxes on incomes from some sources had been held to be "direct taxes" within the meaning of the constitutional requirement as to apportionment. Art. 1, § 2, cl. 3, § 9, cl. 4; *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601. The Amendment relieved from that requirement, and obliterated the distinction in that respect between taxes on income that are direct taxes and those that are not, and so put on the same basis all incomes "from whatever source derived." *Brushaber v. Union P. R. Co.*, 240 U.S. 1, 17. "Income" has been taken to mean the same thing as used in the Corporation Excise Tax Act of 1909, in the Sixteenth Amendment, and in the various revenue acts subsequently passed. Southern Pacific Co. v. Lowe, 247 U.S. 330, 335; Merchants' L. & T. Co. v. Smetanka, 255 U.S. 509, 219. After full consideration, this Court declared that income may be defined as gain derived from capital, from labor, or from both combined, including profit gained through sale or conversion of capital. *Stratton's Independence v. Howbert*, 231 U.S. 399, 415; *Doyle v. Mitchell Brothers Co.*, 247 U.S. 179, 185; *Eisner v. Macomber*, 252 U.S. 189, 207. And that definition has been adhered to and applied repeatedly. See, e.g., *Merchants' L. & T. Co. v. Smetanka*, supra; 518; *Goodrich v. Edwards*, 255 U.S. 527, 535; *United States v. Phellis*, 257 U.S. 156, 169; *Miles v. Safe Deposit Co.*, 259 U.S. 247, 252-253; *United States v. Supplee-Biddle Co.*, 265 U.S. 189, 194; *Irwin v. Gavit*, 268 U.S. 161, 167; *Edwards v. Cuba Railroad*, 268 U.S. 628, 633. In determining what constitutes income, substance rather than form is to be given controlling weight. *Eisner v. Macomber*, supra, 206. [271 U.S. 175]"

[*Bowers v. Kerbaugh-Empire Co.*, 271 U.S. 170, 174 (1926)]

If IN FACT that party filing as a nonresident alien is representing an office in a federal corporation, it could therefore earn "income" within the meaning of the Sixteenth Amendment and the Corporation Excise Tax Act of 1909. "Nonresident Alien" defined in 26 U.S.C. §7701(b)(1)(B), in fact defines what a "nonresident alien" ISN'T, and not what it is.

[TITLE 26 > Subtitle F > CHAPTER 79 > § 7701](#)
[§ 7701. Definitions](#)

(b) Definition of resident alien and nonresident alien

(1) In general

(B) Nonresident alien

An individual is a nonresident alien if such individual is neither a citizen of the United States nor a resident of the United States (within the meaning of subparagraph (A)).

A STATE corporation, for instance, could fall within the above definition, which is really a NON-DEFINITION. A legal definition defines what something IS, not what it is NOT. Anything that is NOT a STATUTORY "citizen" or "resident" therefore could fall therefore within the definition of "nonresident alien". Likewise, the rules of statutory construction do

not permit or delegate to the IRS the authority to restrict this definition of “nonresident alien” that ONLY Congress can enact.

"When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning." Meese v. Keene, 481 U.S. 465, 484-485 (1987) ("It is axiomatic that the statutory definition of the term excludes unstated meanings of that term"); Colautti v. Franklin, 439 U.S. at 392-393, n. 10 ("As a rule, 'a definition which declares what a term 'means' . . . excludes any meaning that is not stated'"); Western Union Telegraph Co. v. Lenroot, 323 U.S. 490, 502 (1945) ; Fox v. Standard Oil Co. of N.J., 294 U.S. 87, 95-96 (1935) (Cardozo, J.); see also 2A N. Singer, Sutherland on Statutes and Statutory Construction § 47.07, p. 152, and n. 10 (5th ed. 1992) (collecting cases). That is to say, the statute, read "as a whole," post at 998 [530 U.S. 943] (THOMAS, J., dissenting), leads the reader to a definition. That definition does not include the Attorney General's restriction -- "the child up to the head." Its words, "substantial portion," indicate the contrary."
[Stenberg v. Carhart, 530 U.S. 914 (2000)]

"It is axiomatic that the statutory definition of the term excludes unstated meanings of that term." Colautti v. Franklin, 439 U.S. 379, 392, and n. 10 (1979) . Congress' use of the term "propaganda" in this statute, as indeed in other legislation, has no pejorative connotation. *As judges, it is our duty to [481 U.S. 485] construe legislation as it is written, not as it might be read by a layman, or as it might be understood by someone who has not even read it."*
[Meese v. Keene, 481 U.S. 465, 484 (1987)]

"As a rule, *a definition which declares what a term 'means' . . . excludes any meaning that is not stated"*
[Colautti v. Franklin, 439 U.S. 379 (1979), n. 10]

If military retirement pay is deferred pay, then it is compensation or reimbursement for services of EQUAL value in the market for labor:

compensate (kom-p;-n-sayt), vb. (17c) 1. PAY (3). 2. To make an amendatory payment to; to recompense (for an injury) <the court ordered the defendant to compensate the injured plaintiff>.
[Black's Law Dictionary, Eleventh Edition, p. 353]

compensation (kom-p3n-say-sh;m), n. (14c) 1. **Remuneration and other benefits received in return for services rendered;** esp., salary or wages.

"Compensation consists of wages and benefits in return for services. It is payment for work. If the work contracted for is not done, there is no obligation to pay. [Compensation] includes wages, stock option plans, profit-sharing, commissions, bonuses, golden parachutes, vacation, sick pay, medical benefits, disability, leaves of absence, and expense reimbursement." Kurt H. Decker & H. Thomas Felix II, Drafting and Revising Employment Contracts§ 3.17, at 68 (1991).

2. Payment of damages, or any other act that a court orders to be done by a person who has caused injury to another. • In theory, compensation makes the injured person whole. 3. SETOFF (2). -compensatory, (k3m-penS3- tor-ee), compensational (kom-p3n-say-sh3-n3l), adj.

~accrued compensation. (1919) Remuneration that has been earned but not yet paid.

~adequate compensation. See just compensation.

~deferred compensation. (1926) 1. **Payment for work performed,** to be paid in the future or when some future event occurs. 2. An employee's earnings that are taxed when received or distributed rather than when earned, such as contributions to a qualified pension or profitsharing plan.

~just compensation. (16c) Under the Fifth Amendment, a payment by the government for property it has taken under eminent domain- usu. the property's fair market value, so that the owner is theoretically no worse off after the taking. -Also termed adequate compensation; due compensation; land damages.

~unemployment compensation. (1921) Compensation paid at regular intervals by a state agency to an unemployed person, esp. one who has been laid off. - Also termed unemployment insurance; unemployment benefit.

~unreasonable compensation. (1946) Tax. Compensation that is not deductible as a business expense because the compensation is out of proportion to the services actually rendered or because it exceeds statutorily defined limits. I.R.C. (26 USCA) § 162(m).

remuneration (ri-myoo-m-ray-sh;;Jn), n. (lSc) 1. Payment; compensation, esp. for a service that someone has performed. 2. The act of paying or compensating. - remunerative, adj. - remunerate, vb.
[Black's Law Dictionary, Eleventh Edition, p. 1550]

We can find no provision of the I.R.C. that establishes that compensation for services is income derived from a source or permitting it to be treated as income derived from a source, not even in the case of a recipient who is a statutory "United States person" in 26 U.S.C. §7701(a)(30).

Our conclusion is that compensation for labor or services paid to a nonresident alien is not income to begin with, and therefore cannot be gross income, unless the individual allows the compensation to be treated as gross income effectively connected with the conduct of a trade or business.

Although I.R.C. Section 861(a) treats compensation for services performed in the United States as "income from sources within the United States" this applies ONLY where such compensation constitutes an item of "gross income", according to the language of I.R.C. Section 61. And in order to be gross income, the compensation must first be "income" i.e. a profit or gain. We can find no provision of I.R.C. that expressly states that compensation for services are included in gross income, as we see with Social Security benefits. I.R.C. Section 61 only APPEARS to state that all compensation for services is gross income, but as the Treasury Regulations recognize, wages and salaries and compensation for services may be excluded by law from income, which would disqualify the compensation from being "gross income". Since compensation is by definition not a gain or profit, it cannot be income.

Only where the recipient is a STATUTORY "United States person" under 26 U.S.C. §7701(a)(30) would Congress have lawful power to declare compensation for services to be "gross income" as Congress appears to do in I.R.C. Section 61 (but does not do so expressly). The Treasury Regulation at 26 C.F.R. §1.61-2 gives away this particular scam. They had to find some way of legally converting compensation for services into income, so that it could be decreed to be "gross income" and subject to tax. But, unlike with SS benefits which are unquestionably federally-connected, even if received by a nonresident alien, compensation for services paid to a nonresident alien is NOT necessarily federally connected. Since their scam depends much more on duping American workers into making themselves liable for taxes on their earnings than it does on taxing Social Security benefits, it makes sense that the "opt out" in this case is buried in an oddly worded provision at 26 C.F.R. §1.61-2. The legal challenges to the treatment of compensation for services as gross income have been predominantly raised in cases where the taxpayer had expressly or tacitly accepted the status of "United States person", which would make their argument frivolous due to being irrelevant. In none of those cases that we am aware of did the litigant rely on 26 C.F.R. Section 1.61-2 in combination with the Eisner v. Macomber (SCOTUS) case. That would seem to be a solid argument, even for a United States person, since there is no provision of I.R.C. that expressly states that "United States person" status gives Congress the right to treat compensation for labor as income. What we am saying is that, even though Congress has the power to enact such a provision, due process still requires that they actually enact such a provision of law.

For a nonresident alien, only a pension that constitutes a gain or profit derived from sources in the United States would qualify as gross income under 26 U.S.C. §872(a)(1).

26 C.F.R. §1.61-2 Compensation for services, including fees, commissions, and similar items.

§ 1.61-2 Compensation for services, including fees, commissions, and similar items.

(a) In general.

