IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA STATESVILLE DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**DOCKET NO. 5:09CR27-V**
	)	
BERNARD VON NOTHAUS, *et al.*,	)	
	)	
Defendants.	)	
	)	
_____	)	

AMICUS CURIAE BRIEF OF GOLD ANTI-TRUST ACTION COMMITTEE, INC.

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INTEREST OF THE AMICUS CURIAE

The Gold Anti-Trust Action Committee ("GATA") was organized in January 1999 to educate, advocate, and litigate against illegal collusion to control the price and supply of gold and silver, and to protect the civil and constitutional rights of Americans in monetary matters. GATA is incorporated in the State of Delaware, and is exempt from federal income taxation under Internal Revenue Code § 501(c)(3). Its website is http://www.gata.org.

GATA educates the public through the publication of its *GATA Dispatches* which are distributed by e-mail, usually multiple times daily. Additionally, it held important public policy conferences on gold, silver, money, and related topics in Yukon, Canada in August 2005, and in Washington, D.C. in April 2008, and one is planned for London, England in August 2011.

In 2000, GATA underwrote the federal anti-trust lawsuit, Reginald H. Howe v. Bank for International Settlements, *et al.*, C.A. No. 00-CV-12485-RCL — litigated in the U.S. District Court for the District of Massachusetts from 2000 to 2002. Although this suit was dismissed on a jurisdictional technicality, it became the model for Blanchard Coin and Bullion's anti-trust lawsuit against Barrick Gold and J.P. Morgan Chase & Co. in the U.S. District Court for the Eastern District of Louisiana in 2002, and prompted Barrick Gold's decision to stop selling gold in advance for a 10-year period.

In December 2009, the Board of Governors of the Federal Reserve System ("Federal Reserve") denied GATA's request under the Freedom of Information Act for "gold swap" and other related information. In response, GATA brought suit against the Federal Reserve in the U.S. District Court for the District of Columbia. Gold Anti-Trust Action Committee, Inc. v. Board of Governors of the Federal Reserve System, C.A. No. 09-2436 (ESH). This case

resulted in an order requiring the Federal Reserve's disclosure of an important document, and the Federal Reserve's payment of legal fees and litigation expenses to GATA.

Over a period of years, GATA has followed the efforts by Bernard von NotHaus to develop a private currency for Americans to use to help protect themselves from the debasement of the currency by America's central bank — the Federal Reserve. GATA has issued over 30 Daily Dispatches regarding the Liberty Dollar and the Government's prosecution of Bernard von NotHaus over a four and one-half year period. *See* http://www.gata.org/search/node/von+nothaus.

GATA has an abiding interest in a correct understanding of the provisions of the U.S. Constitution regarding coinage and counterfeiting. GATA believes that the Government's effort to use this case to end the people's right to develop and use whatever means of exchange that they freely choose constitutes a dangerous step on the path to tyranny. GATA deeply appreciates the Court's willingness to consider its analysis of the issues involved.

RELEVANT U.S. CONSTITUTIONAL PROVISIONS

The word "coin" appears five times in the U.S. Constitution. The word "counterfeiting" appears once. The words "gold and "silver" each appear only once. These usages are confined within the following provisions.

Article I, Section 8, Clauses 5-6

The Congress shall have Power…

> To **coin** Money, regulate the Value thereof, and of foreign **Coin**, and fix the Standard of Weights and Measures;

> To provide for the Punishment of **counterfeiting** the Securities and current **Coin** of the United States…. [Emphasis added.]

Article I, Section 10

> No State shall … **coin** Money; emit Bills of Credit; make any Thing but **gold** and **silver Coin** a Tender in Payment of Debts…. [Emphasis added.]

RELEVANT FEDERAL STATUTES

In addition to 18 U.S.C. § 371 (general conspiracy statute), and 18 U.S.C. § 2 (aiding and abetting statute), this case involves the interpretation and application of two sections of the United States Code:

18 U.S.C. § 485. Coins or bars

> Whoever falsely makes, forges, or **counterfeits** any **coin** or bar in resemblance or similitude of any **coin** of a denomination higher than 5 cents or any **gold** or **silver** bar coined or stamped at any mint or assay office of the United States, or in resemblance or similitude of any foreign **gold** or **silver coin** current in the United States or in actual use and circulation as money within the United States; or
>
> Whoever passes, utters, publishes, sells, possesses, or brings into the United States any false, forged, or **counterfeit coin** or bar, knowing the same to be false, forged, or **counterfeit**, with intent to defraud any body politic or corporate, or any person, or attempts the commission of any offense described in this paragraph-
>
> Shall be fined under this title or imprisoned not more than fifteen years, or both. [Emphasis added.]

18 U.S.C. § 486. Uttering coins of gold, silver or other metal.

> Whoever, except as authorized by law, makes or utters or passes, or attempts to utter or pass, any **coins** of **gold** or **silver** or other metal, or alloys of metals, intended for use as current money, whether in the resemblance of **coins** of the United States or of foreign countries, or of original design, shall be fined under this title or imprisoned not more than five years, or both. [Emphasis added.]

ARGUMENT

I. THE GOVERNMENT'S LEGAL POSITION IN THIS CASE MUST BE REVIEWED IN ITS HISTORICAL AND POLITICAL CONTEXT.

A. The U.S. Attorney's Press Release Issued After the Conviction Reveals a Significant and Overriding Political Objective.

Within hours after the jury returned its verdict of guilty on all three counts, the U.S. Attorney for the Western District of North Carolina issued a remarkable press release, to communicate the government's view of the significance of — and message intended to be sent to the American people by — this prosecution.[1]

First and foremost, the press release makes absolutely no mention of the word, "counterfeit," to describe the conviction secured against Mr. von NotHaus, even though indictment and conviction on two of the three counts rested upon a counterfeit charge based on 18 U.S.C. § 485. Instead, the press release chose a description based upon the naked "resemblance" language of 18 U.S.C. § 486:

> von NotHaus … was found guilty … of making coins **resembling and similar to** United States coins, of issuing, passing, selling, and possessing Liberty Dollar coins, of issuing and passing Liberty Dollar coins intended for use as current money, and of conspiracy against the United States. [Emphasis added.]

The omission of the word "counterfeit" is even more significant when compared to the Government's Response to Mr. von NotHaus's post-trial motions, wherein the Government places primary reliance upon its argument of the sufficiency of the evidence to prove

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[1] This press release (attached hereto as Appendix A) remains posted on the website of the U.S. Department of Justice. U.S. Attorney Anne M. Tompkins, Western District of North Carolina, Department of Justice Press Release, March 18, 2011. http://www.justice.gov/usao/ncw/press/nothaus.html

"counterfeiting," that is, a violation of 18 U.S.C. § 485. *Compare* Govt. Response, pp. 4-10 *with* pp. 10-11.

