Memorandum:

Federal Tax Law Administration & Enforcement

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(Revision 3: August 27, 2001)

Constitutional Framework for Tax Law Administration & Enforcement

In *Wayman v. Southard* (1825)[1], John Marshall, former chief justice of the Supreme Court of the United States, stated that after ratification of the Fifth, Sixth and Seventh Amendments, Congress had no choice but to make certain provisions in the judiciary act of 1792. In the longstanding precedent case, Marshall cited sections of the act in which Congress specified that all actions at law must proceed in the course of the common law where equity, admiralty and maritime causes proceed in the course of the civil law.[2]

What is today known as the Bill of Rights was an essential element in securing ratification of the Constitution so Government of the United States could convene under the Constitution rather than the Articles of Confederation. The reason for insistence on a bill of rights, which most of the original states had in or attached to their respective constitutions, was to restrict powers of the new central government and secure certain rights so there would be no question concerning due process and other essential rights. Accordingly, the amendments ratified in 1792 were implemented as declaratory and restricting clauses.

Some of the first ten amendments merely restated what was otherwise obvious in the Constitution. For example, the Tenth Amendment is little more than the inverse of Article I, Section 8, clause 18 (Art. I § 8, clause 18):

> [The Congress shall have Power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof.

The Article I § 8 empowering clause shouldn't need clarification, but American founders distrusted central government sufficiently that they wanted certain matters nailed down. The Tenth Amendment provided a rigid shackle:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

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[1] *Wayman v. Southard*, 23 U.S. 1, 6 L.Ed. 253, 10 Wheat 1

[2] As is the case for many terms used in law, the term "civil" has several meanings. Causes of action, e.g., cases a government may prosecute, fall within two general categories, one being civil and the other criminal. Civil law systems v. common law systems are types of systems where due process in the course of the common law and due process in the course of the civil law are judicial processes unique to the two systems. Application of the term "civil" must be determined by context.

When taken together, Art. I § 8, clause 18 and the Tenth Amendment might be viewed as a box with a lid on it. Congress has complete responsibility for enacting legislation that enables all three branches of federal government to carry out duties prescribed by the Constitution; the Tenth Amendment prohibits Government of the United States from exercising any power not enumerated in the Constitution. If there is need for additional or expanded powers, the Constitution must be amended.

The amendment process is prescribed by the Constitution itself. Two-thirds of the House of Representatives and the Senate must approve a proposed amendment initiated by Congress then three-fourths of the state legislatures must approve the proposed amendment. In the meantime, legislative and judicial branches cannot do anything unless or until Congress through legislation specifies what can be done and how duties are to be carried out.

Marshall's *Wayman v. Southard* decision is among the more important early examinations of federal jurisdiction. In it, he addressed two questions. The first was, "What can Congress do?" The second was, "What has Congress done?" The actual subject was authority of courts of the United States within States of the Union, but determination of the issue hinged on what authority the Constitution prescribed for the courts and what Congress had done by way of legislation to empower courts of the United States to carry out jurisdictional responsibilities.

Jurisdiction available to courts of the United States is prescribed at Art. III § 2, reproduced here in relative part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers, and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party, etc.

For purposes of this memorandum, two of the above clauses are relevant. Cases in law and equity "arising under" the Constitution and laws of the United States, and admiralty and maritime jurisdiction. Law and equity are normally land-based causes that might arise under federal authority in States of the Union where admiralty and maritime jurisdictions apply to foreign trade and matters relating to ocean-going vessels. Disputes relating to trade agreements and treaties normally fall within admiralty and maritime jurisdiction. Where controversies between the American people and Government of the United States are concerned, litigation must proceed as a common law action unless there is a legitimate admiralty or maritime issue. This is what Marshall was talking about when he said that once the Fifth, Sixth and Seventh Amendments were ratified, Congress had no choice.[3]

Common law as such is not the issue. Common law is a body of largely unwritten law that isn't dependent on legislation. Offenses such as murder, rape and burglary are recognized as criminal acts in virtually all nations, societies and localities whether there

[3] The judiciary act of 1792 is at 1 Stat. 275, Chapter 36. See § 2, 1 Stat. 276, concerning writs, forms of action, etc. In *Wayman v. Southard*, Chief Justice Marshall provided a reasonably thorough accounting of how procedural rules for courts of the United States were adopted and developed.

is organized government or not. Additional common law grows out of usages and customs that provide remedies to offenses and disputes within any given nation or society. In the English-American lineage of jurisprudence, particulars of common law have been judicially declared. The cornerstone, which provides a certain amount of uniformity, is adherence to time-proven principle.

In the American system, government of the United States and governments of States of the Union are established and empowered by their respective written constitutions. Within any given state, government of the state has general jurisdiction concurrent with borders of the state so retains what is known as common law jurisdiction. Conversely, Government of the United States has only powers itemized in the Constitution of the United States, and Congress must put constitutionally enumerated powers into motion through legislation.

Written law enacted by legislative authority is known as positive law. Most state legislatures have enacted statutes for common law crimes so a majority of contemporary law, even where underlying crimes and various civil causes of action are common law in nature, is in positive law form. However, federal government does not have common law jurisdiction in States of the Union. All offices, departments and agencies of federal government are creatures of law, whether created by the Constitution or Congress, and they have only the authority and power vested in them by written positive law. Within States of the Union, federal authority is special and limited.

Analogously, federal government exists in the framework of a play. The play has a written script. Each actor has his role in the play, the role prescribed by positive law, and as he acts out his role, limits to what he can and cannot do with respect to situational improvisation are judicially declared. Somewhat the same principle applies to state and local government personnel, but their respective roles are somewhat broader as they have general rather than special jurisdictional powers.

In *Wayman v. Southard*, Marshall addressed some of the jurisdictional issues in the context of jurisdiction the Constitution authorizes for courts of the United States, but the matter at issue for purposes here is judicial process – the manner in which a court reaches decisions and executes judgments. Due process in the course of the common law does not depend on common or unwritten law as such, nor does civil law process depend on written law as such. Analogously, oxidation that produces rust is a process or procedure in the same sense that judicial process or procedure is the means by which courts of competent jurisdiction reach and enforce judicial remedies.

Civil law procedure developed in early maritime nations and reached its zenith in the declining years of the Roman Empire. The process, e.g., the manner of proceeding, permits mixed pleadings where the judicial officer is responsible for sorting out fact and law. In civil law proceeding, the judicial officer makes his determination more or less independently.

One of the more serious frustrations with civil law process can be traced to the Roman system where there was an underlying presumption that “the will of the prince is law.” Because of the presumption, which has been commonly manifest in civil law systems through the ages, justice is unreliable as it is characteristically incidental to

objectives of entrenched powers. Interpretation and application of law may change from one regime to the next without the law itself being changed.

Conversely, the common law due process system rests on time-tested principles that through the ages have been historically proven and judicially declared. Due process in the course of the common law is particularly important where a state or nation supposes to be under law rather than the iron will of executive authority. One of the reasons for its more reliable character is that common law process preserves the two great branches of natural law.[4] In theory, a new prince, king or president cannot unilaterally discard historical precedent simply because he has a political agenda.

In our system, law remains the same throughout time. Once enacted, any given law means the same thing and has the same application from then until it is repealed.

Where common law process is concerned, the generally recognized point of demarcation for English-American jurisprudence was the Magna Charta, endorsed by King John I in 1215. English barons revolted against John as he commandeered forests and other lands and otherwise used what amounted to executive or admiralty courts to inflict considerable injury on British subjects. The next major conflict came in 1640 when Scottish Presbyterians revolted against draconian Anglican ecclesiastical courts.[5] Once the revolt was under way, Englishmen joined in what is known as the Popular Rebellion to do away with Charles' ecclesiastical and Star Chamber courts, both of which were politically oriented and cruel.

The Glorious Revolution of 1688 was due in part to a convoluted justice system. Less than a century later, the American Revolution was sparked largely because of vice-admiralty courts under George III. In fact, John Hancock was given the honor of being first to sign the Declaration of Independence because he had recently escaped clutches of an English vice-admiralty court.

The hue and cry from approximately 1760 until hostilities commenced at Lexington and Concord was that King George III and Parliament were depriving Americans of constitutional rights secured to Englishmen. Even though the English didn't

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[4] In the Declaration of Independence, American founders justified severance from British rule by the "Laws of Nature and of Nature's God." The former is physical law, the latter is moral law. Since St. Augustine and subsequently St. Thomas Aquinas wrote on the subject of natural law, Christian nations have generally acknowledged that secular law enacted by man cannot abridge or contradict natural law without disastrous social and cultural repercussions.