(1) Wages, salaries, commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, bonuses (including Christmas bonuses), termination or severance pay, rewards, jury fees, marriage fees and other contributions received by a clergyman for services, pay of persons in the military or naval forces of the United States, retired pay of employees, pensions, and retirement allowances are income to the recipients unless excluded by law. Several special rules apply to members of the Armed Forces, National Oceanic and Atmospheric Administration, and Public Health Service of the United States; see paragraph (b) of this section.

So a pension is not necessarily income! 26 U.S.C. §872 does not exclude anything from "income" it only excludes non-federally connected gross income from "gross income". The Eisner v. Macomber case of the U.S. Supreme Court might

1 exclude a pension from income, because it is not a profit or gain derived from a source where the filer is not serving within
2 an office within a federal and not state corporation.

3 The U.S. Supreme Court has held that "whatever sources derived" in the Sixteenth Amendment DOES NOT mean "all
4 earnings", by the way:

5 *"The Court has hitherto consistently held that a literal reading of a provision of the Constitution which defeats*
6 *a purpose evident when the instrument is read as a whole, is not to be favored... [and one of the examples they*
7 *give is...]' **From whatever source derived,' as it is written in the Sixteenth Amendment, does not mean from***
8 ***whatever source derived.** Evans v. Gore, **253 U.S. 245**, 40 S.Ct. 550, 11 A.L.R. 519. See, also, Robertson v.*
9 *Baldwin, **165 U.S. 275, 281**, 282 S., 17 S.Ct. 326; Gompers v. United States, **233 U.S. 604, 610**, 34 S.Ct. 693,*
10 *Ann.Cas.1915D, 1044; Bain Peanut Co. v. Pinson, **282 U.S. 499, 501**, 51 S.Ct. 228, 229; United States v.*
11 *Lefkowitz, **285 U.S. 452, 467**, 52 S.Ct. 420, 424, 82 A.L.R. 775."*
12 *[Wright v. U.S., 302 U.S. 583 (1938)]*

13 We are just saying 26 U.S.C. §872 does not determine whether an item is "income" IN A CONSTITUTIONAL sense, it
14 determines "gross income", which requires first that the item be "income".

15 Forget "source" until you determine there is a profit or gain. If it is not profit or gain, then it is not income. It could still be
16 treated as statutory "gross income", such as Social Security benefits or unemployment compensation, if there is a specific
17 provision that expressly states that the item shall be included in STATUTORY "gross income". They don't have any such
18 provision for "compensation for services" or pensions, but they try to make it LOOK like they do with I.R.C. Section 61.
19 However the regulation under 26 C.F.R. §1.61-2 undercuts that by pointing out that those items are at least in some cases
20 "excluded by law" from "income". If it is excluded by law from income, it cannot be gross income without a specific
21 provision (such as with Social Security benefits or unemployment compensation) that makes it "gross income". An
22 example things that are "excluded by law" are earnings that are "constitutionally exempt" from within a constitutional state.
23 Early regulations referred to these earnings but were conveniently "censored" to hide the truth. See:

- 24 1. Constitutionally Exempt Income, Exhibit #09.043
25 <https://sedm.org/Exhibits/EX09.043-Exempt.pdf>
26 2. Constitutionally Exempt Income Regulations, Exhibit #09.040
27 <https://sedm.org/Exhibits/EX09.040-ConstitutionallyExemptRegulations.pdf>

28 **2.3 Is retired pay a privilege or not?**

- 29 1. Military retired pay is a product of an enlistment CONTRACT. That contract trades private human labor as
30 PROPERTY for a military retirement entitlement. Thus, it is a PRIVATE right and CONSIDERATION under that
31 contract rather than a mere public privilege that is revocable.
32 2. Military retired pay is "granted" and thus a contract:

33 *Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property*
34 *thus held?*

35 *The principle asserted is, that one legislature is competent to repeal any act which a former legislature was*
36 *competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.*

37 *The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an*
38 *act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most*
39 *absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those*
40 *estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to*
41 *be a fact.*

42 *When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal*
43 *of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power*
44 *applicable to the case of every individual in the community.*

45 *It may well be doubted whether the nature of society and of government does not prescribe some limits to the*
46 *legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly*
47 *and honestly acquired, may be seized without compensation.*

136*136 To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.

It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.

The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire; she is a member of the American union; and that union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass. The constitution of the United States declares that no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.

[Fletcher v. Peck, 10 U.S. 87, 1356-136 (1810);

SOURCE: https://scholar.google.com/scholar_case?case=5141123411769984021]

3. As a contract created legislatively through a grant, Congress has no legislative authority to UNDERMINE or revoke that contract to pay retirement once granted:

Independent of these views, there are many considerations which lead to the conclusion that the power to impair contracts, by direct action to that end, does not exist with the general government. In the first place, one of the objects of the Constitution, expressed in its preamble, was the establishment of justice, and what that meant in its relations to contracts is not left, as was justly said by the late Chief Justice, in Hepburn v. Griswold, to inference or conjecture. As he observes, at the time the Constitution was undergoing discussion in the convention, the Congress of the Confederation was engaged in framing the ordinance for the government of the Northwestern Territory, in which certain articles of compact were established between the people of the original States and the people of the Territory, for the purpose, as expressed in the instrument, of extending the fundamental principles of civil and religious liberty, upon which the States, their laws and constitutions, were erected. By that ordinance it was declared, that, in the just preservation of rights and property, 'no law ought ever to be made, or have force in the said Territory, that shall, in any manner, interfere with or affect private contracts or engagements bona fide and without fraud previously formed.'

The same provision, adds the Chief Justice, found more condensed expression in the prohibition upon the States against impairing the obligation of contracts, which has ever been recognized as an efficient safeguard against injustice; and though the prohibition is not applied in terms to the government of the United States, he expressed the opinion, speaking for himself and the majority of the court at the time, that it was clear 'that those who framed and those who adopted the Constitution intended that the spirit of this prohibition should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency.' 8 Wall. 623. [99 U.S. 700, 765] Similar views are found expressed in the opinions of other judges of this court. In Calder v. Bull, which was here in 1798, Mr. Justice Chase said, that there were acts which the Federal and State legislatures could not do without exceeding their authority, and among them he mentioned a law which punished a citizen for an innocent act; a law that destroyed or impaired the lawful private contracts of citizens; a law that made a man judge in his own case; and a law that took the property from A. and gave it to B. 'It is against all reason and justice,' he added, 'for a people to intrust a legislature with such powers, and therefore it cannot be presumed that they have done it. They may command what is right and prohibit what is wrong; but they cannot change innocence into guilt, or punish innocence as a crime, or violate the right of an antecedent lawful private contract, or the right of private property. To maintain that a Federal or State legislature possesses such powers if they had not been expressly restrained, would, in my opinion, be a political heresy altogether inadmissible in all free republican governments.' 3 Dall. 388.

In Ogden v. Saunders, which was before this court in 1827, Mr. Justice Thompson, referring to the clauses of the Constitution prohibiting the State from passing a bill of attainder, an ex post facto law, or a law impairing the obligation of contracts, said: 'Neither provision can strictly be considered as introducing any new principle, but only for greater security and safety to incorporate into this charter provisions admitted by all to be among the first principles of our government. No State court would, I presume, sanction and enforce an ex post facto law, if no such prohibition was contained in the Constitution of the United States; so, neither would retrospective laws, taking away vested rights, be enforced. Such laws are repugnant to those fundamental principles upon which every just system of laws is founded.'

In the Federalist, Mr. Madison declared that laws impairing the obligation of contracts were contrary to the first principles of the social compact and to every principle of sound legislation; and in the Dartmouth College Case Mr. Webster contended that acts, which were there held to impair the obligation of contracts, were not the exercise of a power properly legislative, [99 U.S. 700, 766] as their object and effect was to take away vested rights. 'To justify the taking away of vested rights,' he said, 'there must be a forfeiture, to adjudge upon and

1 declare which is the proper province of the judiciary.' Surely the Constitution would have failed to establish
2 justice had it allowed the exercise of such a dangerous power to the Congress of the United States.

3 *In the second place, legislation impairing the obligation of contracts impinges upon the provision of the*
4 *Constitution which declares that no one shall be deprived of his property without due process of law; and*
5 *that means by law in its regular course of administration through the courts of justice. Contracts are*
6 *property, and a large portion of the wealth of the country exists in that form. Whatever impairs their value*
7 *diminishes, therefore, the property of the owner; and if that be effected by direct legislative action operating*
8 *upon the contract, forbidding its enforcement or transfer, or otherwise restricting its use, the owner is as*
9 *much deprived of his property without due process of law as if the contract were impounded, or the value it*
10 *represents were in terms wholly or partially confiscated.*

11 [Sinking Fund Cases, 99 U.S. 700, 764-766 (1878);

12 SOURCE: https://scholar.google.com/scholar_case?case=17733919134422752358]

- 13 4. To tax the fruit of a private enlistment contract in the private commercial marketplace for human labor involving
14 reimbursement for the equal value of human labor that produced it would therefore be an interference with the right to
15 contract of those eligible to receive the fruit of the contract. Further, there is no "profit" involved and therefore no
16 "income" as the the Sixteenth Amendment defines "income". 26 U.S.C. §83 acknowledges where a trade of human
17 labor for a retirement entitlement produces no "gross income" or profit that therefore might be taxable. The U.S.
18 Supreme Court acknowledge that the purpose of the Sixteenth Amendment was to PREVENT taxing PROPERTY, and
19 human labor used to produce the retirement entitlement constitutes such property beyond the reach of income
20 taxation. Certainly, human labor accumulated over DECADES of participation in the military would constitute the
21 "accumulation of property" described below:

22 "... the classification of direct was adopted for the purpose of rendering it impossible to burden by taxation
23 accumulations of property, real or personal, except subject to the regulation of apportionment, it was held
24 that the duty existed to fix what was a direct tax in the constitutional sense so as to accomplish this purpose
25 contemplated by the Constitution. (157 U.S. 581.)"
26 [Brushaber v. Union Pac. R.R., 240 U.S. 1, 16 (1916)]

- 27 5. The common law requires that you have a right to avoid a "benefit" or the corresponding obligations to pay for it.