In contrast to the emphasis in the Government's Response to the counterfeiting count of the indictment, the press release stressed the Government's theory that the Liberty Dollar was illegally designed to "compete" with the official U.S. currency:

> Von NotHaus designed the Liberty Dollar currency in 1998 and the Liberty coins were marked with the "$", the word dollar, USA, Liberty, Trust in God (instead of In God We Trust) and other features associated with legitimate U.S. coinage. Since 1998, NORFED has been issuing, disseminating, and placing into circulation the Liberty Dollar in all its forms throughout the United States and Puerto Rico. NORFED's **purpose** was to **mix Liberty Dollars into the current money of the United States**. NORFED intended for the Liberty Dollar to be used as current money in order to limit reliance on, and to **compete with**, United States currency. [Emphasis added.]

To bolster this claim, the press release proclaimed that the federal Government's power to coin money is exclusive:

> Article I, section 8, clause 5 of the United States Constitution **delegates to Congress the power to coin Money** and to regulate the Value thereof. This power was delegated to Congress in order to establish and preserve a uniform standard of value and to insure a **singular monetary system** for all purchases and debts in the United States, public and private. Along with the power to coin money, Congress has the **concurrent power to restrain the circulation of money which is not issued under its own authority** in order to protect and preserve the constitutional currency for the benefit of all citizens of the nation. It is a violation of federal law for individuals, such as von NotHaus, or organizations, such as NORFED to create **private coin or currency systems to compete** with the official coinage and currency of the United States. [Emphasis added.]

Yet, in the responses filed by the Government in opposition to Mr. von NotHaus's pre-trial and post-trial motions, the Government made no effort to explain or to defend its constitutional

theory, having simply assumed the matter to be settled by two case opinions,[2] neither of which even addressed the constitutionality of 18 U.S.C. § 486.

Instead of making a serious effort to address the constitutional questions raised by its contention that Congress is authorized to create a money monopoly, with full powers to outlaw any and all competing currencies, the Government press release cast the Liberty Dollar threat as a political, not commercial, one — introducing "von NotHaus [a]s the founder of an organization called the National Organization for the Repeal of the Federal Reserve and Internal Revenue Code, commonly known as NORFED and also known as Liberty Services." Counterfeiters whose interest is defrauding the public to "make a fast buck" (i) do not draw attention to themselves, (ii) do not base their business model on differentiating their offerings from U.S. currency, and (iii) do not then write a book about what they are planning to do. Yet all these things Mr. von NotHaus has done. More political campaign than business, Mr. von NotHaus repeatedly and consistently explained both the motivation behind and the constitutional basis for the development of the Liberty Dollar.

> The genesis of liberty is rooted in man's quest to be free and enjoy his unalienable right to property. No greater property exists — outside of one's own body — than money, for money represents the product of man's labor in its physical form. **Today the government's control of money is the greatest threat to individual liberty.** The entrenched Federal Reserve banking system, hatched by bankers and politicians back in 1913, has run unchecked for 90 years and has confiscated 96% of the wealth it was created to protect. [B. von NotHaus, ed., The Liberty Dollar Solution To the Federal Reserve (American Financial Press 2003) p. 31 (emphasis original).]
>
> One of the most difficult issues that our Founding Fathers had to resolve was what to do with the sovereign power to create money. They did not want

[2] *See* Govt. Response to Post-Trial Motion, pp. 10-11, n.1.

> that power to rest in any of the three branches of government so they put the sovereign power in the hands of the people. For the first time in history, **the common man now Constitutionally holds the sovereign power**. For that reason, **Americans are free to literally coin their own money**. That is why private mints still exist in the United States, and why it was possible for me to be the Mint-master and operate the Royal Hawaiian Mint for 25 years. [*Id.*, p. 38 (emphasis added).]

And it was the issuance of that political challenge by Mr. von NotHaus, backed up by a competing medium of exchange, that apparently prompted the Government's prosecution in this case, not only to put the Liberty Dollar out of circulation, but also any other money system that would compete with the federally sanctioned currency. Thus, the U.S. Attorney's post-conviction press release warned:

> "Attempts to undermine the legitimate currency of this country are simply a unique form of **domestic terrorism**.... While these forms of **anti-government activities** do not involve violence, they are every bit as **insidious** and represent a **clear and present danger to the economic stability of this country**," she added. "We are determined to meet these threats **through infiltration, disruption and dismantling of organizations** which seek to **challenge the legitimacy of our democratic form of government.**" [Emphasis added.]

The U.S. Attorney's intemperate and caustic threat is reminiscent of the days when "counterfeit[ing] of the king's money" was the "sixth species of treason under th[e] [statute of 25 Edw. III]." *See* IV W. Blackstone, Commentaries on the Laws of England, p. 84 (U. Of Chi. Facsimile ed. 1769). In those days counterfeiting was:

> made a species of high treason; as being a breach of allegiance, by infringing upon the king's **prerogative**, and assuming one of the attributes of the **sovereign**, to whom alone it belongs to set the value and determination of coin made at home.... [*Id.* at 88.]

In the American republic, there are no "prerogative" powers, and there is no "sovereign"[3] but the People of the United States," as the Preamble of the United States Constitution reminds us. Unlike the British government,"[t]he people, not the government, possess the absolute sovereignty." *See* J. Madison, "Report on the Virginia Resolution," reprinted in Sources of Our Liberties, pp. 425-26 (R. Perry & J. Cooper, eds., Rev. Ed., American Bar Foundation: 1978). Thus, ours is a government of "enumerated" powers, and those powers are written in the Constitution to the end "that those limits may not be mistaken, or forgotten." *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

Not only does the Department of Justice's press release depart from these great principles, it even goes beyond the English monarchical claim which was limited to "actual counterfeiting the gold and silver of this kingdom; or the importing of such counterfeit money with the intent to utter it, knowing it to be false." Blackstone's Commentaries, p. 88. According to the U.S. Attorney, even a "competing" currency, devoid of these "counterfeiting" attributes, presents a threat to the "legitimacy of our democratic form of government."

One wonders what form of "infiltration, disruption and dismantling" the federal Government is now involved in. If there is anything "insidious" to be found in this press release, it is not the behavior of Mr. von NotHaus, who had the temerity only to "compete" with U.S. currency, but the language of an official of the U.S. Justice Department, who has

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[3] Indeed, an English coin reflecting the connection between money and the Crown was the English Gold Sovereign, first minted in 1489. *See also* E. Vieira, Jr., Pieces of Eight (Devin-Adair Pub. 1983), p. 56; and definition of "sovereign" in Noah Webster's American Dictionary of the English Language (1828).

the power to prosecute, as well as the ancillary powers to do what she threatens to do — to "infiltrate," "disrupt," and "dismantle" organizations — perhaps including organizations such as this amicus, which believe that the federal Government's crusade against private currency is an effort to prop up an increasingly debased currency in the control of the Federal Reserve, and deprive the American People of one important method to preserve their assets as the dollar continues to decline in value as a result of misguided Government policies to stimulate the economy by expanding the money supply and risking hyper-inflation, such as the Federal Reserve's QE2.[4]

B. The Government's Prosecution of von NotHaus Has Great National Significance.

The Government's prosecution of Bernard von NotHaus has been closely followed not only by the mainstream press, but also by the precious metals and numismatic communities and conservative commentators generally. Since the Government has chosen to send its message to the press, it is instructive to see what message is being received.