[5] In 1628, Charles disbanded Parliament, which wasn't convened again until after the Popular Rebellion. One of his major projects was purging the Church of England, i.e., the Anglican Church. Anglican separatists, e.g., what Americans know as Puritans, settled Massachusetts Bay Colony in 1628 and after to escape Charles' persecution. Governor John Winthrop, who in 1636 was responsible for the first written American secular government constitution, migrated to Massachusetts in 1630. The Pilgrim Mayflower Compact, drafted in 1620, provided the conceptual base for the Massachusetts Bay Colony constitution. Immigration to North American and other British colonies accelerated throughout the period. In the course of the rebellion, the Earle of Suffix, head of Charles' Star Chamber court, was beheaded and the chief judge of the ecclesiastical court was delegated to the Tower of London. Rebellion leaders were vindictive enough that they nearly purged the law profession. English attorneys and judges fled to France, North American colonies and wherever else they could find refuge. By the end of the century, Virginia colonial leaders openly referred to the unwanted transplants as vermin.

have a formal written constitution, centuries of struggle produced several documents such as the Magna Charta that listed rights and principles necessary to maintain civilized society and the common good. Powers of the English monarch and Parliament were constrained by essential and substantial rights declared in the cornerstone documents. If and when government transgressed the substantial rights, it was usurping power reserved by the people.

When legislatures of the original American states ratified the first ten amendments, those responsible knew exactly what they were doing.[6] Many of the due process amendments merely restate sections from the Magna Charta. In the preceding five and a half centuries, English-speaking peoples had fought the same fight with despotic rulers frequently enough that it wasn't necessary to invent anything new when they constructed the Fifth, Sixth and Seventh Amendments. This is what prompted Marshall to say Congress had no choice in the judiciary act of 1792 when the legislation specified that all actions in law would proceed in the course of the common law.

Responsibility for bearing the burden of proof is another important difference between civil law and common law process. In many nations that implement civil law process, the defendant must prove innocence where common law process places the burden of proof on the advocate, particularly when the plaintiff is government.

The Spanish Inquisition and other inquisitions in the last several hundred years were little more than Star Chamber courts, the infamous Salem witch hunts were conducted under civil law or what amounted to summary procedure, and there are hundreds of other examples, including the royal statute responsible for Daniel being thrown into the lions' den[7] and Nazi law imposed on the domestic population after 1935 in pre-war Germany.

There are certain essentials in a case or controversy at law. Facts must be clearly established and law must be separately established. With the two principal elements segregated and soundly in place, the advocate must then prove application of law to established facts. If the advocate of a position cannot prove application of law to the fact circumstance or event, the defendant is not liable, whether in civil or criminal forums. Proof of facts requires a competent witness who has first-hand knowledge of facts he or she verifies through testimony.[8] Proceedings must be open to the public, they cannot be closed and secret. Another indispensable element is the right to trial by jury.

For the sake of analogy, consider a dog someone brings home for the first time. When he is turned loose in the fenced back yard, at the first opportunity the dog explores

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[6] Twelve were originally proposed. Ten of the twelve were ratified in 1792.

[7] See Daniel, chapter 6. This is a case where a king, e.g., a chief executive, was duped by advisors who had ulterior motives. The plot backfired, but the example characterizes the civil law system where "the will of the prince is law."

[8] The need for a competent witness has biblical roots. In original covenant law God established for Israel, a false witness was subjected to whatever penalty or punishment the victim of false testimony would have suffered had he been guilty of the claim or offense. In theory, if not practice, contemporary law also deals harshly with perjury and false accusations. Bearing false testimony is serious enough that the Ten Commandments condemn it – the prohibition is quite literally carved in stone.

outer limits of his new domain. The fence is his boundary. If he doesn't already know them, he then begins learning rules of the house. The master of the house, who analogously is the sovereign authority, establishes the rules. In the American system, the people are sovereign.

This is the purpose of the first ten amendments, the declaratory and restrictive clauses. For purposes of this memorandum, the Fourth, Fifth, Sixth and Seventh Amendments are on the order of a fence for the dog. The federal government department, agency, officer or employee cannot encumber or abridge what are known as substantive rights secured by these amendments.

Since Congress has no choice in matters where these declaratory and restrictive amendments secure substantive rights, administrative and judicial procedure must be read in the context of rights the amendments secure. In fact, Congress imposed this same restraint on the U.S. Supreme Court when delegating authority to construct rules of procedure and evidence. The restriction is found in section 2072(b) of Title 28 of the United States Code (28 U.S.C. § 2072(b)): "Such rules shall not abridge, enlarge or modify any substantive right."

The four key amendments are being reproduced in their entirety then relevant portions that declare rights or restrict government power are isolated in a list.

The Fourth Amendment is as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The Fifth Amendment is as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger; nor shall any person be subject for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Sixth Amendment is as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The Seventh Amendment is as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact, tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Article III § 2 "arising under" clause and these four amendments provide the basic fence and rules of the house for federal government. This is particularly the case for revenue laws as the Supreme Court of the United States and virtually all state supreme

courts have declared that any and all adverse actions under revenue laws are criminal in nature. Where tax matters are concerned, there is always the possibility of criminal prosecution so all elements of the amendments are at all times applicable.

The following list segregates elements of the amendments that are declaratory or restrictive.

1. The people have the right to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures;

2. No warrant [which includes summonses, subpoenas or any other "search" or "seizure" instrument] shall issue without (1) probable cause[9] supported by (2) oath or affirmation;[10]

3. The warrant, summons, subpoena or whatever must describe with particularity the place and the person and/or things to be seized [or otherwise taken];

4. Federal prosecution for felony offenses can be only by presentment or indictment of a grand jury;

5. There cannot be double jeopardy for the same offense;

6. A defendant cannot be compelled to testify against himself in a criminal action;

7. People cannot be deprived of life, liberty or property without due process of law [in the course of the common law];

8. Everyone who is accused of a crime is entitled to a speedy and public trial;

9. The trial must be in the State and the district where the offense is committed, and the district must have been previously established by law;

10. The defendant is entitled to know the nature of an action against him;[11]

11. The defendant is entitled to know the cause of an action against him;

12. The defendant is entitled to confront adverse witnesses;

13. The defendant is entitled to compel testimony in criminal matters;

14. The defendant is entitled to [competent] counsel for defense in criminal matters;

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[9] The "probable cause" requirement mandates that whoever is responsible for a complaint must appear before a committing magistrate.

[10] Rule 3 of the Federal Rules of Criminal Procedure requires that the complaint must be in written form, e.g., there must be an affidavit of complaint. Where tax matters are concerned, those who are authorized to make complaints are specified by 18 U.S.C. § 3045.

[11] The "nature" of an action is a jurisdictional matter. In other words, is the complaint or claim an action at law or is the procedure admiralty or maritime? What are the taxing and liability statutes, along with implementing regulations? The "cause" of action includes the factual transaction, event or circumstance giving rise to the complaint.

> 15. Whether defendant or plaintiff [First Amendment right to petition for redress of grievance], the parties are entitled to trial by jury for any controversy where the value of the claim exceeds twenty dollars; and
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> 16. No court of the United States may re-examine any fact tried by jury except according to the rules of the common law.

At first blush it might seem irregular to classify a summons with a warrant, but that isn't the case. The greater includes the lesser. For example, Article I § 9, clause 3 of the Constitution specifies that, "No Bill of Attainder or ex post facto Law shall be passed." On several occasions the U.S. Supreme Court has addressed the prohibition against bills of attainder. They have consistently ruled that intent of the prohibition includes a ban against bills of pains and penalties. The antecedent principle where searches and seizures are concerned was articulated in *United States v. Jacobsen, et al*, 466 U.S. 109; 104 S.Ct. 1652; 80 L.Ed. 2d 85 at 94:

> The first Clause of the Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated …." This text protects two types of expectations, one involving "searches," the other "seizures." A "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. [FN 4] A "seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property ….

Any initiative by a government officer, agent or employee who supposes to penetrate privacy of the American people is effecting a search and any initiative that in any way encumbers property of any kind constitutes a seizure. Either must be supported by an affidavit that is submitted under oath or affirmation in a probable cause hearing before a duly authorized magistrate. An administrative department or agency cannot unilaterally execute summonses or seizures without meeting Fourth Amendment criteria. The role of magistrate is a quasi-administrative ministerial function, but in our system of jurisprudence it must be exercised in conjunction with and under auspices of a court of competent jurisdiction.

One of the contemporary rulings by the U.S. Supreme Court that reinforces Marshall's conclusion in *Wayman v. Southard, supra*, is *Miranda v. Arizona* (1966), 384 U.S. 384, at 491: "Where rights secured by the Constitution are involved, there can be no rule making or legislation that would abrogate them."

With *United States v. Jacobsen, et al*, *Miranda v. Arizona* and substantive rights listed above as guides, we are forced to conclude that one of two things is true where administration of internal revenue laws is concerned: Internal Revenue Service personnel routinely exceed lawful authority or internal revenue laws of the United States are patently unconstitutional. Internal Revenue Service personnel regularly issue administrative summonses that are not under seal of a court of competent jurisdiction, they administratively issue notices of federal tax lien that are not under authority of a court of competent jurisdiction, they levy bank accounts, garnish salaries, etc., and they seize and dispose of real and personal property without court orders authorizing levy, garnishment, seizure and disposal.

The seeming conflict is resolved by reading administrative and judicial process relating to revenue laws in the context of substantive rights and procedural requirements

listed above. The balance of this memorandum demonstrates that there is precious little wrong with the law. Whether they realize what they are doing or not, Internal Revenue Service personnel embark on criminal acts when they encumber, seize and/or dispose of assets without judicial process that proceeds to judgment.