28 *"Cujus est commodum ejus debet esse incommodum.*
29 *He who receives the benefit should also bear the disadvantage."*

30 *"Que sentit commodum, sentire debet et onus.*
31 *He who derives a benefit from a thing, ought to feel the disadvantages attending it. 2 Bouv. Inst. n. 1433."*

32 *Commodum ex injuri su non habere debet.*
33 *No man ought to derive any benefit of his own wrong. Jenk. Cent. 161.*

34 *Invito beneficium non datur.*
35 *No one is obliged to accept a benefit against his consent. Dig. 50, 17, 69. But if he does not dissent he will be*
36 *considered as assenting. Vide Assent.*

37 *Potest quis renunciare pro se, et suis, juri quod pro se introductum est.*
38 *A man may relinquish, for himself and his heirs, a right which was introduced for his own benefit. See 1 Bouv.*
39 *Inst. n. 83.*

40 *Quilibet potest renunciare juri pro se inducto.*
41 *Any one may renounce a law introduced for his own benefit. To this rule there are some exceptions. See 1 Bouv.*
42 *Inst. n. 83.*
43 [Bouvier's Maxims of Law, 1856;
44 SOURCE: <http://famguardian.org/Publications/BouvierMaximsOfLaw/BouviersMaxims.htm>]

- 45 6. If you do not want the benefit and present a Form W-8 and clarify that you are selling PRIVATE property, not
46 "personal services". and are not within the geographical "United states" nor serving as an officer of the CORPORATE
47 United States, then any company that insists on BEHAVING as an "employer" in relation to you and thus treating you
48 AS IF you are an "employee" is engaging in identity theft in violation of 18 U.S.C. §912.
49 7. It's not a privilege unless you can AVOID it. They have to give you a way to avoid it IN ALL CASES.
50 8. If they don't give you a way to avoid the privilege and the civil status the privilege attaches to (statutory "citizen",
51 "resident", "person", "individual", etc), then it's slavery.
52 9. To suggest that imposing a civil status and it's corresponding obligations is NOT slavery is to invalidate the entire
53 approach to choosing NRA instead of statutory "U.S. person" under 26 U.S.C. §7701(a)(30) as well.

10. In the case of retirement checks, the way you avoid it is to just not receive it or ask for it.

3 Status of Retirees

3.1 Are retired servicemembers “members of the Armed Forces”?

26 U.S. Code §6051 - Receipts for employees

(b) Special rule as to compensation of members of Armed Forces

*In the case of compensation paid for service as a **member of the Armed Forces**, the statement required by subsection (a) shall be furnished if any tax was withheld during the calendar year under section 3402, or if any of the compensation paid during such year is **includible in gross income under chapter 1**, or if during the calendar year any amount was required to be withheld as tax under section 3101. In lieu of the amount required to be shown by paragraph (3) of subsection (a), such statement shall show as wages paid during the calendar year the amount of such compensation paid during the calendar year which is **not excluded from gross income under chapter 1** (whether or not such compensation constituted wages as defined in section 3401(a)).”*

We are not sure if retirement pay counts as "compensation of members of Armed Forces". We don't think so and have found no proof otherwise, but note the use of the phrase "includible in gross income under Chapter 1":

"...or if any of the compensation paid during such year is includible in gross income under chapter 1, or if during the calendar year any amount was required to be withheld as tax under section 3101"

Note that "includible" does not mean "included" but means ABLE to be included with the consent of the owner. Also note this language in the second part:

"In lieu of the amount required to be shown by paragraph (3) of subsection (a), such statement shall show as wages paid during the calendar year the amount of such compensation paid during the calendar year which is not excluded from gross income under chapter 1 (whether or not such compensation constituted wages as defined in section 3401(a))."

"not excluded from gross income" means "included in gross income". So a Form W-2 issued under this provision that reports an amount paid to the servicemember that could be construed as a reporting that you received amounts included in gross income (even if it does not constitute "wages" under I.R.C. 3401(a).") Note also how this language makes it sound like "wages" under I.R.C. Section 3401 are necessarily "gross income" even though there is no provision of I.R.C. that expressly states that.

3.2 Civil status of military retirees

1. Military servicemembers are not listed in 5 U.S.C. §2105 as “employees”. Servicemembers aren’t “employers” unless they elect to be an “employee” because they are NOWHERE identified as such IN ANY LAW.
2. Serving in the military is NOT a privilege, because it is COMMANDED by law. People get thrown in jail for being draft dodgers.
3. Those who serve in the military typically serve under an enlistment CONTRACT. The fruit of that contract is PRIVATE PROPERTY.
4. Only by consenting to be treated AS IF they are STATUTORY “employees” in filing a Form W-4 does a service member BECOME a statutory “employee” under 26 U.S.C. §3402(p).
5. Exchanging labor for money of EQUAL value is not profit, and therefore not a privilege.
6. It is unconscionable that the Department of Defense would therefore IN EFFECT reserve a PROPERTY interest in pension payments that taxes were already paid on during active duty by connecting it YET AGAIN to a privileged “trade or business” activity by filing a usually false Form 1099R or 1042-s on the payment proceeds at the end of each year.

4 Status of Retiree Earnings

4.1 Legal Authority for Military Retired Pay

Legal authority for military retired pay is found at:

Policy Document: Retirement and Pensions

Copyright Sovereignty Education and Defense Ministry, <http://sedm.org>
Form 08.028, Rev. 7-3-2024

15 of 30

EXHIBIT: _____

1. Retired Pay for non-regular reserve
10 U.S.C. Chapter 1223
<https://www.law.cornell.edu/uscode/text/10/subtitle-E/part-II/chapter-1223>
2. Army Active
10 U.S.C. Chapter 741
<https://www.law.cornell.edu/uscode/text/10/subtitle-B/part-II/chapter-741>
3. Navy and Marine Corps Active
10 U.S.C. Chapter 841
<https://www.law.cornell.edu/uscode/text/10/subtitle-C/part-II/chapter-841>
4. Air Force Active
10 U.S.C. Chapter 941
<https://www.law.cornell.edu/uscode/text/10/subtitle-D/part-II/chapter-941>

4.2 **“IncludIBLE” or “includABLE”?**

The main word used for equivocation about whether an earning is statutory “income” is the word “includible” v. “includable”. Here is the trickery involved:

Legal Documents

*In legal documents, the use of “includable” or “includible” can have a significant impact on the interpretation of the document. For example, **if a contract states that certain items are “includable,” this means that they must be included in the total calculation. On the other hand, if the contract states that certain items are “includible,” this means that they may be included but are not necessarily required to be.***
[Includable vs Includible: How Are These Words Connected?, The Content Authority;
<https://thecontentauthority.com/blog/includable-vs-includible>*]*

Black’s Law Dictionary, on the other hand, never makes the above distinctions, which is rather curious.

So let’s apply the above to voluntary W-4 withholding agreements to people who would not otherwise earn “wages”:

26 CFR § 31.3402(p)-1 - Voluntary withholding agreements.

§ 31.3402(p)-1 Voluntary withholding agreements.

(a) Employer-employee agreement.

An employee and his employer may enter into an agreement under section 3402(p)(3)(A) to provide for the withholding of income tax upon payments of amounts described in paragraph (b)(1) of § 31.3401(a)-3, made after December 31, 1970. An agreement may be entered into under this section only with respect to **amounts which are includible in the gross income** of the employee under section 61, and must be applicable to all such amounts paid by the employer to the employee. The amount to be withheld pursuant to an agreement under section 3402(p)(3)(A) shall be determined under the rules contained in section 3402 and the regulations thereunder. See § 31.3405(c)-1, Q&A-3 concerning agreements to have more than 20-percent Federal income tax withheld from eligible rollover distributions within the meaning of section 402.

So in the above, they are admitting that the amounts are not required to be included in gross income but a 26 U.S.C. §3402(p) voluntary withholding agreement could cause them to be included in “gross income” regardless.

Obviously they could have just used the word “included” here if there was no choice in the matter but to include the amounts in the “gross income” of the employee.

Interesting how they state that an agreement under 3402(p) can be made “ONLY with respect to amounts which are includible in the gross income of the employee.”

Since literally ANY amount is ABLE to be included in the gross income by the employee, there is actually no such thing as an amount that is NOT includible in the gross income of the employee. This choice of the word “includible” and not “included” is an indication that the possibility still exists of excluding the amounts from the gross income of the employee, notwithstanding any agreement to treat the amounts as “wages” under the provisions of IRC Sec. 3402(p).

The U.S. Tax court uses the word “includible” rather than “includable”, and therefore RECOGNIZES that earnings need not be included in “gross income”:

*“A. Whether Petitioner’s MRP Is Includable in Gross Income Section 61(a)(11) expressly defines gross income to include pensions. Petitioner’s “Military retirement pay is pension income within the meaning of sec. 61(a)(11).” Wheeler v. Commissioner, 127 T.C. 200, 205 n. 11 (2006), aff’d. 521 F.3d 1289 (10th Cir. 2008); see also Eatinger v. Commissioner, T.C. Memo. 1990-310; sec. 1.61-11, Income Tax Regs.” [Mathews v. Commissioner, No. 3074-09, at *7 (U.S.T.C. Oct. 19, 2010)]*

4.3 Congress acknowledges that employee compensation is NOT NECESSARILY includible in “gross income”

I.R.C. Sec. 32 where Congress acknowledges that employee compensation is not necessarily includible in “gross income”:

1. I.R.C. §32(c)(2) Earned Income
2. I.R.C. §32(c)(2)(A) — The term “earned income” means—
3. I.R.C. §32(c)(2)(A)(i) — wages, salaries, tips, and other employee compensation, **but only if such amounts are includible in gross income for the taxable year**

4.4 Taxability of Social Security and military retirement generally

1. Social security is treated as “gross income from within the United States” under 26 U.S.C. §861(a)(8).
<https://www.law.cornell.edu/uscode/text/26/861>

Because it is “gross income” and NOT listed in 26 U.S.C. §871(b) as “trade or business” income, then it is NOT “trade or business” income but is treated AS IF it is from “within the United States” and therefore expressly taxable.