1. Just a few of the press engaged in mere reportage on the prosecution and conviction.

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[4] U.S. Court of Appeals Judge Richard Posner has criticized "'quantitative easing' as 'a pompous, uninformative term for a central bank's buying debt (bonds, mortgages, commercial paper, etc.) in quantity in an effort to depress interest rates in order to stimulate economic activity.' … His main objections: It runs the danger of creating runaway inflation; it threatens to upset our global trading partners, and it allows politicians off the hook for making serious economic reforms." John Carney, "Richard Posner: Quantitative Easing Is a Pompous Term for a Program Unlikely to Work," CNBC NetNet, Nov. 15, 2010, http://www.cnbc.com/id/40201243/Richard_Posner_Quantitative_Easing_Is_a_Pompous_Term_for_a_Program_Unlikely_to_Work

- David Forbes, "Liberty Dollar founder convicted on federal charges," Mountain Xpress Blog, Mar. 18, 2011;[5]

- "Man Convicted of Illegally Minting U.S. Coins," WBTV-TV3, Charlotte, N.C., Mar. 18, 2011;[6] and

- Clarke Morrison, "Liberty Dollar Creator Convicted in Federal Court," Asheville Citizen-Times, Mar. 19, 2011.[7]

2. However, most press accounts have reported the case as dealing with economic and political matters of great import. The prosecution received attention from the national financial and political media:

- Larry Kudlow, Kudlow & Co, CNBC, November 20, 2007;[8]

- Glen Beck, Interview with Bernard von NotHaus, CNN Headline News, Nov. 20, 2007;[9]

- Robert Smith & Allison Stewart, "The New Counterfeit Money," National Public Radio, Nov. 20, 2008;[10]

- Seth Lipsky, "When Private Money Becomes A Felony Offense: The popular revolt against a declining dollar leads to a curious conviction," The Wall Street Journal, Mar. 31, 2011 ("So alarming has been the collapse of the dollar that the legislatures in as many as a dozen American states are considering using their authority—under Article 1, Section 10 of the Constitution—to make legal

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[5] http://www.mountainx.com/blogwire/2011/liberty_dollar_founder_convicted_on_federal_charges#.TeKZQEejjAk

[6] http://www.wbtv.com/story/14279992/man-convicted-of-illegally-minting-us-coins?redirected=true

[7] http://www.citizen-times.com/article/20110319/NEWS01/110319006/1001/news/Liberty-Dollar-fake-currency-creator-convicted-federal-court?odyssey=nav|head

[8] http://www.youtube.com/watch?v=FJhMwxL_KR8&feature=related

[9] http://www.youtube.com/watch?v=IvHhqr8OeFc

[10] http://www.npr.org/templates/story/story.php?storyId=16451371&ft=1&f=1006

tender out of gold and silver coins. Lest the ghost of Friedrich Hayek or any other advocate of privately issued money get any bright ideas, however, the von NotHaus verdict will stand as a warning.");[11]

- Addison Wiggin, "VonNotHaus Affair Shows Two Sides of Coinage," Forbes Blog, Apr. 4, 2011;[12] and

- Associated Press, "Feds move to keep Liberty Dollar's $7 million metal inventory," Apr. 4, 2011.[13]

3. The daily press from around the country have reported on various aspects of this story:

- Charity Vogel, "When the markets catch on, they'll propel gold to record highs," Buffalo News, Apr. 12, 2006;[14]

- Tristan Scott, The Missoulian, Missoula, Montana, "Counterfeiting, not barter, is thrust of threat against Liberty Dollar," Oct. 15, 2006;[15]

- Alec MacGillis, "In Ron Paul Coins, Federal Agents Don't Trust," Washington Post Blog, Nov. 16, 2007;[16]

- Alec MacGillis, "If It's Good Enough for Mickey, Why Not for Paul?" Washington Post Blog, Nov. 19, 2007;[17]

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[11] http://online.wsj.com/article/SB10001424052748704425804576220383673608952.html

[12] http://blogs.forbes.com/greatspeculations/2011/04/04/von-nothaus-affair-shows-two-sides-of-coinage/

[13] http://www.gata.org/node/9773

[14] http://www.gata.org/node/3979

[15] http://www.gata.org/node/4457

[16] http://blog.washingtonpost.com/44/2007/11/post-203.html?hpid=topnews

[17] http://blog.washingtonpost.com/44/2007/11/if-its-good-enough-for-mickey.html

- Joseph Goldstein, "U.S. Raids Issuer of Ron Paul Coins," New York Sun, Nov. 16, 2007;[18]

- Bill Morlin, "FBI raids seize dies, records in CdA," Spokane Spokesman-Review, Nov. 16, 2007;[19]

- Joseph Goldstein, "'Spectacular trial' seen in Liberty Dollar Case," New York Sun, Nov. 19, 2007;[20] and

- Joseph Goldstein, "Government is Sued Over Seizure of Liberty Dollars," New York Sun, Jun. 20, 2008.[21]

The Government clearly wanted this prosecution to send a so-called "anti-terrorism" message to the American people, but the message being sent is more complicated, and not flattering to the federal government. Several of the above-referenced articles demonstrate understandable public confusion as to whether Mr. von NotHaus was prosecuted for counterfeiting, or for issuing a competing currency of "original design." Almost always, Mr. von NotHaus' Liberty Dollars are understood to reflect a political statement about the nation's monetary policy, not just a business proposition, and certainly not an effort to deceive Americans into accepting his Liberty Dollars as though they were U.S. dollars.