Reconciling the United States Code

The Internal Revenue Code, classified as Title 26, is one of fifty titles in the United States Code. The United States Code is not law as such. It is a classification system. Laws of the United States are published annually in the Statutes at Large. New laws and amendments to existing laws are subsequently classified in the United States Code. Even though there are fifty titles, each is part of the whole; there are not fifty separate United States Codes. A title in the Code is simply the first subdivision in the classification system much as a library is divided into sections according to type.

The first edition of the United States Code was published in 1926. It compiled laws of the United States then in existence, with the compilation based on the Revised Statutes of 1878 and session laws published in the Statutes at Large through 1925.[12]

Any given title does not contain all law relating to any given subject. Using internal revenue laws of the United States as an example, there are sections and in some cases complete chapters in Titles 4, 5, 18, 19, 20, 27, 28, 31, 42, 48 and several other titles relating to taxes and tax administration that are in some way addressed in the Internal Revenue Code.[13] Likewise, most titles in the United States Code contain sections that prescribe criminal penalties even though Title 18 is designated as the criminal code, and most titles contain sections pertaining to court jurisdiction and procedure even though Title 28 is designated as the judicial and civil procedure title.[14]

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[12] Preface documents for the 1926 edition of the United States Code are presently published in the forward of Title 48.

[13] One of the prime examples, which is addressed in this memorandum, is IRS seizure authority. All IRS seizures are based on 26 U.S.C. § 7302, "property used in violation of internal revenue laws." The delegation of authority is Treasury Delegation Order #157, which specifies that the seizure must be in the framework of Part 403 of Title 26 of the Code of Federal Regulations (26 CFR § 403). Where there is a seizure under this regulation, it is based on the presumption that the property seized has been involved with one of the drug-related commercial crimes listed in the regulation. The controlling code section is in Title 19, customs laws. The exit from the Internal revenue Code is 26 U.S.C. § 7327, "customs laws applicable."

[14] The current Title 18 is based on the Criminal Code of 1909, as amended, which was published in the Statutes at Large, and the current Title 28, Code of Civil Procedure, is based on the judiciary act of 1911, as amended. The 1940 edition was the benchmark edition that provided the point of demarcation for serious convolution of the United States Code in 1948 and after. Prior to 1940 there were legislative irregularities particularly with respect to terms and proper entity identities. Amendment bills in summer 1948 corrected most of the irregularities prior to Congress unilaterally enacting Titles 18 and 28 as positive law titles. The President has never signed the United States Code into law, as the Constitution requires, so it simply cannot be law as such.

There is the further problem of people reading various titles of the United States Code sequentially as though they are constructed so administrative and judicial procedure follow the order of sections. That simply isn't the case.

For example, Subtitle F of the Internal Revenue Code contains administrative and judicial procedure relative to internal revenue laws. Most administrative sections are numbered in the 6000 series where judicial sections are in the 7000 series. If we read Title 26 in sequential order, it would appear that the Secretary of the Treasury has authority to administratively issue liens (26 U.S.C. § 6321) and levies (26 U.S.C. § 6331) prior to initiating a civil action to collect contested tax obligations (26 U.S.C. § 7402). It would appear that Internal Revenue Service personnel legitimately issue administrative summonses without going through a court of law (26 U.S.C. §§ 7602 & 7603). However, if the Secretary has authority to issue and enforce administrative summonses, encumber assets with notices of lien, levy assets with notices of levy, administratively garnish wages and administratively seize assets, the Bill of Rights is of no effect and Congress has overturned eight centuries in the evolution of English-American jurisprudence. However, while Congress and the courts routinely accommodate Internal Revenue Service usurpation of power, the law doesn't.

Proper construction of the law strung around in the classification system requires interpretation in the context of substantive rights before concluding that any given statute is unconstitutional. That matter is made possible by unlocking a few mysteries.

One important mystery is resolved by realizing that each title of the Code incorporates a disclaimer. The Internal Revenue Code disclaimer is at 26 U.S.C. § 7806(b), "Arrangement and classification."

> No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title, nor shall any table of contents, table of cross references, or similar outline, analysis, or descriptive matter relating to the contents of this title be given any legal effect. The preceding sentence also applies to the sidenotes and ancillary tables contained in the various prints of this Act before its enactment into law.

Title 26 has never been enacted as "positive law", but whether or not any given title has been enacted as positive law is irrelevant. The Code as a whole and as individual titles is not law as such, and even titles such as Titles 18 and 28, which Congress unilaterally declared to be positive law in 1948, include disclaimers. The disclaimer for Title 28 is § 33 of the Act of June 25, 1948, Chapter 646, 62 Stat. 985, et seq.:

> Sec. 33. No inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure, as set out in section 1 of this Act, in which any section is placed, nor by reason of the catchlines used in such title.

If no inference of legislative construction can be drawn by reason of the placement of sections, chapters, catchlines or anything else in any given title of the Code, including so-called positive law titles, it is reasonable to investigate how administrative and judicial process prescribed in the whole Code, not just one isolated title, can be reconciled with substantive rights and due process prescribed by Article III § 2 the Constitution. This is the only way to avoid the conclusion that Congress has legislatively authorized administrative and judicial overthrow of the Constitution.

The Judicial Role in Contested Tax Administration

So long as Treasury Department officers and employees are doing routine chores in a cooperative environment where there is no significant controversy, they are simply performing ministerial duties. Where regulated enterprises are concerned, they do periodic on-site inspections, review records and documentation of various sorts, and otherwise monitor the enterprise to verify that it complies with revenue laws.

In the course of these functionary tasks, the revenue officer and the taxpayer may have differing opinions concerning application of law, what does or doesn't constitute deductible expenses, and sundry other issues ranging from accounting practice to mathematical errors. So long as obvious errors can be corrected through direct agreement and differences of opinion can be resolved through a reasoned approach that results in a meeting of minds, the error or difference does not rise to the level of a case or controversy "arising under" the Constitution and laws of the United States.

However, once Treasury Department personnel resort to use of summonses for investigative purposes and begin executing liens, levies and seizures that are non-consensual and punitive in nature, the situation is adversarial and requires judicial process. The difference has elevated to the point it is a case or controversy arising under the Constitution and laws of the United States. If the controversy is land-based within States of the Union, it falls within parameters of the arising under clause in Article III § 2 of the Constitution and proceedings must be in the course of the common law. If the fact circumstance, transaction or event involves foreign commerce that falls within parameters of regulated enterprise, admiralty and maritime jurisdiction applies. Within certain limits, including the right to trial by jury, the matter may proceed in the course of the civil law. In any event, substantive rights secured by the Fourth, Fifth, Sixth and Seventh Amendments restrict administrative and judicial powers and the government bears the burden of proof for whatever claim is made.

It is useful to examine Code sections and other authorities for summonses, liens and levies in the context of Article III § 2 and substantive rights secured by due process amendments. For example, the lien authority of 26 U.S.C. § 6321 is dependent on a predetermination of liability:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property or rights to property, whether real or personal, belonging to such person.

The key in this section is, "If any person liable to pay any tax...," refuses to pay the tax, etc., the amount shall be a lien. It is obvious that Government of the United States must sue to secure a judgment prior to executing a lien if an alleged tax liability is contested. If this section had general application for collection of taxes imposed by any and all internal revenue laws of the United States,[15] a civil action for collection would

[15] The Parallel Table of Authorities and Rules, located in the Index volume of the Code of Federal Regulations, lists the primary implementing regulation for 26 U.S.C. §§ 6321, 6331 and other sections in this series as 27 CFR Part 70, which relates to distilled spirits and is under Bureau of Alcohol, Tobacco and Firearms jurisdiction. In the event licensing in a regulated industry such as production and distribution of distilled spirits incorporates a stipulation that delinquency results in a lien against production and

have to be initiated in compliance with 26 U.S.C. § 7401 & 7402, then procedure would have to comply with requirements of the Federal Debt Collection Act in Chapter 176 of Title 28. The judgment lien is prescribed at 28 U.S.C. § 3201.

The debt covered by the Federal Debt Collection Act is defined at 28 U.S.C. § 3002(3):

> (A) an amount that is owing to the United States on account of a direct loan or loan insured or guaranteed, by the United States; or
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> (B) an amount that is owing to the United States on account of a fee, duty, lease, rent, service, sale of real or personal property, over-payment, fine, assessment, penalty, restitution, damages, interest, tax, bail bond forfeiture, reimbursement, recovery of a cost incurred by the United States, or other source of indebtedness to the United States, but that is not owing under the terms of a contract originally entered into by only persons other than the United States… [Underscore added for emphasis]

The Federal Debt Collection Act lists all categories of obligations that might arise under internal revenue laws of the United States with the exception of a criminal forfeiture. The civil action must issue for collection of tax, interest, penalties, assessments, over-payments, et al. Further, as 28 U.S.C. § 3001 specifies, litigation under authority of the Federal Debt Collection Act is the exclusive remedy unless there is some contrary law concerning any given controversy:

> § 3001. Applicability of chapter
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> (a) In general. Except as provided in subsection (b), the chapter provides the exclusive civil procedures for the United States--
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> (1) to recover a judgment on a debt; or
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> (2) to obtain, before judgment on a claim for a debt, a remedy in connection with such claim.
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> (b) Limitation. To the extent that another Federal law specifies procedures for recovering on a claim or a judgment for a debt arising under such law, those procedures shall apply to such claim or judgment to the extent those procedures are inconsistent with this chapter [*28 USCS § § 3001* et seq.].[16]

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distribution assets, the lien might be administratively executed. There are no corresponding listings for 26 CFR Part 1 or 31, the former pertaining to the normal tax imposed by Chapter 1 and the latter to employment taxes (social welfare taxes) imposed by Chapters 21-23 of the Internal Revenue Code, for 26 U.S.C. § 6321. The reason is because these sections are derived from 1860's legislation that applied to distilled spirits and in some cases cotton and tobacco products. The sections have never been amended for general application. However, a clause was inserted in 26 U.S.C. § 6331 relative to government agencies and personnel withholding at the source. It appears that application was intended to accommodate the Public Salary Tax Act of 1939 or the Victory Tax, but the implementing regulation remains in 27 CFR Part 70.