In the case of a nonresident alien, it must be reported on Form 1042s RATHER than Form 1099R.

<https://faq.ssa.gov/en-us/Topic/article/KA-01723>

2. Military retirement is not listed in I.R.C. §861 as “gross income” or as “trade or business” income under I.R.C. §871(b). Military retirement or retirement generally is NOT expressly listed on the 1040NR form or in IRS Publication 515 or 519. They are paid out by the Defense Financial Accounting Service (DFAS) located geographically in Indianapolis, IN:
<https://www.dfas.mil/Contact-Us/>

4.5 Civil status of the EARNINGS of military retirees

1. Military retirement is “deferred compensation”, usually on earnings that were ALREADY previously taxed.
2. Military retirement is similar to civil service retirement, which the Supreme Court said the following about:

“While retirement pay is not actually disbursed during the time an individual is working for the Government, the amount of benefits to be received in retirement is based and computed upon the individual’s salary and years of service. 5 U.S.C. §8339(a). We have no difficulty concluding that civil service retirement benefits are deferred compensation for past years of service rendered to the Government. See, e.g., Zucker v. United States, 758 F.2d 637, 639 (CA Fed.), cert. denied, 474 U.S. 842 (1985); Kizas v. Webster, 227 U.S.App.D.C. 327, 339, 707 F.2d 524, 536, (1983), cert. denied, 464 U.S. 1042 (1984); Clark v. United States, 691 F.2d 837, 842 (CA7 1982). And because these benefits accrue to employees on account of their service to the Government, they fall squarely within the category of compensation for services rendered “as an officer or employee of the United States.” Appellant’s federal retirement benefits are deferred compensation earned “as” a federal employee, and so are subject to § 111.^[3]” [Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989)]

FOOTNOTES:

^[3] See Ariz. Rev. Stat. Ann. §§ 43-1022(3) and (4) (Supp. 1988) (benefits, annuities, and pensions received from the state retirement system, the state retirement plan, the judges’ retirement fund, the public safety personnel retirement system, or a county or city retirement plan exempt in their entirety; income received from the United States civil service retirement system exempt only up to \$2500); Colo. Rev. Stat. §§ 39-22-104(4)(f) and (g) (Supp. 1988) (amounts received as pensions or annuities from any source exempt up to \$20,000, but

amounts received from Federal Government as retirement pay by retired member of Armed Forces less than 55 years of age exempt only up to \$2000); Ga. Code Ann. § 48-7-27(a)(4)(A) (Supp. 1988) (income from employees' retirement system exempt); La. Rev. Stat. Ann. §§ 42:545, 47:44.1 (West Supp. 1989) (annuities, retirement allowances and benefits paid under the state employee retirement system exempt from state or municipal taxation in their entirety, but other annuities exempt only up to \$6000); Md. Tax-Gen. Code Ann. § 10-207(o) (1988) (fire, rescue, or ambulance personnel length of service award funded by any county or municipal corporation of State exempt); Mo. Rev. Stat. § 169.587 (Supp. 1989) (retirement allowance, benefit, funds, property, or rights under public school retirement system exempt); Mont. Code Ann. §§ 15-30-111(2)(c)-(f) (1987) (benefits under teachers retirement law, public employees retirement system, and highway patrol law exempt in their entirety; benefits under Federal Employees Retirement Act exempt only up to \$3600); N. Y. Tax Law § 612(c)(3) (McKinney 1987) (pensions to officers and employees of State, its subdivisions and agencies exempt); N. C. Gen. Stat. §§ 105-141(b)(13) and (14) (Supp. 1988) (amounts received from retirement and pension funds established for firemen and law enforcement officers exempt in their entirety, but amounts received from federal-employee-retirement program exempt only up to \$4000); Ore. Rev. Stat. §§ 316.680(1)(c) and (d) (1987) (payments from Public Employees Retirement Fund exempt in their entirety, but payments under public retirement system established by United States exempt only up to \$5000); S. C. Code §§ 12-7-435(a), (d), (e) (Supp. 1988) (amounts received from state retirement systems and retirement pay received by police officers and firemen from municipal or county retirement plans exempt in their entirety; federal civil service retirement annuity exempt only up to \$3000); Va. Code § 58.1-322(C)(3) (Supp. 1988) (pensions or retirement income to officers or employees of Commonwealth, its subdivisions and agencies, or surviving spouses of such officers or employees paid by the Commonwealth or an agency or subdivision thereof exempt); W. Va. Code §§ 11-21-12(c)(5) and (6) (Supp. 1988) (annuities, retirement allowances, returns of contributions or any other benefit received under the public employees retirement system, the department of public safety death, disability, and retirement fund, the state teachers' retirement system, pensions and annuities under any police or firemen's retirement system exempt); Wis. Stat. § 71.05(1)(a) (Supp. 1988-1989) (payments received from the employees' retirement system of city of Milwaukee, Milwaukee city employees' retirement system, sheriff's retirement and benefit fund of Milwaukee, firefighters' annuity and benefit fund of Milwaukee, the public employee trust fund, and the state teachers' retirement system exempt).

3. Military retirement is NOT an “annuity” as used in 26 U.S.C. §72 or 26 C.F.R. §1.871-7(b)(2).
4. The Uniformed Services Employment and Reemployment Act (USERRA), 38 U.S.C. Chapter 43: Employment and Reemployment Rights of Members of the Uniformed Services governs conditions under which former military retirees or servicemen may be reemployed in civilian careers:
 - 4.1. 38 U.S.C. §4318 governs employee pension benefit plans of civilian employers hiring former military servicemen.
 - 4.2. If a serviceman is drafted into military service while working for a civilian employer and subsequently returns to that employer, the employer must contribute to their pension or retirement plan as if they were still working for that employer.
5. “U.S. person” taxability of military retirement:
 - 5.1. 26 C.F.R. §1.61-11 says the following on the taxability of “pensions and retirement allowances” for U.S. Persons but not Foreign Persons:

26 C.F.R. § 1.61-11 - Pensions.

§ 1.61-11 Pensions.

(a) In general.

Pensions and retirement allowances paid either by the Government or by private persons constitute gross income unless excluded by law. Usually, where the taxpayer did not contribute to the cost of a pension and was not taxable on his employer's contributions, the full amount of the pension is to be included in his gross income. But see sections 72, 402, and 403, and the regulations thereunder. When amounts are received from other types of pensions, a portion of the payment may be excluded from gross income. Under some circumstances, amounts distributed from a pension plan in excess of the employee's contributions may constitute long-term capital gain, rather than ordinary income.

(b) Cross references.

For the inclusion of pensions in income for the purpose of the retirement income credit, see section 37 and the regulations thereunder. Detailed rules concerning the extent to which pensions and retirement allowances are to be included in or excluded from gross income are contained in other sections of the Code and the regulations thereunder. Amounts received as pensions or annuities under the Social Security Act (42 U.S.C. ch. 7) or the Railroad Retirement Act (45 U.S.C. ch. 9) are excluded from gross income. For other partial and total exclusions from gross income, see the following:

(I) Annuities in general, section 72 and the regulations thereunder;

(2) Employees' annuities, sections 402 and 403 and the regulations thereunder;

(3) References to other acts of Congress exempting veterans' pensions and railroad retirement annuities and pensions, section 122.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6856, 30 FR 13316, Oct. 20, 1965]

The key phrase in the above is “unless excluded by law”. They don’t enumerate or define what is “excluded by law”, and thus make it difficult for retirees to prove what might be excluded on a tax return.

5.1.1. The above regulation implements 26 U.S.C. §61, which begins with the language: “Except as otherwise provided in this subtitle”.

5.1.2. 26 U.S.C. §871, IN THE CASE OF NONRESIDENT ALIENS ONLY, in fact “otherwise provides” a different definition of “gross income” that contradicts 26 U.S.C. §61.

5.1.3. 26 C.F.R. §1.61-11 is therefore limited to statutory “U.S. persons” (the DEFAULT status in the I.R.C.) and does not apply to nonresident aliens.

5.2. 26 U.S.C. §861 and 864 relate to U.S. person earnings from U.S. and foreign sources so they aren’t helpful in determining taxability of military retirement to nonresident alien retirees.

5.2.1. Under I.R.C. Section 861(a)(3) compensation for labor or personal services performed in the United States shall be treated as income from sources within the United States.

5.2.2. Under I.R.C. Section 864(b) performing personal services within the United States is included in the meaning of a “trade or business within the United States.”

5.2.3. HOWEVER, “personal services” itself is defined as services performed in connection with a “trade or business”, so this is a tautology:

26 C.F.R. §1.469-9 Rules for certain rental real estate activities.

(b)(4) PERSONAL SERVICES.

Personal services means any work performed by an individual in connection with a trade or business. However, personal services do not include any work performed by an individual in the individual’s capacity as an investor as described in section 1.469-5T(f)(2)(ii).

See: <https://famguardian.org/TaxFreedom/CitesByTopic/PersonalServices.htm>

So “personal services” is “the functions of a public office” that’s included in gross income under I.R.C. Section 872, whether we call it “wages” or not. Serving as a serviceman who is not a statutory “employee” under 5 U.S.C. §2105 does not constitute such “personal services” or “the functions of a public office”, except perhaps if they are an commissioned officer or volunteer by misrepresenting their status as an “employee” in submitting a Form W-4.

6. “Foreign Person” Taxability of military retirement:

6.1. Taxability of military retirement for “foreign persons” such as nonresident aliens is governed exclusively by 26 U.S.C. §871.