4. The numismatic press covered the story and the implications for that industry:

- Beth Deisher, Coin World Editor, "Verdict could have implications for all private mints in U.S.," Coin World, Apr. 11, 2011 ("The government's approach to this case and successful prosecution could have far-reaching implications for every private mint in the United States and for anyone

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[18] http://www.nysun.com/national/us-raids-issuer-of-ron-paul-coins/66542/

[19] http://www.spokesmanreview.com/breaking/story.asp?ID=12398

[20] http://www.nysun.com/national/spectacular-trial-is-seen-in-case-of-liberty/66642/

[21] http://www.nysun.com/national/government-is-sued-over-seizure-of-liberty-dollars/80368/

possessing privately issued rounds that remotely resemble or contain any devices used on U.S. coins. Such pieces exist in the marketplace by the hundreds of thousands, if not by the millions, and are bought and sold in the marketplace every day. Never mind that these privately produced pieces do not replicate the metal content, diameter, weight, design devices and legends used on U.S. coins — the standard definition of a counterfeit. Von NotHaus' .999 fine silver Liberty Dollars — denominated as $5, $10, $20 and $50 — do not replicate any U.S. coins and by any standard definition are not coins. The United States has never issued .999 fine silver coins in the denominations von NotHaus used on his Liberty Dollars. In fact, he spent a lot of money printing brochures, books and pamphlets to distinguish his private barter currency from U.S. coins. Von NotHaus espoused the view that his Liberty Dollars were better and had more value than U.S. coins.");[22]

- Patrick A. Heller, "Is U.S. Terrorized by Gold?" Numismaster.com, Mar. 22, 2011 ("If selling (and, by implication) buying gold and silver coins is an act of domestic terrorism that needs to be prosecuted, is the Department of Justice going to go after "terrorist organizations" that are major manufacturers and sellers of gold and silver such as the United States Mint, Royal Canadian Mint, Perth Mint, Royal Mint, Austrian Mint, South African Mint, Casa de Moneda, and others? They all produce large quantities of gold and silver issues sold to people who are not purchasing them for their numismatic value but rather for their status as safe haven alternatives to owning Federal Reserve Notes. Then is the Department of Justice going to go after every "domestic terrorist" who owns any gold or silver bullion-priced coins and ingots?");[23] and

- "FBI Busts Mastermind Criminal for Issuing Silver Currency, Demanding Repeal of Fed and IRS; Faces 15 Years in Prison," ZeroHedge.com, Mar. 19, 2011.[24]

5. The irony of the eroding value of the dollar and the escalating value of the Liberty Dollar has not escaped notice.

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[22] http://www.coinvaluesmag.com/articles/verdict-could-have-implications-for-all-priva/

[23] http://www.numismaster.com/ta/numis/Article.jsp?ad=article&ArticleId=18628

[24] http://www.zerohedge.com/article/fbi-busts-mastermind-criminal-issuing-silver-currency-demanding-repeal-fed-and-irs-faces-15-

- "A 'Unique' Form of Terrorism," New York Sun Editorial, Mar. 20, 2011 ("Here is a thought experiment concerning two men who have issued money. One issued gold and silver coins that will today bring more in dollars than he charged for them. The other issued paper notes that are today worth but a fraction the gold or silver they were worth at the time they were issued. One man is facing the possibility of years in prison after a federal jury found his issuing of money to have been a crime. The other man is walking around free and being treated by the authorities with great deference. Which is which? It turns out that the man walking free is Ben Bernanke, the chairman of the Federal Reserve.... The man who issued the coins that will fetch more dollars today than when he issued them is Bernard von NotHaus...."); [25] and

- David Deschense, "U.S. Attorney's Remarks Suggest the Federal Reserve is Engaging in 'Domestic Terrorism,'" Fort Fairfield Journal, Apr. 6, 2011, p. 1. [26]

6. Lastly, various public policy think tanks and commenters have speculated about the implications of the case:

- Sheldon Richman, "A Victim of the State: Bernard von NotHaus and the Liberty Dollar," The Freeman OnLine, Mar. 25, 2011 ("I'm no expert in the law governing money, but I detect a faulty premise. Although the Constitution authorizes Congress to coin and regulate money, does it delegate *exclusive power* to do so? I don't see that in the text. So where did Congress get the authority to "restrain the circulation of money which is not issued under its own authority"? Sounds like a power grab reminiscent of the crackdown on Lysander Spooner when he not only dared to compete with the government's postal service, but to do it better!"); [27]

- William L. Anderson, "Defining 'Terrorism' Down," The Freeman, Mar. 30, 2011 ("In this politicized age, government officials are constantly expanding the meaning of 'terrorism.'"); [28] and

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[25] http://www.nysun.com/editorials/a-unique-form-of-terrorism/87269/

[26] http://www.mainemediaresources.com/ffj_04061101a.htm

[27] http://www.thefreemanonline.org/columns/tgif/victim-of-the-state/

[28] http://www.thefreemanonline.org/headline/defining-terrorism-down/

- Lew Rockwell, "Use the Dollar or Else," Lewrockwell.com, Apr. 6, 2011 ("It is wholly understandable that people have doubts about the future of the paper dollar. Many people are seeking alternatives, in their own financial interest. What this proprietor did was provide something that turned out to be a possible alternative to the dollar. And for that, and that alone, he is being hounded and destroyed.... Allowing for alternative currencies is not terrorism. It is a path to monetary reform, merely an application of the principle of free enterprise to a sector that should have never fallen so completely to government control. The people who are working to provide alternatives should not be jailed; they should be celebrated in every country that values freedom.").[29]

7. The von NotHaus case has even found its way into a recently published book designed to educate Americans about the United States Constitution. Seth Lipsky, ed., The Citizen's Constitution: An Annotated Guide, Rev'd, Basic Books (2011), p. 58 ("Liberty Dollars far outperformed the dollar issued by the federal government, a fact that ... could invite this question: Is something counterfeit when it has value that is equal or greater than the original?").

C. The Context of the von NotHaus Case Necessitates a Close Look at the Constitutional Principles Involved.

The prosecution of Bernard von NotHaus has great significance for the simple reason that it involves the possible incarceration of an individual U.S. citizen. However, this case has additional significance because the Government has chosen to use the press to deliver a warning to the American people through the prosecution of Mr. von NotHaus. The Government has laid down a marker that the Government will not tolerate the issuance of a competing currency. The Government has even employed the most emotion-laden term

[29] http://www.lewrockwell.com/rockwell/use-the-dollar-or-else176.html

available in a post-9/11 world: "terrorism."[30] As can be seen from the nation's press, the public has followed this case with deep interest, for it will have great effect in determining the parameters of the people's sovereignty with respect to money. For all of these reasons, it is incumbent on this Court to scrutinize carefully whether there actually exists any Constitutional predicate for the Government's assertion of the authority to criminalize an American citizen's effort to offer his fellow citizens an opportunity to participate voluntarily in the selection of the means of exchange in what remains of our free market economy.

II. THE COURT'S INSTRUCTION ON COUNT III PERMITTED A GUILTY VERDICT IF THE JURY FOUND THAT THE LIBERTY DOLLAR WAS INTENDED FOR USE AS CURRENT MONEY TO COMPETE WITH U.S. CURRENCY.

A. The Government Contended That 18 U.S.C. § 486 Prohibited Mr. von NotHaus from Developing a Coin Intended for Use as Current Money to Compete with U.S. Currency.