[16] There are numerous court decisions that give credence to unilateral administrative liens, garnishments and the like under authority of 26 U.S.C. §§ 6321, 6331, et al, but these are decisions where judges may have given right answers to wrong questions. Even Internal Revenue Service rules for administrative appeals acknowledge substantive rights at 26 CFR § 601.106(f)(1): "Rule I. An exaction by the U.S. Government, which is not based upon law, statutory or otherwise, is a taking of property without due process of law, in violation of the Fifth Amendment to the U.S. Constitution."

> (c) Amounts owing other than debts. This chapter [*28 USCS § § 3001* et seq.] shall not apply with respect to an amount owing that is not a debt or to a claim for an amount owing that is not a debt. [Underscore added for emphasis]

The Federal Debt Collection Act is the exclusive remedy for collection of tax-related debt unless procedure prescribed in some other law is inconsistent with that prescribed by the Act.

Black's Law Dictionary, 6th edition, defines the term "exclusive" as follows:

> **Exclusive**. Appertaining to the subject alone, not including, admitting, or pertaining to any others. Sole. Shutting out; debarring from interference or participation; vested in one person alone. Apart from all others, without the admission of others to participation. People on Complaint of Samboy v. Sherman, 158 N.Y. S.2d 835, 837.

In the context of Article III § 2 of the Constitution, the only alternative where the American people are concerned would be an action that falls within admiralty and maritime jurisdiction. In that event, procedure would have to comply with Supplemental Admiralty and Maritime Rules A through F of the Federal Rules of Civil Procedure. Criminal forfeiture in the context of Chapter 75, Subchapter C of the Internal Revenue Code (26 U.S.C. §§ 7301 through 7328) proceeds under authority of Rule 41 of the Federal Rules of Criminal Procedure. In either case, judicial process is required.[17]

An unpaid tax obligation is a debt. It's that simple. If the United States secures a favorable judgment on an alleged tax liability, the judgment lien may be secured in compliance with requirements of 28 U.S.C. § 3201:

> (a) Creation. – A judgment in a civil action shall create a lien on all real property of a judgment debtor on filing of certified copy of the abstract of the judgment in the manner in which a notice of tax lien would be filed under paragraphs (1) and (2) of section 6323(f) of the Internal Revenue Code of 1986. A lien created under this paragraph is for the amount necessary to satisfy the judgment, including costs and interest. [Underscore added for emphasis]

The filing requirement at 26 U.S.C. § 6523(f)(1) & (2) is as follows:

> (f) Place for filing notice; form.
>
> (1) Place for filing. The notice referred to in subsection (a) shall be filed--
>
> (A) Under state laws.
>
> (i) Real property. In the case of real property, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated; and
>
> (ii) Personal property. In the case of personal property, whether tangible or intangible, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated, except that State law merely conforming to or reenacting Federal law establishing a national filing system does not constitute a second office for filing as designated by the laws of such State; or
>
> (B) With clerk of district court. In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State has not by law designated one office which meets the requirements of subparagraph (A); or

[17] The only significant exception is property valued at $2,500 or less seized for criminal forfeiture. See 26 CFR § 403.26. In the event value exceeds $2,500, it must be judicially forfeited. See procedure in the balance of 26 CFR § 403 and 19 U.S.C. §§ 1613 & 1618. This subject is treated in more detail *infra*.

> (C) With recorder of deeds of the District of Columbia. In the office of the Recorder of Deeds of the District of Columbia, if the property subject to the lien is situated in the District of Columbia.
>
> (2) Situs of property subject to lien. For purposes of paragraphs (1) and (4), property shall be deemed to be situated--
>
> (A) Real property. In the case of real property, at its physical location; or
>
> (B) Personal property. In the case of personal property, whether tangible or intangible, at the residence of the taxpayer at the time the notice of lien is filed.
>
> For purposes of paragraph (2)(B), the residence of a corporation or partnership shall be deemed to be the place at which the principal executive office of the business is located, and the residence of a taxpayer whose residence is without the United States shall be deemed to be in the District of Columbia.

The first procedural conformity requirement specified by 28 U.S.C. § 3201(a) is that a notice of lien, filed subsequent to judgment, must include an abstract of the judgment. Internal Revenue Service personnel are or should be aware of this requirement as the back of Form 668(Y)(c) provides space for the judgment abstract. If and when the judgment abstract is not completed, the notice of federal tax lien that might be sent to a county recorder or some other office designated by state law is an uttered instrument issued under color of law. A notice of lien is evidence of a lien only when it identifies the underlying judgment sufficiently for the case to be easily found.

Under both state and federal law, notices and other official documents, including summonses, notices of lien, notices of levy or any other such instrument, must be verified under seal of the issuing authority. Where federal courts and agencies are concerned, Rule 902 of the Federal Rules of Evidence controls:

> Rule 902. Self-authentication
>
> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> (1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.
>
> (2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

Each state has corresponding requirements in its rules of evidence. Additionally, the Uniform Federal Tax Lien Filing Act, which has been adopted in approximately twenty-two states, specifically requires signatures on notices of lien to be verified. Rules of evidence and procedure address the matter otherwise. If the document isn't under official seal and signed by someone who has custody of the record and/or the seal, it is not admissible as evidence in courts of law, nor can it be filed as an authentic legal instrument in any state or federal government office that maintains public records.

Rule 44 of the Federal Rules of Civil Procedure prescribes criteria for verification of domestic documents:

> Rule 44. Proof of Official Record
>
> (a) Authentication.
>
> (1) Domestic. An official record kept within the United States, or any state, district, or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.

In the case of a notice of lien, completion of the judgment abstract on the back of Form 668(Y)(c) might be adequate so far as that element of disclosure is concerned, but the signature on the notice of lien must be verified and under seal, with the issuing officer's signature verified by signature of the officer who has custody of the seal if the issuing officer himself does not have it. Ideally, the issuing officer should have custody of the judgment or at least have first-hand knowledge that the judgment exists. See requirements for testimony prescribed by Rule 43 of the Federal Rules of Civil Procedure and Rules 601 & 602 of the Federal Rules of Evidence.

Per 26 U.S.C. § 6523(f)(1) & (2), a notice of lien must issue against real or personal property, not both simultaneously. In either case, the instrument must be specific with respect to property it encumbers.

Another element of routine IRS document fraud on notices of lien, notices of levy and seizure instruments is failure to identify the tax at issue. The left column on notices of lien and levy requires identification of a "kind of tax." Rather than identifying the tax at issue, IRS personnel enter a form number such as "1040" or "1041".

This might be a non-issue if the Internal Revenue Service administered only one or two kinds or classes of tax, but eight classes colorably fall under IRS subject matter jurisdiction. Any given return might consolidate several kinds or classes.

Each class of tax, each penalty, and the accrued interest for each class, must be separately assessed in compliance with requirements of 26 U.S.C. § 6203 and 26 CFR § 301.6203-1. Until there is a lawful, procedurally proper assessment certificate for each class of tax, each penalty, and accrued interest for each class, there is no liability. The requisite judgment should account for each liability and each should be reflected on ensuing notices of lien, levy and other encumbering and execution instruments. In addition to information required by Form 668(Y)(c), the face of notices of lien and levy should reflect elements of the judgment by identifying the judgment amount for each class of tax, penalties, and interest. When notices merely reflect return numbers and consolidated liability amounts, they do not meet requirements for particularization and specificity. (Fourth and Sixth Amendments)

In order for there to be a tax liability, there must be taxing statute and liability statutes. Penalty statutes in particular do not apply without taxing and liability statutes.

As a tripod, all three legs must be in place in order for civil or criminal penalties to issue. The necessity of these elements was addressed in *United States of America v. Menk*, 260 F. Supp. 784 at 787:

> It is immediately apparent that this section alone does not define the offense as the defendant contends. But rather, all three of the sections referred to in the information - Sections 4461, 4901 and 7203 - must be considered together before a complete definition of the offense is found. Section 4461 imposes a tax on persons engaging in a certain activity; Section 4901 provides that payment of the tax shall be a condition precedent to engaging in the activity subject to the tax; and Section 7203 makes it a misdemeanor to engage in the activity without having first paid the tax, and provides the penalty. It is impossible to determine the meaning or intended effect of any one of these sections without reference to the others.