6.2. 26 U.S.C. §871, in turn, does NOT directly mention pensions or retirement, and thus they are EXCLUDED by the rules of statutory construction:

<https://www.law.cornell.edu/uscode/text/26/871>

6.3. The closest thing to retirement in 26 U.S.C. §871 is FDAP:

26 U.S. Code § 871 - Tax on nonresident alien individuals

(a) INCOME NOT CONNECTED WITH UNITED STATES BUSINESS—30 PERCENT TAX

(1) INCOME OTHER THAN CAPITAL GAINS

Except as provided in subsection (h), there is hereby imposed for each taxable year a tax of 30 percent of the amount received from sources within the United States by a nonresident alien individual as—

(A) interest (other than original issue discount as defined in section 1273), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income,

- 6.4. While military retirement may seem to be “fixed or determinable annual or periodical gains, profits, or income”, everything listed in the above:
- 6.4.1. MUST derive from TANGIBLE physical property such as real estate.
- 6.4.2. May NOT derive from INTANGIBLE property such as currency, promissory notes, stocks, bonds, investments, contracts, etc. This is because the U.S. Supreme Court held in *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194 (1905) held that the taxation of all such intangibles must occur at the DOMICILE of the owner of the payment, which is you.
- 6.5. A nonresident alien is NOT domiciled in the statutory geographical “United States” defined in 26 U.S.C. §7701(a)(9) and (a)(10) and 4 U.S.C. §110(d). That, in fact, is WHY they are called a “nonresident” to begin with. Thus, per *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194 (1905) the military retirement check may only be taxed at the domicile of the recipient and NOT by the U.S. government.
- 6.6. A military retiree who is a nonresident alien and ALSO an ALIEN is subject to Foreign Person withholding under 26 C.F.R. §1.1441-1. HOWEVER, an American National is NOT an “individual” subject to subject to such withholding because they are not identified in 26 C.F.R. §1.1441-1(c)(3). Thus, they are a NON-PERSON for foreign person withholding. This is also because American Nationals do not fall under the foreign affairs jurisdiction of Congress in Article 1, Section 8, Clause 3 of the Constitution. See:

Lawfully Avoiding Foreign Person Withholding, FTSIG
<https://ftsig.org/lawfully-avoiding-foreign-person-withholding/>

- 6.7. A military retiree who is a American National not subject to foreign person withholding under 26 C.F.R. §1.1441-1 is also NOT subject to backup withholding because they are not an “employee” while receiving a retirement check. This is because the pay is DEFERRED compensation from a previous time when they WERE an “employee”. See:

Lawfully Avoiding Backup Withholding under 26 U.S.C. §3406, FTSIG
<https://ftsig.org/lawfully-avoiding-backup-withholding/>

- 1.1. Because American Nationals filing as nonresident aliens are not “individuals” under 26 C.F.R. §1.1441-1, they do not and should not need to submit EVEN a W-8BEN form. For information on the W-8BEN, see:

About IRS Form W-8BEN, Form #04.202
<https://sedm.org/Forms/04-Tax/2-Withholding/W-8BEN/AboutIRSFormW-8BEN.htm>

2. States of the Union

- 2.1. 4 U.S.C. §111 preserves federal employees’ immunity from discriminatory taxation.
- 2.2. States of the Union can tax military retirement if the recipient is domiciled in a constitutional state but may not exempt state employees from state tax without also exempting federal employees from state income tax per *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989).
https://scholar.google.com/scholar_case?case=8043058223910471263
3. Is military retirement a taxable “U.S. source” for compliant members, who are required to be “nonresident aliens”?
- 3.1. Even during the period of active duty, the services of military servicemen are rendered OUTSIDE the statutory geographical “United States” and unless they are commissioned officers, they are not engaged in “the functions of a public office” per 26 U.S.C. §7701(a)(26).
- 3.1.1. Regular enlisted servicemen are NOT OFFICERS of the United States. They are also not statutory “employees”.
- 3.1.2. Retired servicemen, whether enlisted or commissioned officers, are also not civil statutory “employees” under 5 U.S.C. §2105.
- 3.2. HOWEVER, we can find NO LEGISLATIVE authority to treat the term “United States” as EXPRESSLY including the CORPORATE “United States”.
- 3.2.1. The only definition of GEOGRAPHICAL “United States” in the code is 26 U.S.C. §7701(a)(9) and (a)(10).
- 3.2.2. Since servicemembers are not “employees” under 5 U.S.C. §2105, the only way they can BECOME STATUTORY “employees” is by consenting and submitting a W-4.
- 3.2.3. AFTER they consent by filing a W-4, they are WITHIN the CORPORATE “United States”, but even then, 4 U.S.C. §72 forbids them from acting as a public officer engaged in a “trade or business” outside the District of Columbia.
- 3.3. The DEFAULT definition of “United States” is District of Columbia in 26 U.S.C. §7701(a)(9) and (a)(10).
- 3.3.1. ONLY in the case of aliens does it enlarge to the entire country in 26 C.F.R. §301.7701(b)-1(c)(2)(ii), which is the PRESENCE test for ALIENS and never NATIONALS.
- 3.3.2. The presence test DOES NOT apply to American nationals.
- 3.3.3. The presence test DOES NOT distinguish being in the GEOGRAPHICAL “UNITED STATES” from being within the COPORATE “United States”. Thus, there is no such thing as being a source “within the United

- States” as an “employee” or “officer” of the United States working OUTSIDE the geographical “United States” because it is not expressly recognized where it needs to be recognized.
- 3.4. Of COURSE income tax can have an extraterritorial application outside the statutory geographical “United States” defined in 26 U.S.C. §7701(a)(9) and (a)(10), as in the case of Cook v. Tait, 265 U.S. 47 (1924). HOWEVER:
- 3.4.1. Cook volunteered for the privileged status of “U.S. Person” by filing a 1040 instead of a 1040NR.
- 3.4.2. Service members who DO NOT submit a Form W-4, who submit a Form W-8, and therefore DO NOT ELECT to be treated as statutory “employees” remain PRIVATE and their earnings are absolutely owned private property.
- 3.4.3. There is NO LEGISLATIVE AUTHORITY to exercise public offices or “trades or business” outside the statutory geographical “United States” under 4 U.S.C. §72.
- 3.4.4. By CONSENT, however, ANYTHING is permissible. This includes servicemembers who are NOT otherwise “employees” making elections under 26 U.S.C. §3402(p) to be treated AS IF they are “employees”.

5 Withholding on military retirement:

26 C.F.R. § 31.3401(a)-1 - Wages.

(b) Certain specific items—

(1) Pensions and retirement pay.

[. . .]

(ii) Amounts received as retirement pay for service in the Armed Forces of the United States, the Coast and Geodetic Survey, or the Public Health Service or as a disability annuity paid under the provisions of section 831 of the Foreign Service Act of 1946, as amended (22 U.S.C. 1081; 60 Stat. 1021), are subject to withholding unless such pay or disability annuity is excluded from gross income under section 104(a)(4), or is taxable as an annuity under the provisions of section 72. Where such retirement pay or disability annuity (not excluded from gross income under section 104(a)(4) and not taxable as an annuity under the provisions of section 72) is paid to a nonresident alien individual, withholding is required only in the case of such amounts paid to a nonresident alien individual who is a resident of Puerto Rico.

26 U.S.C. §104 mentioned above relates to “compensation for injuries or sickness”, by the way. Those who are compliant members and who file as nonresident aliens therefore will NOT be subject to I.R.C. Subtitle C withholding unless they are residents of Puerto Rico.

Now a summary of the scenario for withholding:

1. When servicemen retire:
 - 1.1. They submit DD Forms 2656 and 108.
 - 1.2. They are asked by DFAS on the DD Form 2656, Part 1, Section VI to fill out a Form W-4 before they can receive their retirement check.
 - 1.3. If they complete a Form W-4, this constitutes a VOLUNTARY ELECTION to treat the earnings as statutory “wages”. See 26 U.S.C. §3402(p) and 26 U.S.C. §83(b).
 - 1.4. Members should NOT be submitting the W-4, but rather the SEDM Form W-8SUB on our website instead as part of their retirement application:

W-8SUB, Form #04.231
<https://sedm.org/Forms/04-Tax/2-Withholding/W-8SUB.pdf>
2. If retiring servicemen do decide to submit our W-8SUB, Form #04.231 mentioned above, be cognizant that:
 - 2.1. DFAS will try to ignore it or pretend they didn’t receive it.
 - 2.2. During the time between submitting your DD Form 2656 retirement package and the time you begin receiving pay, there is no way to interact with DFAS directly, because your myPay account will not have been established. This puts you in a blind spot as far as making sure that DFAS both receives and honors your W-8SUB form. That means you should go out of your way to contact them BEFORE the myPay account is established to make SURE they received the W-8SUB and that they will honor it.
 - 2.3. The DFAS default method is to ignore your withholding paperwork, use a Social Security Number for reporting, and send out the IRS Forms 1099R or 1042s at the end of each year. DO NOT LET THEM get away with this.

Our W-8SUB emphasizes that there is NO WITHHOLDING, NO REPORTING, and that reports may NOT contain a Social Security Number. VERY IMPORTANT!

3. The duty to WITHHOLD at single zero for those not submitting a W-4 is NOT FOUND in the statutes. 26 C.F.R. §31.3401(f)(2)-1(a). The statute this regulation implements in 26 U.S.C. §3401(f) does not even mention this! The obligation is only in the regulations and thus BEYOND the scope of the statutes and unconstitutional. U.S. v. Calamaro, 354 U.S. 351 (1957). The regulation is only CONSTITUTIONAL if it limits itself to people WITHIN the treasury department. The following article PROVES that STATUTORY “citizens” and “residents” made “liable to” rather than “liable for” the income tax in 26 C.F.R. §1.1-1(a) are OFFICERS WORKING IN THE DEPARTMENT OF TREASURY. See:

[How American Nationals Volunteer to Pay Income Tax](https://sedm.org/Forms/08-PolicyDocs/HowYouVolForIncomeTax.pdf), Form #08.024
<https://sedm.org/Forms/08-PolicyDocs/HowYouVolForIncomeTax.pdf>

4. 5 U.S.C. §301 FORBIDS the Secretary to write regulations for people OUTSIDE the Department of Treasury, such as those who are military service members who do not consent to be treated as “employees” or to work in the Treasury Department IN ADDITION to their role as servicemembers.
5. IRS Form W-2 “wages” are classified by the IRS as Tax Class 5, which means GIFTS rather than income tax. Employers have NO AUTHORITY to COMPEL GIFTS to the treasury of other people’s money. You HAVE to volunteer before they can.