From the filing of the indictment to trial through the post-conviction press release, the Government's position in this case has been that any coin "intended for use as current money," within the meaning of 18 U.S.C. § 486, is illegal, regardless of whether such coin was counterfeit. According to this theory, it was enough to prove a violation of section 486 if the purpose and use of the Liberty Dollar was to compete with U.S. currency. *See* Indictment ¶¶

[30] The Government has a long record of claiming threats to evoke fear in the people to justify new assertions of power. *See, e.g.,* Robert Higgs, Crisis and Leviathan: Critical Episodes in the Growth of American Government, Pacific Institute for Public Policy (1989).

12, 13, 15.[31] Indeed, the Government flatly alleged in the indictment that "it is a violation of law for private coin systems to compete with the official coinage of the United States." Indictment ¶ 33.

Furthermore, in defense of the jury verdict finding Mr. von NotHaus guilty of violating 18 U.S.C. § 486 (Count III), the Government — tracking the statutory language word by word — stated that, as section 486 and its predecessors demonstrate:

> [T]hey were **primarily** adopted to **prevent** the coining of money in **competition** with the United States; resemblance or similitude is not necessarily an element. [United States' Response in Opposition to Defendant's Motions Under Rules 29, 33 and 34 of Fed. R. Crim. Proc. (U.S. Post-Trial Resp.), p. 10, n.1 (emphasis added).]

B. The Government's Literal Reading of 18 U.S.C. § 486 is Based Upon Two Lower Court Opinions.

In its post-trial response, the Government relied on two cases: United States v. Gellman, 44 F. Supp. 360 (D. Minn. 1942), and United States v. Falvey, 676 F. 2d 871 (1st Cir. 1982). Both courts read the statute literally. Presumably on the strength of the phrase "or original design," the district court in Gellman concluded that "[i]f one manufactures a coin, a five cent piece, for instance, in an oblong shape, and although much larger than a genuine five cent piece, for the purpose of circulation as money within any area of the United States, a violation would occur." Gellman, 44 F. Supp. at 364. Echoing the Gellman conclusion that section 486 outlaws competing currencies, without any evidence that the competing money is counterfeit, the Falvey Court noted "the complete absence of an intent to

[31] *See also* United States' Response in Opposition to Defendant's Motions to Dismiss the Indictment Pursuant to Fed. R. Crim. P. 12(B), p. 2.

defraud requirement," such as would be found in 18 U.S.C. § 485, the counterfeiting statute. *Compare* Falvey, 676 F.2d at 876 *with* 676 F.2d at 872.

Indeed, as both Gellman and Falvey imply, the phrase "in the resemblance of coins of the United States," as stated in 18 U.S.C. § 486, stands alone, whereas the phrase "in resemblance or similitude of … coin current in the United States" in 18 U.S.C. § 485 is linked directly to the phrase "falsely makes, forges or counterfeits." Thus, to prove a violation of section 486, the competing currency need not be counterfeit, whereas to prove a violation of section 485, it would. *See* United States v. Hopkins, 26 F. 443, 444 (W.D.N.C. 1885). *Compare* Instruction on Count III (pp. 67-73) *with* Instruction on Count II (pp. 50, 54, and 58).

C. The Instruction on Count III Permitted a Finding of Guilt Even if the Liberty Dollar Was Not Counterfeit.

The Court's instruction on Count III tracked the literal words of section 486, thereby permitting a conviction if the jury found either that the Liberty Dollar was "in resemblance of genuine coins of the United States [or] were of original design," so long as the Liberty Dollar was "intended … for use as current money." *See* Instructions, pp. 66, 67, and 73. By so instructing the jury, Count III was submitted to the jury in conformity with the Government's principal theory of the case at trial. This theory had been spelled out previously by the U.S. Treasury Department in a Memorandum dated January 19, 2005, in response to the question whether the Liberty Dollar violated Title 18 of the United States Code:

> It is our understanding that the **Liberty Coins are not counterfeits of or in similitude** to any official United States coins. However, given that section 486 specifically applies to coins of original design, **the Liberty Coins** would likely be found to **violate** this aspect of **section 486.**

> The primary focus for courts interpreting and applying section 486 has been the phrase "intended for use as current money." This focus results from the legislative history indicating that the primary concern of Congress, in enacting the predecessor to section 486, was the "**prohibition of private systems of coinage** erected for use **in competition** with the **official United States coinage**" [citing Falvey and Gellman]. [*See* United States Memorandum from John J. Kelleher, Chief Counsel re: Liberty Dollar Coins, p. 3 (January 19, 2005) (hereinafter "Kelleher Memo") (emphasis added).[32]]

Having been instructed on Count III in the language of the statute, the jury was told that it could find Mr. von NotHaus guilty even if the Liberty Dollar coins were not counterfeit, if those coins were intended for use as current money in competition with official U.S. currency.

III. 18 U.S.C. § 486, AS CONSTRUED AND APPLIED IN THIS CASE, IS UNCONSTITUTIONAL.

A. Section 486 is Not Constitutionally Authorized as an Exercise of the Power Granted to Congress to "Coin Money."

Quoting from Gellman in its post-trial response, the Government assumes that section 486, as literally construed and applied in this case, is a constitutional exercise of Congress's "'sole power to coin money.'" U.S. Post-Trial Resp., p. 10, n.1. Indeed, the Government adopts the Gellman assumption of constitutionality as its own:

> [U]nder the Constitution, … if anyone, **individual** or State, assumes to supplant the medium of exchange adopted by our Government, or assumes to compete with the United States Government in this regard, a violation of [section 486's predecessor] would follow. Undoubtedly, no one can interfere with the monopoly which this Government has obtained…. [Gellman, 44 F. Supp. at 364 (emphasis added).]

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[32] A copy of this Memorandum is attached as Exhibit B to Mr. von NotHaus' post-trial motion of March 31, 2011.

Both Gellman and Falvey assumed the constitutionality of the criminalization of a privately issued, voluntarily circulated, competing coinage — the issue not having been raised, litigated, or even necessary to the actual holding of either case. However, in his motion to dismiss, Mr. von NotHaus has raised doubts as to section 486's constitutionality. *See* Motion to Dismiss Challenging the Sufficiency of the Indictment to State an Offense, pp. 5-15. A more careful examination of the constitutional text relating to Congressional powers with respect to coinage demonstrates the fallacy of the Government's position.