Additionally, taxing statutes must be specific. This requirement was articulated in *United States of America v. Community TV, Inc.*, 327 F.2d 79 (10th Cir., 1964):

> Without question, a taxing statute must describe with some certainty the transaction, service, or object to be taxed, and in the typical situation it is construed against the Government. *Hassett v. Welch, 303 U.S. 303, 58 S. Ct. 559, 82 L. Ed. 858.*

Where notices of lien and levy issued by Internal Revenue Service personnel do not meet the minimum requirement for identifying the kind or class of tax, they would be uttered instruments even if the Service had authority to unilaterally encumber, garnish and otherwise seize assets. Without itemizing assessment and judgment particulars on the face of notices of lien and levy, IRS personnel avoid conspicuously required documentation and disclosure.

General judgment enforcement remedies under the Federal Debt Collection Act are set out at 28 U.S.C. § 3202:

> (a) Enforcement remedies. – A judgment may be enforced by any of the remedies set forth in this subchapter. A court may issue other writs pursuant to section 1651 of title 28, United States Code, as necessary to support such remedies, subject to rule 81(b) of the Federal Rules of Civil Procedure.

Execution is prescribed at 28 U.S.C. § 3203, which includes levy generally, and garnishment is prescribed by § 3205:

> (a) In general. – A court may issue a writ of garnishment against property (including nonexempt disposable earnings) in which the debtor has a substantial nonexempt interest and which is in the possession, custody, or control of a person other than the debtor, in order to satisfy the judgment against the debtor…

Garnishments must comply with requirements of the Consumer Credit Protection Act (15 U.S.C. § 1673), and generally may not exceed twenty-five percent of disposable income. There is a colorable exception to the 25% limit for tax obligations, but the Title 15 section confirms that courts of the United States must execute garnishments for tax obligations:

> § 1673. Restriction on garnishment
>
> (a) Maximum allowable garnishment. Except as provided in subsection (b) and in section 305 [*15 USCS § 1675]*, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment may not exceed
>
> (1) 25 per centum of his disposable earnings for that week, or

(2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 6(a)(1) of the Fair Labor Standards Act of 1938 [*29 USCS § 206*(a)(1)] in effect at the time the earnings are payable, whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).

(b) Exceptions.

(1) The restrictions of subsection (a) do not apply in the case of--

(A) any order for the support of any person issued by a court of competent jurisdiction or in accordance with an administrative procedure, which is established by State law, which affords substantial due process, and which is subject to judicial review.

(B) any order of any court of the United States having jurisdiction over cases under chapter 13 of title 11 of the United States Code [*11 USCS § § 1301* et seq.]

(C) any debt due for any State or Federal tax.

(2) The maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed--

(A) where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual's disposable earnings for that week; and

(B) where such individual is not supporting such a spouse or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week;

except that, with respect to the disposable earnings of any individual for any workweek, the 50 per centum specified in clause (A) shall be deemed to be 55 per centum and the 60 per centum specified in clause (B) shall be deemed to be 65 per centum, if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the twelve-week period which ends with the beginning of such workweek.

(c) Execution or enforcement of garnishment order or process prohibited. No court of the United States or any State, and no State (or officer or agency thereof), may make, execute, or enforce any order or process in violation of this section.

One of the better examples of the United States Code preserving substantive rights is the requirement for litigation prior to garnishment of wages owing to government employees. The requirement is prescribed at 5 U.S.C. § 5512 and applies to Chapter 24[18] of the Internal Revenue Code in particular:

§ 5512. Withholding pay; individuals in arrears

[18] The "employee" is defined at 26 U.S.C. § 3401(c) as follows: "For purposes of this chapter [Chapter 24], the term 'employee' includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term 'employee' also includes an officer of a corporation." An "employer", defined at § 3401(d), merely employs the employee so is the employing department, agency or government corporation. Further, Chapter 24 does not impose a tax; it merely authorizes withholding from wages at the source when there is a liability for Chapter 1 normal taxes or Chapter 21 employment taxes. The Treasury Financial Management Service must authorize the employer to withhold at the source by issuing the Form 8655 Reporting Agent Authorization Certificate. See Internal Revenue Manual § 3.0.258.4 (11/21/97), January 1999 edition on CD. Without TFMS certification, there is no lawful authority for withholding from wages at the source.

> (a) The pay of an individual in arrears to the United States shall be withheld until he has accounted for and paid into the Treasury of the United States all sums for which he is liable.
>
> (b) When pay is withheld under subsection (a) of this section, the employing agency, on request of the individual, his agent, or his attorney, shall report immediately to the Attorney General the balance due; and the Attorney General, within 60 days, shall order suit to be commenced against the individual.

Although it tortures grammar, § 5512 is on point. If a government employee contests claims by a government agency he works for or some other agency attempting to collect debt through the employer agency, the matter must be litigated to resolve the controversy.[19] Government paymasters, who may also function as withholding agents in the context of 26 U.S.C. §§ 1441 et seq., have no more authority to seize wages to satisfy contested obligations than private employers do. The American people are entitled to a day in court before government encumbers or deprives them of life, liberty or property even when government is the employer.

The corresponding provision in the Internal Revenue Code is 26 U.S.C. § 7401, "Authorization":

> No civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced.

The proper process is for the agency that makes a claim to submit the matter for verification by the General Accounting Office, which is general agent of the Treasury, and then GAO may recommend collection litigation to the Attorney General. It appears that GAO has delegated authority for validating tax obligations to the Treasury Financial Management Service, but the Internal Revenue Service generally makes recommendations under what amounts to color of law.[20]

Where criminal prosecution is concerned, the CID investigator must complete Form 9131 specifying what the nature and cause of action are then transmit the recommendation for prosecution under a cover letter. The Attorney General or his delegate must approve a grand jury investigation before the local U.S. Attorney can pursue prosecution.

Both 5 U.S.C. § 5512 and 26 U.S.C. § 7401 and requirements for criminal prosecution comply with § 5 of Executive Order #6166 of June 10, 1933, as amended:

> § 5. Claims By or Against the United States
>
> The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States and of defending claims and demands

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[19] Another colorable exception is the situation where child support is collected through government agencies and tax refunds are encumbered on child support claims. This exception is predicated on the notion that an antecedent judgment awarding child support is effective against any and all assets of the delinquent parent and can be administratively executed without additional litigation.

[20] The Internal Revenue Service has authority to administer Chapter 1, 2 & 21 taxes in insular possessions. See 26 U.S.C. § 7701(a)(12)(B). No internal revenue districts have been established in States of the Union in compliance with requirements of 26 U.S.C. § 7621, Executive Order #10289 and the Federal Register Act, 44 U.S.C. § 1505(a). Therefore, virtually all IRS collection and enforcement actions in States of the Union are under color of law. This matter is addressed in the course of this memorandum.

against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

For the exercise of such of his functions as are not transferred to the Department of Justice by the foregoing two paragraphs, the Solicitor of the Treasury is transferred from the Department of Justice to the Treasury Department.

Nothing in this section shall be construed to affect the function of any agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense.[21]

Authority for commencement of an action for collection of a tax debt is at 26 U.S.C. § 7402:

§ 7402. Jurisdiction of district courts.

(a) To issue orders, processes, and judgments. The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) To enforce summons. If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

(c) For damages to United States officers or employees. Any officer or employee of the United States acting under authority of this title, or any person acting under or by authority of any such officer or employee, receiving any injury to his person or property in the discharge of his duty shall be entitled to maintain an action for damages therefor, in the district court of the United States, in the district wherein the party doing the injury may reside or shall be found.

(d) Repealed.

(e) To quiet title. The United States district courts shall have jurisdiction of any action brought by the United States to quiet title to property if the title claimed by the United States to such property was derived from enforcement of a lien under this title.

(f) General jurisdiction. For general jurisdiction of the district courts of the United States in civil actions involving internal revenue, see section 1340 of title 28 of the United States Code.

Subsections (a) & (f) of 26 U.S.C. § 7401 make solid links with Title 28. Subsection (a) authorizes writs and other process, which ties into and is harmonized with

[21] E.O. #6166 is published following 5 U.S.C. § 901. Franklin D. Roosevelt originally issued the order on June 10, 1933, which was near the end of the infamous hundred-day New Deal overhaul that for all practical purposes transformed the American system of government to one of convenience rather than law. Many of the so-called emergency proclamations Roosevelt and his successors issued are regularly renewed as vehicles for avoiding what would otherwise be constitutional encumbrances. In the meantime, Congress has legislatively accommodated many aspects of various cornerstone executive orders, as is the case for 5 U.S.C. § 5512 & 26 U.S.C. § 7401.

the Federal Debt Collection Act. The general jurisdictional statute is classified at 28 U.S.C. § 1340, per subsection (f). The Federal Debt Collection Act further ties in with the all writs act (28 U.S.C. § 1651) and thereby preserves due process in the course of the common law. In the context of the Federal Debt Collection Act, Federal Rules of Civil Procedure, which suppose to merge process to "one form of action," have qualified and limited application.[22]

Subsection (b) is also of interest as the district court, "at the instance of the United States" (not the Internal Revenue Service or the United States of America) has authority "to compel such attendance, testimony, or production of books, papers, or other data" as may be summoned.