6 Reporting on military retirement

[26 U.S. Code §6041 - Information at source](#)

(a) Payments of \$600 or more

All persons engaged in a trade or business and making payment in the course of such trade or business to another person, of rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income (other than payments to which section 6042(a)(1), 6044(a)(1), 6047(e), 6049(a), or 6050N(a) applies, and other than payments with respect to which a statement is required under the authority of section 6042(a)(2), 6044(a)(2), or 6045), of \$600 or more in any taxable year, or, in the case of such payments made by the United States, the officers or employees of the United States having information as to such payments and required to make returns in regard thereto by the regulations hereinafter provided for, shall render a true and accurate return to the Secretary, under such regulations and in such form and manner and to such extent as may be prescribed by the Secretary, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.”

[26 C.F.R. §1.6041-1 - Return of information as to payments of \\$600 or more.](#)

(a)General rule -

(1)Information returns required -

(i)Payments required to be reported.

Except as otherwise provided in §§ 1.6041-3 and 1.6041-4 , every person engaged in a trade or business shall make an information return for each calendar year with respect to payments it makes during the calendar year in the course of its trade or business to another person of fixed or determinable income described in paragraph (a)(1)(i) (A) or (B) of this section. For purposes of the regulations under this section, the person described in this paragraph (a)(1)(i) is a payor.

(A) Salaries, wages, commissions, fees, and other forms of compensation for services rendered aggregating \$600 or more.

Note the language above suggesting the reporting is on profits and gains, not all amounts earned:

“setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.”
[26 U.S.C. §6041(a)]

The term "income" under the Sixteenth Amendment has also been defined by the U.S. Supreme Court as "PROFIT". There is no "profit" in the case of a human being working for him or her self. Only if they work for a company and the company earns profit from the labor of their workers does it become reportable. See:

Sovereignty Forms and Instructions Online, Form #10.004, Cites by Topic: "income"
<https://famguardian.org/TaxFreedom/CitesByTopic/income.htm>

Based on the above, the connection of "trade or business" is to the PAYER, not the target. And of course the U.S. Inc., as the payer, is one of the FEW parties actually engaged in "the functions of a public office". So even with the W-8SUB, Form #04.231 being filed with the retirement papers, DFAS will probably still report and treat it as "U.S. source". That means a 1040NR return will need to be filed to reconcile the reporting with the fact that it is from human labor but not profit and therefore not "income".

In addition, the decision of whether to file an information return is entirely up to the payer:

*"To the extent there is any doubt that a Form 1099 was required, the decision to file a Form 1099 is left "with the payor, the party who typically decides whether to file the form and the party who is subject to penalties should it incorrectly decide not to file the form." McCormick v. Brzezinski, No. 08-10075, 2010 WL 2105110, at *2 (E.D. Mich. May 21, 2010). Thus, RPM was entitled to take a protective approach by issuing and filing a Form 1099. "*
*[Childers v. Receivables Performance Mgmt. LLC, No. C13-0697JLR, at *5 (W.D. Wash. May 9, 2013)]*

Now a summary of the scenario for reporting:

1. DFAS retirement reporting is documented at:

Taxes, DFAS

<https://www.dfas.mil/RetiredMilitary/manage/taxes/>

2. DFAS typically uses the following forms for military compensation reporting:

- 2.1. IRS Form 1042s for nonresident aliens.

- 2.2. IRS Form 1099R for statutory "U.S. persons" under 26 U.S.C. §7701(a)(30) (STATUTORY "citizens" and "residents" DOMICILED within the exclusive jurisdiction of Congress). This is the WRONG form for most Americans in states of the Union, who are nonresident aliens by default.

3. DFAS tries to sidestep all this by filing information returns against retirees, often in DIRECT CONFLICT with the withholding paperwork they submit from this site such as the SEDM Form W-8SUB.

- 3.1. They do this in DIRECT violation of 26 U.S.C. §6041(a), because a nonresident alien from a state of the Union is NOT engaged in a "trade or business" and therefore not subject to reporting AT ALL! See:

Correcting Erroneous Information Returns, Form #04.001

<https://sedm.org/Forms/04-Tax/0-CorrErrInfoRtns/CorrErrInfoRtns.pdf>

- 3.2. When this happens, the retiree must correct these false reports in the 1040NR filing using Forms #09.074, 09.075, and 09.077.

- 3.3. Since the divorced spouse is not the DIRECT recipient of the retirement check, the actual recipient would need to cooperate with the spouse in the process of correcting these reports. Since a divorce is involved, this may be difficult.

- 3.4. If DFAS were pressed in court to correct these FALSE information returns, the task of proving that military pay paid from DFAS in Indianapolis, IN would be a "source within the United States", because it is nowhere listed in the I.R.C. (Sections 861, 871) or the regulations thereunder as falling in that category and thus must be geographical in nature. A case brought before a court on this subject would probably cause them to lose.

7 Tax Returns Involving Retirement

7.1 How to File a 1040NR and get all withholding back on military retirement

The following tools on our website describe how to file a lawfully prepared tax return at the end of the year which has no income tax on amounts withheld by the Defense Financial Accounting Service (DFAS):

1. *1040NR Attachment*, Form #09.077

<https://sedm.org/Forms/09-Procs/1040NR-Attachment.pdf>

2. How to File Returns, Form #09.074** (Member Subscriptions)
<https://sedm.org/product/filing-returns-form-09-074/>
3. Procedure to File Returns, Form #09.075** (Member Subscriptions)
<https://sedm.org/product/procedure-to-file-tax-returns-form-09-075/>

Below is some of the language in the filing describing why you deserve a full refund of all withholdings on military retirement pay:

0. INTRODUCTION

This attachment provides court admissible evidence of:

(1) Reasons why my earnings from military retirement are not included in "gross income" on the 1040-NR or Schedule NEC;

(2) Rebuttal to any and all false information filed against my name by legally ignorant third parties who aren't reading and refuse to follow the law as I have tried repeatedly to explain to them. Such false information returns are or may therefore be classified as willfully false information "returns" in criminal violation of 26 U.S.C. §7204 and 7207 and subject to civil penalty under 26 U.S.C. §6674. Such "returns" include but are not limited to the W-2, 1098, 1099, and 1042-S as mentioned herein.

1. INFORMATION RETURNS

Specifically, 26 U.S.C. §6041(a) requires that that information returns may only be filed against those engaged in the "trade or business" excise taxable franchise within the "United States" federal corporation and therefore representing or exercising "the functions of a public office" as defined by 26 U.S.C. §7701(a)(26). I am NOT lawfully engaged in such a public office and it would be a criminal offense under 18 U.S.C. §912 to pretend to be or to impersonate such a public office. False personation also includes exercising said office where it is not geographically expressly authorized as described by 4 U.S.C. §72, such as in a constitutional state of the Union. I can find no express authorization to do so in a Constitutional state, even with my consent and if you believe otherwise, please specify where such authorization may be found. See the following for details on this subject: The "Trade or Business" Scam, Form #05.001; <https://sedm.org/Forms/05-MemLaw/TradeOrBusScam.pdf>

If I have attached form 1099CC to this submission, be advised that these forms are custom forms made by me which are NOT purported to be "information returns" under 26 U.S.C. §6041. They function mainly as affidavits rebutting the original third party information returns they are intended to correct. Therefore, such forms would NOT be subject to criminal or civil sanction under 26 U.S.C. §7204 and 7207, 26 U.S.C. §6674. For detailed treatment of the subject of false information returns and exactly why I sincerely believe that all information returns filed against my name are false, see: Correcting Erroneous Information Returns, Form #04.001; <https://sedm.org/Forms/04-Tax/0-CorrErrInfoRtns/CorrErrInfoRtns.pdf>

2. REASONS WHY EARNINGS FROM MY MILITARY RETIRED PAY ARE NOT INCLUDED IN GROSS INCOME ON THIS SUBMISSION

Earnings from my own absolutely owned, constitutionally protected, private labor are not included as "gross income" on this submission because:

(a) The ONLY thing you can lawfully write CIVIL rules or laws for is PUBLIC property you have a proven ownership interest in under Article 4, Section 3, Clause 2 such as fictions you create and privileges I ask for. No such PUBLIC property is involved in this transaction so your CIVIL laws don't apply.

(b) 26 U.S.C. §83 acknowledges that only profit is taxed as "income" in the case of transfers of property (such as my labor for money) by deducting the fair market value the property (labor) from the amount paid for it if the payment was to the laborer rather than the person he or she is working for. It permits an exception to this rule in which an "election" can be made to treat the WHOLE amount paid to the laborer as "income" in 26 U.S.C. §83(b)(2). However, I do NOT here make and do not consent for you to make such an election on my behalf to convert the entire amount or reimbursement for my labor into "income" or "profit" under the Sixteenth Amendment or "gross income" under the I.R.C.. All labor in my case was executed OUTSIDE the statutory "United States" and therefore does not constitute "employment" per 26 C.F.R. §31.3121(b)-3(c) and I do not consent/elect to call it "employment" either subject to income taxation. To treat it otherwise is THEFT and a violation of the Fifth Amendment Takings Clause.

(c) They represent PRIVATE property/capital and not profit which would be a direct tax that is still unconstitutional. "Income" within the meaning of the Sixteenth Amendment means ONLY profit and not GROSS RECEIPTS. <https://famguardian.org/TaxFreedom/CitesByTopic/income.htm>

(d) The U.S. Supreme Court acknowledged that involuntary taxation of humans on their own labor is unconstitutional. "Every man has a natural right to the fruits of his own labor; is generally admitted; and no other person can rightfully deprive him of those fruits, and appropriate them against his will..." [The Antelope, 23 U.S. 66, 10 Wheat 66; 6 L.Ed. 268 (1825)]. Peonage to pay off public debt is a criminal offense per 18 U.S.C. §1583.