First, neither Article I, Section 8, Clause 5 nor Section 8, Clause 6 purports to grant an exclusive power to Congress. Moreover, if the express grant of power to "coin money" in Article I, Section 8, Clause 5 is construed as a grant of power in Congress to coin money, to the exclusion of all others, then the written prohibition in the first clause of Article I, Section 10 — which forbids any State to "coin Money; emit bills of credit; [or] make anything but gold or silver coin a Tender in payment of debts" — would be wholly redundant. Such a construction would be contrary to the well-established principle of constitutional interpretation that:

> In expounding the Constitution … every word must have its due force and appropriate meaning; for it is evident from the whole instrument that no word was unnecessarily used or needlessly added…. Every word appears to have been weighed with the utmost deliberation and its force and effect to have been fully understood. No word in the instrument … can be rejected as superfluous or unmeaning. [Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-71 (1840).]

In the very case in which it iterated this rule, the Supreme Court emphasized how this principle would particularly apply to the issue in this case, stating that this:

> [P]rinciple of construction applies with peculiar force to the two clauses of the tenth section of the first article … because the whole of this short section … is

> employed altogether in enumerating the rights surrendered by the States….
> [*Id.*, 39 U.S. at 571.]

In short, it is not the grant of power to Congress to "coin money" that precludes the States from "coining money," "emitting bills of credit," or "making anything but gold and silver a payment for debts." Rather, it is because Article I, Section 10 says so.

And because Article I, Section 10 says so, another rule of construction — the venerable rule of *exclusio unius, est inclusio alterius* — dictates that, unless the Constitution contains similar language prohibiting the People from "coining money," then the grant of power to Congress to coin money may not be construed rightly to negative the inherent power and natural right of the People to ascribe value to certain metals, predominantly gold and silver, for consensual use as money or a medium of exchange.[33]

Because Article I, Section 8, Clause 5 cannot be reasonably construed to authorize Congress to prohibit the People from exercising their inherent power to use whatever they voluntarily choose to bargain and exchange, the right of the People to create a medium of exchange in competition with the official U.S. currency is reserved by the Tenth Amendment to the People. Monetary scholar Edwin Vieira, Jr. concludes from his research that "the Constitution left unchanged the traditional right of the people of the United States to adopt whatever media of exchange they desired in their private commercial transactions," citing, *inter alia*, the Tenth Amendment.[34]

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[33] *See* J. Locke, Second Treatise of Government, §§ 36-37, 46-50.

[34] E. Vieira, Jr., Pieces of Eight (Devin-Adair Pub. 1983), p. 90.

Additionally, unlike the governments of the several states, the People have no power to make any medium of exchange legal tender, that is, as a matter of legal obligation, rather than as a matter of mutual obligation after individual negotiation and voluntary consent. The Article I, Section 10 ban on the states to coin money and emit bills of credit is coupled with a prohibition on the States to make any thing but gold or silver "Tender" in payment of debts is in recognition that the States would otherwise have such "legal tender" powers, notwithstanding the express grant of power to Congress to "coin money." *See* Legal Tender Cases, 79 U.S. 457, 544-45 (1871). In its January 2005 Memorandum, the Government plucks two statements — one each from the Legal Tender Cases and Veazie Bank v. Fenno, 75 U.S. 533 (1869) — in support of its view that, unless the "coin money" grant is construed to grant Congress monopoly monetary powers, there could be no "uniform" national currency. *See* Kelleher Memo, p. 2. Neither of those cases even addressed the question whether a privately issued genuine coin intended for use as current money, but not backed by any civil government as legal tender, could be banned by Congress to protect its coin from competition. Indeed, the "uniformity" statement lifted by the Government from Veazie Bank was part of a discussion whether it was constitutional for Congress to tax bank notes issued under the authority of a state law that authorized them "for circulation." *See id.*, 75 U.S. at 548-49. The Liberty Dollar coins have no such state backing.

B. As Construed and Applied, 18 U.S.C.§ 486 is Not a Constitutional Exercise of Power to "Provide for the Punishment of Counterfeiting."

Article I, Section 8, Clause 6 was devised to expressly authorize Congress "to provide for the Punishment of counterfeiting the … current coin of the United States." By granting

this express power, and not leaving it to implication or to legislative discretion under the Necessary and Proper Clause, Congress was given authority only to enact penal legislation prohibiting "counterfeiting," that is, any "imitation of the genuine." *See* United States v. Bogart, 24 Fed. Cas. 1185 (N.D.N.Y. 1878). On its face, this grant of power does not vest in Congress any general regulatory power, much less any power to punish any person for creating and circulating a coin intended for use as money in competition with the official U.S. currency. Rather, it grants Congress the limited power to punish "counterfeiting," that is, making or uttering a coin that is in such similitude and resemblance to the official currency as "it might deceive a person using ordinary caution." *Id.*

In short, by using the word, "counterfeiting," Article I, Section 8, Clause 6 made a term that might otherwise be determined by statute, or even by the common law, to be determined by the Constitution, the purpose of which is to establish "principles … designed to be permanent" in order that "[t]he powers of the legislature are defined, and limited…." *See* Marbury v. Madison, 5 (1 Cranch) U.S. 137, 177 (1803). In his 1828 dictionary, Noah Webster defined "counterfeit" as:

> To forge; to copy or imitate, without authority or right, and with a view to deceive or defraud, by passing the copy or thing forged, for that which is original or genuine; as to *counterfeit* [t]o make a likeness or resemblance of anything with a view to defraud. [N. Webster, American Dictionary of the English Language (1828).]

Read literally, 18 U.S.C. § 486 goes beyond this constitutionally dictated meaning.

The danger of such a literal meaning has been detected and dealt with before. The district court in United States v. Bogart, 24 Fed. Cas. 1185 (N.D.N.Y. 1878) observed with respect to section 486's predecessor[35]:

> If it should be held that the section makes it a crime to make or utter any pieces of metal, with the intent that the pieces serve as a substitute for money, an offense is created which is new and **foreign** to the law of counterfeiting. [*Id.* (emphasis added).]

Prompted by this observation, the district court in Bogart opted to construe the statute narrowly so as to bring it within the outer parameters of counterfeiting, and thereby, to avoid a construction that would produce "an offense radically differ[ent] from that of counterfeiting." *Id.* Thus, the district judge adopted a construction limiting the statute to those cases in which the privately issued coin is a "spurious piece purport[ing] to be coin of the United States." *Id.*, 24 Fed. Cas. at 1186. In choosing this narrowing interpretation, the district court may very well have followed the rule that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." United States v. Delaware & Hudson Co., 213 U.S. 366, 407-08 (1909). *See also* Skilling v. United States, 561 U.S. ___, 130 S.Ct. 2896, 2929-30 (2010). Without such an interpretive gloss, section 486 clearly is beyond the power granted to Congress by Article I, Section 8, Clause 6.