Internal Revenue Service personnel administratively issue summonses under authority supposedly vested in the Secretary of the Treasury or his delegate by 26 U.S.C. § 7602:

> § 7602. Examination of books and witnesses.
>
> (a) Authority to summon, etc. For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized--
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.
>
> (b) Purpose may include inquiry into offense. The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.
>
> (c) Notice of contact of third parties.
>
> (1) General notice. An officer or employee of the Internal Revenue Service may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer without providing reasonable notice in advance to the taxpayer that contacts with persons other than the taxpayer may be made.

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[22] Congress first authorized the Supreme Court to promulgate rules that turned out to be "one form of action" rules via the act of June 19, 1934, Chapter 651, 48 Stat. 1064. The civil rules were originally promulgated for Article III District Courts of the United States via the Supreme Court order of December 20, 1937. After Congress amended authorization in summer 1948, the Supreme Court via an order dated December 29, 1948, amended the rules to apply in territorial courts, e.g., United States District Courts. Current authorization for civil and criminal rules, appellate rules and rules of evidence is principally at 28 U.S.C. § 2072 and specifically designate application to territorial United States District Courts, not Article III District Courts of the United States.

(2) Notice of specific contacts. The Secretary shall periodically provide to a taxpayer a record of persons contacted during such period by the Secretary with respect to the determination or collection of the tax liability of such taxpayer. Such record shall also be provided upon request of the taxpayer.

(3) Exceptions. This subsection shall not apply--

(A) to any contact which the taxpayer has authorized;

(B) if the Secretary determines for good cause shown that such notice would jeopardize collection of any tax or such notice may involve reprisal against any person; or

(C) with respect to any pending criminal investigation. [Underscore added for emphasis]

Summons authority prescribed in § 7602 is in Chapter 78, Subchapter A of the Internal Revenue Code, "Examination and Inspection". In order to see proper application of this authority, it is necessary to consider several other sections in the chapter. The first is 26 U.S.C. § 7601:

§ 7601. Canvass of districts for taxable persons and objects.

(a) General rule.

The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

(b) Penalties.

For penalties applicable to forcible obstruction or hindrance of Treasury officers or employees in the performance of their duties, see section 7212. [Underscore added for emphasis]

It is obvious that the canvassing authority pertains to regulated commercial enterprise. It does not apply to the general population. This conclusion is reinforced by § 7606, which authorizes entry of premises:

§ 7606. Entry of premises for examination of taxable objects.

(a) Entry during day. The Secretary may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects.

(b) Entry at night. When such premises are open at night, the Secretary may enter them while so open, in the performance of his official duties.

(c) Penalties. For penalty for refusal to permit entry or examination, see section 7342.

Summons service authority further narrows the object of inquiry. The controlling section is 26 U.S.C. § 7603:

§ 7603. Service of summons.

(a) In general. A summons issued under section 6420(e)(2), 6421(g)(2), 6427(j)(2) or 7602 shall be served by the Secretary, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

(b) Service by mail to third-party recordkeepers.

(1) In general. A summons referred to in subsection (a) for the production of books, papers, records, or other data by a third-party recordkeeper may also be served by certified or registered mail to the last known address of such recordkeeper.

(2) Third-party recordkeeper. For purposes of paragraph (1), the term "third-party recordkeeper" means--

(A) any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law, any bank (as defined in section 581), or any credit union (within the meaning of section 501(c)(14)(A)),

(B) any consumer reporting agency (as defined under section 603(f) of the Fair Credit Reporting Act *(15 U.S.C. 1681a*(f))),

(C) any person extending credit through the use of credit cards or similar devices,

(D) any broker (as defined in section 3(a)(4) of the Securities Exchange Act of 1934 *(15 U.S.C. 78c*(a)(4))),

(E) any attorney,

(F) any accountant,

(G) any barter exchange (as defined in section 6045(c)(3)),

(H) any regulated investment company (as defined in section 851) and any agent of such regulated investment company when acting as an agent thereof,

(I) any enrolled agent, and

(J) any owner or developer of a computer software source code (as defined in section 7612(d)(2)).

Subparagraph (J) shall apply only with respect to a summons requiring the production of the source code referred to in subparagraph (J) or the program and data described in section 7612(b)(1)(A)(ii) to which such source code relates. [Underscore added for emphasis]

The service section cites § 6420, gasoline used on farms, § 6421, gasoline used for non-highway purposes, local transit systems and other exempt purposes, and § 6427, fuels not used for taxable purposes.

The Parallel Table of Authorities and Rules[23] lists regulations for §§ 7601 through 7606 as 27 CFR § 70. Additional regulations for § 7602 are listed as 27 CFR §§ 170 & 296, and additional regulations for § 7606 are 27 CFR §§ 24, 25, 170, 270, 275, 290, 295 & 296. The primary regulation for §§ 7608 through 7610 is 27 CFR § 70, and additional regulations for § 7608 include 27 CFR §§ 170 & 296. All of these regulations pertain to distilled spirits of various sorts or under various circumstances and are under Bureau of Alcohol, Tobacco and Firearms subject matter jurisdiction. There are no Title 26 CFR Part 1 or 31 regulations listed for any of the sections in Chapter 78 of the Internal Revenue Code.

[23] The Parallel Table of Authorities and Rules is one of the ancillary finding aids authorized by the Federal Register Act at 44 U.S.C. § 1510. The section also specifies that the Code of Federal Regulations is prima facie evidence of publication in the Federal Register. The department or agency responsible for administration of any given title or part thereof is required to keep the Parallel Table of Authorities and Rules current and accurate. Controlling regulations are in Title 1 of the Code of Federal Regulations.

Whether by direct examination, summons or however else, Treasury Department personnel are entitled to "examine any books, papers, records, or other data which may be relevant or material to such inquiry" (26 U.S.C. § 7602(a)(1)) only, there is no authority whatever for a summons to be open-ended. A summons must be specific not only with respect to the items, but must also be specific with respect to the tax at issue. A summons cannot go beyond subject matter authority of the section nor of the agency making the request.

Venue is also important so far as canvassing, summonses and other collection activity as 26 U.S.C. § 7621 is not listed in the Parallel Table of Authorities and Rules. This section authorizes the President to establish internal revenue districts:

> § 7621. Internal revenue districts.
>
> (a) Establishment and alteration. The President shall establish convenient internal revenue districts for the purpose of administering the internal revenue laws. The President may from time to time alter such districts.
>
> (b) Boundaries. For the purpose mentioned in subsection (a), the President may subdivide any State or the District of Columbia, or may unite into one district two or more States.

Geographical authority is dictated by 4 U.S.C. § 72: Any department of government attached to the seat of government, e.g., the Department of the Treasury, the Department of Justice, etc., may operate outside the District of Columbia only as prescribed by statute. Where the Secretary of the Treasury established customs collection offices under jurisdiction of the U.S. Customs Service, but did not establish internal revenue districts under authority of the Internal Revenue Service, it follows that IRS personnel do not have canvassing and summons authority in States of the Union.

Aside from the requirement that summonses be issued via clerks of courts of competent jurisdiction, which will be addressed in due course, there are two essential elements that limit application of the 26 U.S.C. § 7602 summons authority: The summons may be issued only to those engaged in regulated industries within internal revenue districts established in compliance with requirements of 26 U.S.C. § 7621, E.O. #10289, and the Federal Register Act (44 U.S.C. § 1505(a)).

The particularity requirement originates in the Fourth Amendment. Unless a summons is specific, it is not enforceable (*Local 174, etc., v. U.S.*, 240 F.2d 387). The Internal Revenue Service may not issue nonspecific summonses for what are judicially described as fishing expeditions (*First National Bank of Mobile v. U.S.*, 160 F.2d 532). In other words, the purpose of the summons, whether for business books and records, records of financial transactions, or whatever else, must be specific with respect to the tax at issue and the reason for issuing the summons must meet probable cause criteria. Third parties are also exempt from surrendering business books and records, records of financial transactions, or anything else when the summons is not specific with respect to the object of the inquiry, meaning the tax event or circumstance. IRS must justify relevance of the books, records and other objects being summoned to the tax at issue. See *Zimmerman v. Wilson*, 105 F.2d 387.

When considering the whole of Chapter 78, Subchapter A, it is obvious that Treasury Department personnel have unrestricted access to whatever enterprise is subject to the summons during regular business hours. Unrestricted access is a licensing

condition for certain regulated enterprises such as production and distribution of distilled spirits, and within properly established internal revenue districts, tax-exempt fuels. As is the case for warrants, summonses wouldn't ordinarily be necessary since production facilities, warehouses and retail distribution points are supposed to be open for inspection and owners are supposed to make records available on request. Therefore, the summons prescribed by § 7602 is an extraordinary rather than an ordinary means for gaining access. When use of a summons becomes necessary, the examination, audit or investigation has progressed beyond amiable and normal operations. The summons is an invasive procedural instrument. It is a search or seizure instrument. Therefore, the clerk of a court of competent jurisdiction must issue it.