(e) Military retirement constitutes consideration under an enlistment contract. That consideration is private property and Congress has no authority to unilaterally impair this contract or reduce or eliminate the consideration through taxation without my consent, which I do not give. See Sinking Fund Cases, 99 U.S. 700 (1878). Congress also has not given reasonable notice that it is otherwise taxable like Social Security in I.R.C. §861(a)(8).

(f) The labor was and is performed by a nonresident alien not engaged in a "trade or business" from without the statutory geographical "United States". It is therefore excluded from "gross income" under 26 U.S.C. §872 and 26 C.F.R. §1.872-2(f) and 26 C.F.R. §1.871-7(a)(4) and 26 U.S.C. §861(a)(3)(C)(i).

(g) The labor was not performed as an agent of anyone such as a "U.S. person" (26 U.S.C. §7701(a)(30)), "employee" (26 U.S.C. §3401(c)), or "person" (26 U.S.C. §6671(b) and 7343), but rather by myself and only for the benefit of myself as a HUMAN BEING and not a fiction. It is thus not attributable to a PRINCIPAL who is a fiction with no constitutional rights under the Bill of Rights (such as you) trading the labor of a third party for money as described in 26 U.S.C. §61(a)(1) or 26 U.S.C. §871(a)(1)(A).

(h) 26 C.F.R. §1.871-7(a)(2) specifies that ONLY earnings within the meaning of "gross income" under 26 U.S.C. §61 are to be taxed at the 30% rate found in 26 U.S.C. §871(a) in the case of nonresident aliens not engaged in a "trade or business" such as myself. Since my own human labor is not included in "gross income", then earnings from my labor such as military service are not taxable under 26 U.S.C. §871(a).

I am well aware that earnings from labor that consensually BECAME "gross income" through a 26 U.S.C. §3402(p) election or which was earned by a "U.S. person" fiction ELECTION WOULD NOT fit any of the above, but I do not claim or ELECT any PUBLIC fictional status that would reflect an ownership interest in the proceeds of my labor by anyone else or any government. Instead, I am filing as a private human who retains all constitutional protections. DO NOT therefore respond with caselaw or authorities that only pertain to taxability of the earnings of FICTIONS called "compensation for services". More detailed information on the above is contained at and incorporated by reference: Proof that Involuntary Income Taxes on Your labor are Slavery, Form #05.055; <https://sedm.org/Forms/05-MemLaw/ProofIncomeTaxLaborSlavery.pdf>.

3. MANDATORY ATTACHMENT

The following form in its entirety is incorporated by reference into its entirety in the event that the refund claimed is not given, the submission is penalized, or litigation over this submission ensues: 1040-NR Attachment, Form #09.077; <https://sedm.org/Forms/09-Procs/1040NR-Attachment.pdf>

[1040-NR Attachment, Form #09.077, Form 2, Section 3;
<https://sedm.org/Forms/09-Procs/1040NR-Attachment.pdf>]

For much greater detail on the taxability of your labor you may use to expand or improve the above, see:

Proof that Involuntary Income Taxes on Your Labor are Slavery, Form #05.055
<https://sedm.org/Forms/05-MemLaw/ProofIncomeTaxLaborSlavery.pdf>

7.2 Minimizing income tax on retirement checks

By default, the entire amount of a retirement check would go on Schedule NEC and be taxed at a 30% rate. There are very few itemized deductions that nonresident aliens can take to reduce their income tax liability.

However, "electing" to make the retirement check "effectively connected" will significantly reduce the tax to usually 1/3 of the 30% found on schedule NEC. This is because the tax table used on "effectively connected" earnings is the same one used on the IRS Form 1040. Pensions appear on line 5a of the Form 1040NR. This is therefore the most effective way we know of to reduce the tax on retirement checks paid by the national government.

Social Security also goes on Schedule NEC. If most of your earnings are Social Security, the only way to reduce the tax on those below 30% is to file as a statutory "U.S. Person". HOWEVER, there are HUGE downsides to filing as a statutory "U.S. Person", as we discuss in the following resource:

Below are just a few of the downsides and costs of changing your status to that of a U.S. Person under 26 U.S.C. §7701(a)(30):

1. Subject to income taxation on WORLDWIDE earnings, rather than only those from a federal zone or federal government source as in the case of a nonresident alien. See 26 C.F.R. §1.1-1.
2. Subject to Affordable Care Act (ACA).
3. Subject to FATCA reporting on bank accounts in foreign countries.

8 Further research on your part

1. Conducting your own search for information:
 - 1.1. Any discussion of the tax subject BEGINS with an examination of the 1040NR return itself and IRS Publication 515.
<https://www.irs.gov/pub/irs-pdf/f1040nr.pdf>
<https://www.irs.gov/publications/p515>
 - 1.2. A search of the above should be conducted by you BEFORE posting to this forum. Did you examine these?
 - 1.3. IRS Publication 519 does not directly address nonresident aliens, because not all “nonresident aliens” are “aliens” and the publication only addresses aliens.
 - 1.3.1. Nonresident aliens are NOT a subset of “aliens”. This is covered in:

Non-Resident Non-Person Position, Form #05.020
<https://sedm.org/Forms/05-MemLaw/NonresidentNonPersonPosition.pdf>

- 1.3.2. If nonresident aliens were, in fact, a subset of aliens, there would be no need for a SEPARATE IRS Publication 515 for them because they could be addressed by IRS Publication 519.

2. Beyond these considerations, it is up to YOU to research these issues further. We CANNOT advise “taxpayers” on this site, and any other approach described herein to this issue would involve STATUTORY “taxpayer” whores who we can’t help. These people should go to a member of the tax or legal profession who only deal with government whore “taxpayers” instead. See:

Your Rights as a “Nontaxpayer”, IRS Publication 1a, SEDM Form #08.008
<https://sedm.org/LibertyU/NontaxpayerBOR.pdf>

3. Taxpayer whores are those who file the Form 1040, who seek socialist benefits, or who invoke the CIVIL STATUTORY privileges or immunities associated with ANY civil statutory status, such as “person”, “citizen”, “resident”, “taxpayer”, “spouse” (under the family code), “driver” (under the vehicle code). See:

Why Statutory Civil Law is Law for Government and Not Private Persons, Form #05.037
<https://sedm.org/Forms/05-MemLaw/StatLawGovt.pdf>

4. For reasons you should NEVER fornicate with the Beast by taking its privileges or its money and why you are jeopardizing your own economic security to do so, see:

Your Lawless, Irresponsible, Anarchist Beast Government, Form #05.054
<https://sedm.org/Forms/05-MemLaw/YourIrresponsibleLawlessGov.pdf>

Blacks Law Dictionary defines COMMERCE as “intercourse”. The Bible refers to those who conduct commerce with the lawless government beast as “playing the harlot”. The “life of luxury” mentioned in the book of Revelation is paid for with socialist “benefits”, in fact. See:

Are You “Playing the Harlot”?, SEDM Blog
<https://sedm.org/are-you-playing-the-harlot/>

5. If, during your own further research on this subject, you discover any evidence that contradicts the above, it is your duty as a member to post the information here so that our materials can be continually improved to remove errors.

9 What about spouses of military members receiving military pay as part of a divorce settlement?

Since the divorced spouse is not the DIRECT recipient of the retirement check, the actual recipient would need to cooperate with and agree with the ex spouse in the process of whatever approach the two of you decide to take based on the content of this document.

10 Rebutted Objections to this document

10.1 “gross income” includes retirement and pensions for EVERYONE under 26 C.F.R. §1.61-11

FALSE STATEMENT:

“Gross income” includes retirement and pensions for EVERYONE under 26 C.F.R. §1.61-11.

REBUTTAL:

1. 26 C.F.R. §1.61-11 says the following on the taxability of military retirement:

26 C.F.R. § 1.61-11 - Pensions.

§ 1.61-11 Pensions.

(a) In general.

Pensions and retirement allowances paid either by the Government or by private persons constitute gross income unless excluded by law. Usually, where the taxpayer did not contribute to the cost of a pension and was not taxable on his employer's contributions, the full amount of the pension is to be included in his gross income. But see sections 72, 402, and 403, and the regulations thereunder. When amounts are received from other types of pensions, a portion of the payment may be excluded from gross income. Under some circumstances, amounts distributed from a pension plan in excess of the employee's contributions may constitute long-term capital gain, rather than ordinary income.

(b) Cross references.

For the inclusion of pensions in income for the purpose of the retirement income credit, see section 37 and the regulations thereunder. Detailed rules concerning the extent to which pensions and retirement allowances are to be included in or excluded from gross income are contained in other sections of the Code and the regulations thereunder. Amounts received as pensions or annuities under the Social Security Act (42 U.S.C. ch. 7) or the Railroad Retirement Act (45 U.S.C. ch. 9) are excluded from gross income. For other partial and total exclusions from gross income, see the following:

(1) *Annuities* in general, section 72 and the regulations thereunder;

(2) *Employees' annuities*, sections 402 and 403 and the regulations thereunder;

(3) *References* to other acts of Congress exempting veterans' pensions and railroad retirement annuities and pensions, section 122.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6856, 30 FR 13316, Oct. 20, 1965]

2. This regulation implements 26 U.S.C. §61, which begins with the language: “Except as otherwise provided in this subtitle”.
3. 26 U.S.C. §871, IN THE CASE OF NONRESIDENT ALIENS ONLY, in fact “otherwise provides” a different definition of “gross income”.
4. This regulation is therefore limited to statutory “U.S. persons” (the DEFAULT status in the I.R.C.) and does not apply to nonresident aliens.
5. 26 U.S.C. §871, in turn, does NOT directly mention pensions or retirement, and thus they are EXCLUDED by the rules of statutory construction:
<https://www.law.cornell.edu/uscode/text/26/871>
6. Under I.R.C. Section 861(a)(3) compensation for labor or personal services performed in the United States shall be treated as income from sources within the United States.
7. Under I.R.C. Section 864(b) performing personal services within the United States is included in the meaning of a “trade or business within the United States.”
8. HOWEVER, “personal services” itself is defined as services performed in connection with a “trade or business”, so this is a tautology:

26 C.F.R. §1.469-9 Rules for certain rental real estate activities.

(b)(4) PERSONAL SERVICES.