Neither the Government in its indictment nor this Court in its instructions on Count III placed such a narrowing interpretation upon the section 486 text. Instead, the charged

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[35] Although Bogart was decided on the basis of the statutory language in the 1864 version of what is now section 486, "[n]o substantive changes [have been] made with respect to the statute's scope in any subsequent version." *See* Falvey, 676 F.2d at 876.

violation of section 486 was submitted to the jury as if the statute prohibited private coinage in competition with the official U.S. currency without regard to whether it "purported to be coin of the United States."

C. The Necessary and Proper Clause Does Not Save 18 U.S.C. § 486 as Construed and Applied Here.

Although the Government does not appear to rely upon Article I, Section 8, Clause 18's Necessary and Proper Clause, any such reliance would be unavailing. In pertinent part, Article I, Section 8, Clause 18 authorizes Congress "to make all laws necessary and proper for carrying into execution the foregoing powers." Pertinent to this case, are the powers to "coin money" and to "provide for the punishment of counterfeiting." In McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice John Marshall expressed the Supreme Court's view that the Necessary and Proper Clause does not confer upon Congress complete discretion to enact any law that it believes to be necessary and proper, but permits only those laws "plainly adapted to [constitutionally] legitimate" ends:

> [S]hould Congress … under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would be the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. [*Id.*, 17 U.S. at 423.]

Section 486 — if construed literally to prohibit a privately issued coin made and circulated to compete with the official U.S. currency — is not authorized because, so construed, it is not "plainly adapted" to accomplish an object entrusted by the Constitution to Congress.

In 1864, when Congress first enacted the criminal offense defined by section 486, it entitled the act as one "to punish and prevent the counterfeiting of coin of the United States."

See Chapter 114, 13 Stat. 120 (1864). *See also* 136 Cong. Globe, 38th Cong., 1st Sess. 2707 (1864). However, if the words of the statute are read literally, the offense described is not "counterfeiting," because the statute does not comply with "the rules applicable to the offence of counterfeiting, [namely] that the resemblance of the spurious to the genuine coin must be such as that it might deceive a person using ordinary caution, and a conviction cannot be had for uttering pieces of metal which are not in the likeness or similitude of genuine coins." *See* Bogart, 24 Fed. Cas. at 1185.

Moreover, the statute was not even enacted to "prevent" counterfeiting. Rather, as the courts in Gellman and in Falvey concluded — after reviewing the legislative history of the 1864 version of section 486 — the object or the end of the legislation was "to **prevent** the coining of money in **competition** with the United States." Gellman, 44 F. Supp. at 364 (emphasis added); Falvey, 676 F.2d at 876 ("[T]he primary concern of Congress seems to have been with the **prohibition** of private systems of coinage created for use in competition with the official United States coinage" (emphasis added)). That is also the position of the Government in this case, wherein it has endorsed the reading of the legislative history in both Gellman and Falvey. *See* U.S. Post-Trial Resp., p. 10, n.1.

In its January 2005 memorandum on whether the Liberty Dollar, although not counterfeit, is nonetheless considered to be in violation of section 486, the Government, citing United States v. Marigold, 50 (9 How.) 560, 586 (1850), contends that the naked grant of power to "coin money" brings with it the "**concurrent power** to restrain the circulation of money not issued under its own authority." *See* Kelleher Memo, p. 2 (emphasis added). The

Government's reliance on Marigold is misplaced. According to Marigold, the monetary powers granted to Congress:

> [A]uthorized [it] and bound [it] in duty to prevent [the official U.S. coin's] debasement and expulsion, and the general confidence and convenience, by the influx and substitution of a spurious coin in lieu of constitutional currency. [*Id.*, 50 U.S. at 568.]

As the Marigold Court pointed out, Congress's monetary power, whether derived from clause 5 and 6 combined, or clause 5 alone, is "to protect and to preserve in its **purity** this constitutional currency for the benefit of the nation." *Id.* (emphasis added).

To infer that the power granted in clause 5 is, as the Government contends here, to grant to Congress power to establish a monetary monopoly,[36] is not only unsupported by Marigold, but is directly contrary to the constitutional text. The very essence of the counterfeit is to debase the currency, not to compete with it — as the Government alleged that the Liberty Dollar was designed to do[37] — and as section 486, literally construed, prohibits. Congress has no power to prohibit a private currency, but only a counterfeit one designed to deceive. Indeed, typically counterfeiting consists of taking a comparatively worthless item, and making it appear to be an item of worth. Thus, Black's Law Dictionary defines a "counterfeit coin" as altering a coin "so as to resemble or pass for coin of a higher denomination." Black's Law Dictionary, p. 420 (West Pub.: 1968). Under the Government's constitutional theory, Congress would have the power to prohibit any competing coin even if that coin held more value than the official U.S. currency. Paradoxically, to construe Article I, Section 8, Clauses

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[36] *See* U.S. Post-Trial Resp., p. 10, n.1.

[37] *See* Indictment, ¶¶ 12, 13, and 15.

5, 6, and 18 to grant to the federal government the power to create a monopoly medium of exchange invites abuse of that monopoly through the debasement of the currency, not its protection.[38] *See* December 14, 1776 Constitution of North Carolina, Declaration of Rights, Article XXIII ("That perpetuities and monopolies are contrary to the genius of a free State, and ought not be allowed."), reprinted in Sources of Our Liberties, at 356.

IV. THE GOVERNMENT'S UNCONSTITUTIONAL INTERPRETATION OF 18 U.S.C. § 486 POISONED THE JURY'S CONSIDERATION OF ALL THREE COUNTS OF THE INDICTMENT, TO MR. VON NOTHAUS'S PREJUDICE.

A. The Gravamen of the Indictment Was that Competition with U.S. Currency by the Liberty Dollar Was Criminal.

The 13-page indictment against Mr. von NotHaus does not present a standard case of counterfeiting U.S. currency. Instead, it paints an elaborate portrait of a public business in

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[38] As economist Murray N. Rothbard explains:

> Money arises on the free market, as individuals on the market try to facilitate the vital process of exchange.... A commodity that is in general use as a medium of exchange is defined as a *money*.... Historically, there have been two major kinds of legalized counterfeiting. One is *government paper money*....
>
> If the government falls prey to the temptation of printing a great deal of new money, not only will prices go up, but the "quality" of the money will become suspect in that society, and the lack of redeemability in gold may lead the market to accelerated discounting of that money in terms of gold. And if that money is not at all redeemable in gold, the rate of discount will accelerate further. In the American Revolution, the Continental Congress issued a great amount of non-redeemable paper dollars, which soon discounted radically, and in a few years, fell to such an enormous discount that they became literally worthless and disappeared from circulation. The Common phrase "Not worth a Continental" became part of American folklore as a result of this runaway depreciation and accelerated worthlessness of the Continental dollars. [M. Rothbard, The Case Against the Fed (The Ludwig von Mises Institute 2007), pp. 12, 14, 27, 29 (italics original).]

which Mr. von NotHaus and others were openly engaged in interstate commerce, employing their own currency designed and intended to compete with, not counterfeit, U.S. coins. *See* Indictment ¶¶ 1-27. Never touted as "legal tender" with which users could pay debts to federal or state governments, or engage in commerce with persons unwilling to accept them, the Liberty Dollar was intended to be a practical, usable medium of exchange with lasting value, which Americans could voluntarily choose to exchange among themselves. For the Government — operating under a faulty view of the powers delegated Congress under Article I, Section 8, Clauses 5 and 6, and thus a faulty view of the proper scope of 18 U.S.C. § 486 — the fact that someone had the temerity to compete with official U.S. currency constituted, by definition, criminal conduct. *See* Indictment ¶¶ 31 and 33.