The Form 2039 third-party summons assembly Internal Revenue Service personnel use verifies this as the back of Part D, which is supposed to be provided to the noticee (the person being investigated), cites relative portions of Rule 4 of the Federal Rules of Civil Procedure. Basic Rule 4 provisions are as follows:

> Rule 4. Summons
>
> (a) Form. The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.
>
> (b) Issuance. Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.

Part D of Form 2039 also includes a safety valve in that the noticee is supposed to be informed that he can stop third parties from surrendering whatever IRS personnel request if the summons is not issued by a court of competent jurisdiction by informing the third party in writing not to surrender the requested records or documents. The notice is as follows:

> Enclosed is a copy of a summons served by the I.R.S. to examine records or to request testimony relating to records which have been made or kept of your business transactions or affairs by the person summoned. If you object to the examination of these records, you may stay (prevent) examination of the records until a summons enforcement proceeding is commenced in court. Compliance with the summons will be stayed if, within 14 days from the date of this notice, you advise the person summoned, in writing not to comply with the summons, and you send a copy of that notice by certified or registered mail to the internal revenue service at the address shown on the summons. The copy should be sent to the attention of the internal revenue service officer before whom the summoned person is to appear.

Additional confirmation is provided through the Department of Justice via the United States Attorney Manual, Title 6, § 6-5.000, the Civil Tax Case Responsibility Section. Subsection 6-5.240, titled Litigation Support Relating to Summons Cases. The section refers to a publication titled "A Primer on I.R.S. Summons Enforcement", prepared by the Tax Division's Appellate Section, which is available on USANET under the name TAXPRIMR.ZIP. The publication restates essentially the same thing found on the back of Form 2039 Part D:

E. Third-Party Recordkeeper Summonses

> Section 7609 provides that when an IRS summons is issued to any of several specifically defined third parties, the taxpayer must receive notice of the summons and may, by letter, force the summoned party to refuse compliance with the summons. The statute also accords the taxpayer a right to institute a proceeding to quash such a summons and to raise substantive objections to its enforcement [FN31] These statutory rights arise, however, only if the summoned records are maintained by the summoned party in its capacity as a "third-party recordkeeper" as that term is defined in Section 7609(a)(3) and the Regulations thereunder. A "third-party recordkeeper" is defined by the statute to include only banks and other financial institutions, consumer reporting agencies, brokers, attorneys, accountants, barter exchanges, regulated investment companies, and "any person extending credit through the use of credit cards or similar devises." Section 7609(a)(3)(C).

Even in the civil forum where there is no formal probable cause hearing antecedent to a summons being issued, there must be a complaint that discloses the nature and cause of action, i.e., the underlying law and the reason or reasons for gaining access to the object of the summons. Additionally, the complaining party must be identified so he is available for cross-examination. The clerk of a court of competent jurisdiction must issue the summons and it is enforceable only by a court of competent jurisdiction.

Levy, Seizure & Forfeiture Authority

Internal Revenue Code levy authority is classified in Subchapter D of Chapter 64, "Seizure of Property for Collection of Taxes", sections 6330 through 6344. Basic authority is codified in § 6331. For purposes of this examination, it is useful to reproduce subsections 6331(a) and (b) to initiate examination of this hybrid process:

> § 6331. Levy and distraint.
>
> (a) Authority of Secretary. If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official.[24] If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.
>
> (b) Seizure and sale of property. The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (e), a levy shall

[24] There appears to be conflict between the "notice of levy" authority in § 6331(a) and the § 6332(a) "demand of the Secretary" provisions. However, there is no conflict. The government "employee" subject to administrative levy is the disbursement officer responsible for maintaining a withholding trust account. Whatever is in the account doesn't belong to the disbursement officer. This seeming conflict is partially resolved by 26 U.S.C. §§ 3403 & 3404. The government agency and the designated withholding officer are liable for whatever tax liability an employee might have whether it is withheld at the source or not.

> extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible). [Underscore added for emphasis]

As is the case for the lien prescribed at 26 U.S.C. § 6321, authority for levy and distraint issues against "any person liable to pay any tax…." Providing law, which includes judicial process when liability is contested, establishes liability the Secretary may collect the tax "by levy upon all property and rights to property…." In subsection (b), we find that, "The term 'levy' as used in this title includes the power of distraint and seizure by any means."

There are four core terms relative to levy and distraint authority. Three are in § 6331(a) & (b). The terms are "levy", "distraint", "seizure" and "forfeiture". Definitions of the terms reproduced below are from *Black's Law Dictionary*, 6th edition:

> **Distraint**. Seizure; the act of distraining or making a distress. The inchoate right and interest which a landlord has in the property of a tenant located on the demised premises. Upon a tenant's default, a landlord may in some jurisdictions distrain upon the tenant's property, generally by changing the locks and giving notice, and the landlord will then have a lien upon the goods. The priority of the lien will depend on local law.
>
> **Forfeiture**. A comprehensive term which means a divestiture of specific property without compensation; it imposes a loss by the taking away of some preexisting valid right without compensation. … A depravation or destruction of a right in consequence of the nonperformance of some obligation or condition. Loss of some right or property as a penalty for some illegal act. Loss of property or money because of breach of a legal obligation (e.g. default in payment).
>
> Forfeiture of property (including money, securities, and real estate) is one of the penalties provided for under certain federal and state criminal statutes (e.g., RICO and Controlled Substances Act). Such forfeiture provisions apply to property used in the commission of a crime under the particular statutes, as well as property acquired from the proceeds of the crime. See, e.g., 18 U.S.C.A. §§ 981, 982 (criminal and civil forfeiture), 21 U.S.C.A. § 853 (forfeiture in drug cases).
>
> **Levy**. N. A seizure. The obtaining of money by legal process through seizure and sale of property; the raising of the money for which an execution has been issued.
>
> The process whereby a sheriff or other state official empowered by writ or other judicial directive actually seizes, or otherwise beings within her control, a judgment debtor's property which is taken to secure or satisfy the judgment.
>
> **Seizure**. The act of taking possession of property, e.g., for the violation of law or by virtue of an execution of a judgment. Term implies taking or removal of something from the possession, actual or constructive, of another person or persons….
>
> The act performed by an officer of the law, under the authority of exigence of a writ, in taking into the custody of the law the property, real or personal, of a person against whom the judgment of a competent court has passed, condemning him to pay a certain sum of money, in order that such property may be sold, by authority and due course of law, to satisfy the judgment. Or the act of taking possession of goods in consequence of a violation of public law.
>
> A "seizure" of property (under Fourth Amendment) occurs when there is some meaningful interference with an individual's possessory interest in that property. U.S. v. Jacobsen, U.S.Minn., 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85.

Where there is something on the order of a landlord-tenant relationship, distraint is an ages-old common law self-help remedy, but this kind of unilateral action is not

available to government except where government has a proprietary interest. In other words, if someone were renting office space in a government-owned building, the government as landlord would have the self-help remedy available. However, where there is no proprietary interest, the remedy is available only through judicial process. The necessity of judicial process is reflected in the other three closely related terms.

As used in the Internal Revenue Code, the terms “levy” and “seizure” are for all practical purposes interchangeable. “Distraint” may be the means by which an antecedent court order is executed. A court order must come first as substantive rights secured by due process amendments preclude government seizing anything or anyone without process required by the amendments.

The Fifth Amendment speaks clearly to the matter: No person shall be deprived of life, liberty or property without due process of law, and as former Chief Justice Marshall penned in *Wayman v. Southard*, due process must be in the course of the common law.

The Federal Debt Collection Act prescribes necessary process: A judgment lien must be secured in compliance with requirements of 28 U.S.C. § 3201; enforcement of judgments in general is prescribed in § 3202; the manner of execution is prescribed in § 3203, including levy of execution; and the manner for issuing a writ of garnishment is prescribed in § 3205.

Internal Revenue Service practice strays far enough from procedure prescribed in the Internal Revenue Code that it would be fraudulent even if government administrative agencies had power to seize wages and property without judicial due process of law. The revenue agent will normally send a “notice of levy” to a bank, employer or some other third party who has possession of property belonging to the victim. However, there is no authority in the Internal Revenue Code for sending notice to third parties. The Code specifies that there must be demand for payment. Only the person who is levied on receives notice. The demand requirement is prescribed by 26 U.S.C. § 6332(a):

> § 6332. Surrender of property subject to levy.
>
> (a) Requirement. Except as otherwise provided in this section, any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

Notice is given to the property owner after seizure, per 26 U.S.C. § 6335(a):

> § 6332. Surrender of property subject to levy.
>
> (a) Requirement. Except as otherwise provided in this section, any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

The third party who surrenders property to the Internal Revenue Service based on a notice instrument is liable to the owner. Unless he receives verification of judicial process, e.g., a valid levy that has the necessary information and attending documents, issued under seal of a court of competent jurisdiction or the Internal Revenue Service, the

third party does not have a government immunity shield. The immunity exception is stated at 26 CFR § 301.6332-1(c)(2):

> (2) *Exception for certain incorrectly surrendered property*. Any person who surrenders to the Internal Revenue Service property or rights to property not properly subject to levy in which the delinquent taxpayer has no apparent interest is not relieved of liability to a third party who has an interest in the property. However, if the delinquent taxpayer has an apparent interest in property or rights to property, a person who makes a good faith determination that such property or rights to property in his or her possession has been levied upon by the Internal Revenue Service and who surrenders the property to the United States in response to the levy is relieved of liability to a third party who has an interest in the property or rights to property, even if it is subsequently determined that the property was not properly subject to levy. [Underscore added for emphasis]

The core questions are, "Has a levy been made?" and "Has the property custodian made a due diligent effort to see if a levy has been made?" Unless both are answered in the affirmative, limited immunity provided by the Code section is not available.