Personal services means any work performed by an individual in connection with a trade or business. However, personal services do not include any work performed by an individual in the individual's capacity as an investor as described in section 1.469-5T(f)(2)(ii).

See: <https://famguardian.org/TaxFreedom/CitesByTopic/PersonalServices.htm>

So "personal services" is "the functions of a public office" that's included in gross income under I.R.C. Section 872, whether we call it "wages" or not. Serving as a serviceman who is not a statutory "employee" under 5 U.S.C. §2105 does not constitute such "personal services" or "the functions of a public office", except perhaps if they are an commissioned officer or volunteer by misrepresenting their status as an "employee" in submitting a W-4.

You also haven't explained why 26 U.S.C. §861(a)(8) making social security "gross income" is even necessary if 26 C.F.R. §1.61-11 makes all pensions taxable anyway. They wouldn't need this provision if social security was treated as the pension described in 26 C.F.R. §1.61-11.

The answer is that 26 U.S.C. §861 applies to BOTH statutory "nonresident aliens" (26 U.S.C. §7701(b)(1)(B)) and "U.S. Persons" (26 U.S.C. §7701(a)(30)), but 26 U.S.C. §61 limits itself to "U.S. persons" by default.

10.2 IRS "The Truth About Frivolous Tax Arguments", Item 4

We also looked at the cases cited by the IRS re:

IRS "The Truth About Frivolous Tax Arguments"

4. Contention: Military retirement pay does not constitute income.

Eligible, retired United States military personnel may receive military retirement pay (MRP) from the agency responsible for disbursing these payments, the Defense Finance and Accounting Service (DFAS). Some individuals argue that MRP does not constitute income for federal income tax purposes.

The Law: The Internal Revenue Code defines gross income as "all income from whatever source derived, including . . . pensions." I.R.C. §61(a)(11). Military retirement pay is pension income within the meaning of section 61. *Wheeler v. Commissioner*, 127 T.C. 200, 205 n.11 (2006); see also *Eatinger v. Commissioner*, T.C. Memo. 1990-310.

Relevant Case Law:

Wheeler v. Commissioner, T.C. Memo. 2010-188, 100 T.C.M. (CCH) 180 (2010) – the Tax Court imposed a \$25,000 penalty under section 6673(a)(1) because the taxpayer continued to argue that his military retirement pay was not income and that he did not need to file federal income tax returns.

Mathews v. Commissioner, T.C. Memo. 2010-226, 100 T.C.M. (CCH) 336 (2010) – in addition to penalties for failure to file and pay taxes, the Tax Court imposed a \$500 penalty under section 6673(a)(1) against Mr. Mathews for his "frivolous" argument that his military retirement pay, including an amount garnished by the state for child support, was not income.

[IRS "The Truth About Frivolous Tax Arguments", Section I.B.4; SOURCE: <https://www.irs.gov/pub/irs-utl/2022-the-truth-about-frivolous-tax-arguments.pdf>]

All of these cases involved either a non-filer (thus the deficiency was presumed correct) or other issues. Not one case was decided on the merits of the retirement pay being income:

"A. Whether Petitioner's MRP Is includable in Gross Income Section 61(a)(11) expressly defines gross income to include pensions. Petitioner's "Military retirement pay is pension income within the meaning of sec. 61(a)(11)." *Wheeler v. Commissioner*, 127 T.C. 200, 205 n. 11 (2006), *aff'd*, 521 F.3d 1289 (10th Cir. 2008); see also *Eatinger v. Commissioner*, T.C. Memo. 1990-310; sec. 1.61-11, *Income Tax Regs.*" [Mathews v. Commissioner, No. 3074-09, at *7 (U.S.T.C. Oct. 19, 2010)]

Further, the IRS' own website says they are NOT bound by Tax Court Rulings such as all the above they quote, and therefore their The Truth About Frivolous Tax Arguments is, ITSELF, FRIVOLOUS!

Internal Revenue Manual
Section 4.10.7.2.8.8 (01-01-2006)
Importance of Court Decisions

1. Decisions made at various levels of the court system are considered to be interpretations of tax laws and may be used by either examiners or taxpayers to support a position.

2. Certain court cases lend more weight to a position than others. A case decided by the U.S. Supreme Court becomes the law of the land and takes precedence over decisions of lower courts. The Internal Revenue Service must follow Supreme Court decisions. For examiners, Supreme Court decisions have the same weight as the Code.

3. Decisions made by lower courts, such as Tax Court, District Courts, or Claims Court, are binding on the Service only for the particular taxpayer and the years litigated. Adverse decisions of lower courts do not require the Service to alter its position for other taxpayers.

[SOURCE: https://www.irs.gov/irm/part4/irm_04-010-007]

11 Conclusions

If you want to play it safe and behave responsibly, ultimately the only LOW MAINTENANCE approach you can take is that if you are receive a retirement payment from the national government, you should PRESUME that it's a "U.S. source" and thus "gross income" paid to a nonresident alien member under 26 U.S.C. §§871 and 872. As far as state taxation, no tax would be owed on that payment in the case of a nonresident alien member, because it does not derive from a source within the state for a nonresident filer.

If you don't like having to deal with government legal strings inevitably attached to everything the government pays you, then you may wish to consider not receiving the payment.

If you want your cake and eat it too, by receiving the payment and yet not accepting the legal strings attached to the payment created by usually FALSE information returns, then you may want to duke this out in court. If you do, you are guaranteed to lose if you approach them as anything OTHER than a constitutional "person" and never a civil statutory "person".

If you want to spent a lot of time arguing and litigating to destroy the "Indian giving" the government does with money they OWE you that you PURCHASED with your PRIVATE labor of equal value, by all means take that route, but be prepared to spend a lot of time arguing with prejudiced and presumptuous public servants who want to steal from you and violate their oath to protect PRIVATE property as public officers. The resources in this document provide a starting point for that ultimately endless court battle trying to get public servants to do their ONLY job, which is to protect your private property, labor, and earnings from being converting public property without your consent, as described in:

Separation Between Public and Private Course, Form #12.025
<https://sedm.org/LibertyU/SeparatingPublicPrivate.pdf>

12 Resources for Further Research and Rebuttal

If you would like to study the subjects described herein further, we highly recommend the following resources:

1. How is Military Retirement Handled by COMPLIANT Members Only, SEDM Forums
<https://sedm.org/forums/topic/how-is-military-retirement-handled/>
2. Filing Tax returns:
 - 2.1. 1040NR Attachment, Form #09.077
<https://sedm.org/Forms/09-Procs/1040NR-Attachment.pdf>
 - 2.2. How to File Returns, Form #09.074** (Member Subscriptions)-describes how to file a 1040NR tax return and nearly all withholdings back.
<https://sedm.org/product/filing-returns-form-09-074/>

- 2.3. *Procedure to File Returns*, Form #09.075** (Member Subscriptions) -describes how to file a 1040NR tax return and nearly all withholdings back.
<https://sedm.org/product/procedure-to-file-tax-returns-form-09-075/>
3. Defense Financial Accounting Service (DFAS):
- 3.1. *DOD Retirement Pay Request Letter*, Form #04.227** (Member Subscriptions)-example document how to apply the information in this document to applying for retired military pay.
<https://sedm.org/product/dod-retirement-pay-request-letter-form-04-227/>
- 3.2. *Defense Financial Accounting Service (DFAS) Website* -pay military retirements exclusively
<https://www.dfas.mil/>
- 3.3. *Wikipedia: Defense Financial Accounting Service (DFAS)*
https://en.wikipedia.org/wiki/Defense_Finance_and_Accounting_Service
4. Social Security:
- 4.1. *Communism, Socialism, and Collectivism News*, Family Guardian Fellowship. News about the DISINTEGRATING Social Security safety net
<https://famguardian.org/category/news/communism-socialism-and-collectivism/>
- 4.2. *Getting a Refund of Social Security and Medicare Taxes*, SEDM
<https://sedm.org/getting-a-refund-of-social-security-and-medicare-taxes/>
- 4.3. *Office Of Earnings & International Operations*, SSA
<https://www.ssa.gov/foreign/>
- 4.4. *Social Security Payments Abroad Screening Tool*, SSA
https://www.ssa.gov/international/payments_outsideUS.html
- 4.5. *SSA-7162: Report to the United States Social Security Administration*-allows Americans OUTSIDE the statutory geographical “United States” to change their citizenship using block 3.
<https://ec.usembassy.gov/wp-content/uploads/sites/38/SSA-7162.pdf>
- 4.6. *Social Security Benefits U.S. Citizens Outside the United States*, Social Security Blog
<https://blog.ssa.gov/social-security-benefits-u-s-citizens-outside-the-united-states/>
- 4.7. *How Long Can You Live Outside the US Before Losing Social Security?*, Family Guardian Fellowship
<https://famguardian.org/how-long-can-you-live-outside-the-us-before-losing-social-security/>
- 4.8. *Social Security POMS Manual, GN 00303.120 Who Is a U.S. Citizen*
<http://secure.ssa.gov/poms.nsf/lnx/0200303120>
5. Military:
- 5.1. *Military and War Topic Page*, Family Guardian Fellowship
<https://famguardian.org/Subjects/Military/Military.htm>
- 5.2. *Military and War News Articles*, Family Guardian Fellowship
<https://famguardian.org/category/news/military-and-war/>
- 5.3. *Veterans Administration Benefit Application*, Form #06.041
<https://sedm.org/Forms/06-AvoidingFranch/10-10EZ-fillable-Amended.pdf>