This operative assumption was rife throughout the indictment. For example, paragraph 12 stated, "NORFED intends for the Liberty Dollar to be used as current money in order to limit reliance on, and to **compete** with, United States currency." (Emphasis added.) Paragraph 13 stated, "Because NORFED, as a core belief, views United States currency as worthless, it intends the Liberty Dollar to be used as current money in order to limit reliance on, and to **compete** with, Federal Reserve Notes and coinage." (Emphasis added.) Certain paragraphs, starting on page 6, even contained a headnote entitled "2006 Warning by the United States Mint." Paragraph 28 asserted the Mint made a "public service announcement" that "the Department of Justice had determined that the use of Liberty Dollars as circulating money was a federal crime." These sections, along with others in the indictment, convey the notion that competition is nefarious and criminal.

Paragraph 33 was the indictment's capstone, revealing the Government's operative assumption that U.S. currency is an **exclusive monopoly**, vis-à-vis even private American citizens. Thus, the paragraph concluded: "[I]t is a violation of law for private coin systems to **compete** with the official coinage of the United States." (Emphasis added.) Although this specific paragraph was redacted before the indictment was given to the jury,[39] the Government's anti-competition theory of the case remained. While redaction of paragraph 33 was warranted in view of the jury's role to determine the facts, and the court's role to instruct on the law, it came far too late, and accomplished far too little, given the overriding thrust of the indictment which told the jurors that competing with U.S. currency was itself the criminal offense in this case.

B. The Verdicts Against Mr. von NotHaus on All Three Counts Must be Set Aside.

Count III. Because the Tenth Amendment reserves to the People the right to create a medium of exchange so long as it does not counterfeit U.S. currency, the Government's main theory of the case is wrong. Accordingly, any verdict on Count III against Mr. von NotHaus for violation of 18 U.S.C. § 486 — on a theory of competition with U.S. currency — must be set aside. A criminal statute construed and applied in violation of the Constitution is unenforceable. *See* Brown v. Kelly, 244 F.R.D. 222, 234 (S.D.N.Y. 2007).

Count I. As for the conspiracy count (18 U.S.C. § 371), Count I alleged two objects: (i) 18 U.S.C. § 485 (counterfeiting) and (ii) 18 U.S.C. § 486 (competition). Indictment ¶ 46. The verdict sheet allowed only a general verdict, leaving the jury no way to make a distinction

[39] Copies of the indictment were apparently available in the jury room for all jurors.

between sections 485 and 486. Thus, it is impossible to know from the guilty verdict returned whether the jury convicted on (i) conspiracy to counterfeit, or (ii) conspiracy to compete, or (iii) both. When an indictment alleges more than one object, and one of those objects is not a violation of a federal statute, then a general verdict of guilt is "flawed." *See* Skilling v. United States, 561 U.S. ___, 130 S.Ct. at 2934 ("[C]onstitutional error occurs when a jury is instructed on alternative theories of guilty and returns a general verdict that may rest upon a legally invalid theory.").

The Government might argue that this was harmless error because there was ample evidence showing a conspiracy to violate section 485. But such argument overlooks the jury instruction that the jury could find Mr. von NotHaus guilty of conspiracy if it found that "the alleged object of the conspiracy was to violate **either** (or both)" sections 485 or 486. *See* Instructions, pp. 29-30 (emphasis added). As the jury returned a general verdict on Count I, there is no way of knowing whether the object found by the jury was one or the other. "[T]he proper rule to be applied[,] [then], is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *See* Yates v. United States, 354 U.S. 298, 311-12 (1957). Because a lawful criminal charge (counterfeiting) was mixed in with a criminal charge not permitted under the Constitution (competition) — in a single conspiracy count — the conviction on Count I must be set aside.

Count II. The conviction under Count II, the substantive charge of counterfeiting in violation of 18 U.S.C. § 485, should also be overturned. The first part of Count Two (¶ 48) expressly incorporated by reference into this charge all of the preceding parts of the

indictment. Those parts were primarily concerned with describing what purported to be a criminal activity of competing with U.S. currency. Thus, the whole idea of an "illegal" competition in private coins was inextricably intertwined with standard counterfeiting. If competition is in fact a freedom Americans enjoy, and counterfeiting a crime, then to mix these concepts together as if both are serious and related crimes is to work fatal prejudice against any defendant. There is no way to know whether the jury found the Liberty Dollar to be "counterfeit" because it met the required definition of counterfeit under section 485, or whether the jury found the Liberty Dollar to be counterfeit because it was part of an overall enterprise competing with U.S. currency.

Additionally, the jury may have been confused by the Court's introductory instruction which referred to Counts II and III as though they were virtually equal "counterfeit" charges. Instruction, p. 3. This conflation of the two charges was repeated in the instruction as to the objects of the conspiracy. *See* Instruction, p. 31. Both of these instructions conflicted with the specific instruction on Count III, wherein there was no mention of "counterfeiting" as an element of the offense defined in section 486. *See* Instruction, p. 67. Even though it could be argued that the introductory and conspiracy instruction favored Mr. von NotHaus, imposing upon the government a requirement not provided in section 486, the instructions are nevertheless contradictory. As the U.S. Court of Appeals for the Ninth Circuit has observed: "The difficulty with contradictory instructions is the confusion they must have generated in the jury." *See* United States v. Aguon, 813 F.2d 1413 (9th Cir. 1987). The jury could, indeed, have been confused believing that because the Liberty Dollar was intended to be used as money in competition with official U.S. currency, such an intention was tantamount to an intention to

deceive with counterfeit coin, which would not only violate section 486, but 485 as well. Therefore, the verdict of guilt on Count II should be set aside.

CONCLUSION

For the foregoing reasons, because the U.S. Constitution secures the freedom for American citizens to engage in non-counterfeit competition with U.S. currency, all three guilty verdicts against Mr. von NotHaus must be set aside.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing along with attachment was served this 31st day of May, 2011, by means of the Electronic Filing System for the Western District of North Carolina, upon the following parties:

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This the 31st day of May, 2011.

/s Thomas J. Ashcraft
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