The current § 6331 is a consolidation of two sections from the 1939 edition of the Internal Revenue Code. One of the two sections specifically required a warrant of distraint in order to execute a levy. The two 1939 sections were merged via the Internal Revenue Code of 1954 (Volume 68A of the Statutes at Large). The warrant of distraint had to be issued by a court of competent jurisdiction just as any other warrant, writ or other execution instrument.

The current administrative, or more appropriately, ministerial levy instrument, is the Form 668-B Levy. The notice of levy does not compel anybody to do anything. It merely conveys information. As is the case for the notice of lien, which requires a judgment abstract, the Form 668-B Levy must be issued by or in conformity with proper judicial authority and must be under seal. The term "warrant of distraint" has vanished from Code-prescribed procedure, but substantive law is unaffected. Regardless of what it is called or what form is used, judicial process is necessary before property is levied, seized, forfeited or otherwise impaired.

Generally speaking, that which is subject to seizure is also subject to forfeiture. Application is to regulated industries subject to Subtitle E and Title 19 administration and collection authority. Where the Internal Revenue Code is concerned, a forfeiture proceeding is an action *in rem* prescribed in Chapter 75, § 7323:

> § 7323. Judicial action to enforce forfeiture.
>
> (a) Nature and venue.
>
> The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the United States District Court for the district where such seizure is made.

An *in rem* action issues against a thing, not a person. It is an admiralty proceeding, with the object being property listed in §§ 7301 through 7304. Additionally, designation of the United States District Court, as opposed to the district court of the United States vested with jurisdiction in § 7402, is a territorial court – it is not an Article III court of the United States – so the geographical location (venue) in which the forfeiture action can be executed includes territories and insular possessions of the United States subject to Congress' plenary power.

The character of the court and the venue notwithstanding, Chapter 75 of the Internal Revenue Code presumes criminal causes of action from beginning to end. It is here that the Secretary of the Treasury is vested with specific authority to seize property subject to forfeiture, at § 7322:

> § 7322. Authority to seize property subject to forfeiture.
>
> Any property subject to forfeiture to the United States under any provision of this title may be seized by the Secretary.

The link between §§ 6331 & 7322 and Chapter 75 in general is made by § 6331(b): "The term 'levy' as used in this title includes the power of distraint and seizure by any means. … In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible)."

Subchapter C of Chapter 75 lists property subject to forfeiture proceedings in sections 7301 through 7303. The only regulations listed in the Parallel Table of Authorities and Rules for any of these sections is for § 7302, "property used in violation of internal revenue laws." The regulations are 27 CFR Parts 24 & 252, both under BATF jurisdiction. However, there is a solid link that goes to the heart of most Internal Revenue Service encumbrances as Rule 41 of the Federal Rules of Criminal Procedure governs seizures under authority of §§ 7302 & 7323. The complete rule is reproduced here even though it is reasonably lengthy:

> Rule 41. Search and seizure
>
> (a) Authority to issue warrant. Upon the request of a federal law enforcement officer or an attorney for the government, a search warrant authorized by this rule may be issued (1) by a federal magistrate judge, or a state court of record within the federal district, for a search of property or for a person within the district and (2) by a federal magistrate judge for a search of property or for a person either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed.
>
> (b) Property or persons which may be seized with a warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.
>
> (c) Issuance and contents.
>
> (1) Warrant upon affidavit. A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate judge or state judge and establishing the grounds for issuing the warrant. If the federal magistrate judge or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, that magistrate judge or state judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate judge or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a

specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate judge to whom it shall be returned.

(2) Warrant upon oral testimony.

(A) General rule. If the circumstances make it reasonable to dispense, in whole or in part, with a written affidavit, a Federal magistrate judge may issue a warrant based upon sworn testimony communicated by telephone or other appropriate means including facsimile transmission.

(B) Application. The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate judge. The Federal magistrate judge shall enter, verbatim, what is so read to such magistrate judge on a document to be known as the original warrant. The Federal magistrate judge may direct that the warrant be modified.

(C) Issuance. If the Federal magistrate judge is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate judge shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate judge's name on the duplicate original warrant. The Federal magistrate judge shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(D) Recording and certification of testimony. When a caller informs the Federal magistrate judge that the purpose of the call is to request a warrant, the Federal magistrate judge shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate judge shall record by means of such device all of the call after the caller informs the Federal magistrate judge that the purpose of the call is to request a warrant. Otherwise a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate judge shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate judge shall file a signed copy with the court.

(E) Contents. The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(F) Additional rule for execution. The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.

(G) Motion to suppress precluded. Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.

(d) Execution and return with inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate judge shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for return of property. A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

(f) Motion to suppress. A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

(g) Return of papers to clerk. The federal magistrate judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(h) Scope and definition. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

The rule obviously preserves Fourth Amendment substantive rights as the applicant for a warrant must submit a complaint under oath, and if not at some remote location, the complaint must be in written affidavit form. A committing magistrate must conduct a probable cause hearing prior to issuing the warrant. The balance of the rule provides details including how to move to suppress evidence and recover seized property.

In this particular case, Advisory Committee Notes for subsection (g) of Rule 41 make the link with 26 U.S.C. § 7302, property used in violation of internal revenue laws:

Note to Subdivision (g). While Rule 41 supersedes the general provisions of *18 USC former § § 611*-626 (now *18 USC § § 3105,* 3109), relating to search warrants, it does not supersede, but preserves, all other statutory provisions permitting searches and seizures in specific situations. Among such statutes are the following:

USC Title 18 former:

§ 287 [Rule 41] (Search warrant for suspected counterfeiter)

USC Title 19:

§ 1595 (Customs duties; searches and seizures)

USC Title 26:

§ 3117 [now § 5557] (Officers and agents authorized to investigate, issue search warrants, and prosecute for violations)

For statutes which incorporate by reference *18 USC former § 98,* and therefore are now controlled by this rule, see e.g.:

USC Title 18 former:

§ 12 (Subversive activities; undermining loyalty, discipline, or morale of armed forces; searches and seizures)

USC Title 26 former:

§ 3116 [now § 7302] (Forfeitures and seizures)

No implementing regulations under Internal Revenue Service jurisdiction are listed in the Parallel Table of Authorities and Rules for § 7302 so it is necessary to rely on secondary authorities to determine what underlying presumptions are when IRS personnel seize things under this Code section. The matter is addressed in § 9.1.2.7.1 of the Internal Revenue Manual current in July 2001:

9.1.2.7.1 - Title 26 Seizures

((1)) The authority to seize assets for forfeiture comes from both the Internal Revenue law (Title 26 CFR) and Title 18 Code of Federal Regulations. For more information concerning seizure authority and procedure, see the Asset Seizure And Forfeiture Handbook.

((1)) Section 7608 of the Internal Revenue Code of 1954, as amended, authorizes special agents of CI to serve search warrants and to make seizures of personal property subject to forfeiture.

((2)) Secdtion 7302 of the Internal Revenue Code provides that it shall be unlawful to have or possess any property which is used, or intended for use, in violation of the Internal Revenue laws, or regulations prescribed under such laws. The Secretary or the Secretary's delegate is authorized by statute to seize such property (26 USC 7321). It provides further that no property rights shall exist in any such property, and that a search warrant may be issued as provided in Title 18, USC, Chapter 205, and the Federal Rules of Criminal Procedure, for the seizure of such property.

((3)) A search warrant may be issued for seizure of property used or intended for use in violation of Internal Revenue laws. **(**Rule 41(b), F.R.Cr.P..). A seizure in violation of the Fourth Amendment will not sustain a forfeiture, (One 1958 Plymouth Sedan v. Pennsylvania) unless the property seized is contraband per se. (U.S. v. Jeffers; Trupiano v. U.S.)

((4)) Delegation Order No. 157 authorizes special agents to seize personal property for forfeiture to the United States when involved, used, or intended to be used in violation of Internal Revenue laws other than Chapters 51, 52 and 53 of the Internal Revenue Code of 1954;

The Internal Revenue Manual section makes the link between Rule 41, F.R.Crim.P., and 26 U.S.C. § 7302, but does not disclose the implementing regulation. It is necessary to consult Treasury Delegation Order #157 to determine what regulation governs:

Internal Revenue Service (I.R.S.)

Delegation Order

THE SEIZURE AND FORFEITURE OF PERSONAL PROPERTY

Published: February 29, 1988

Effective Date: June 15, 1987

(1) Pursuant to the authority granted to the Commissioner of Internal Revenue by 26 CFR 403 through 403.65, IRC 7325 and Treasury Department Order No. 150- 10,

(a) Special Agents and Internal Security Inspectors are authorized:

1. To seize personal property for forfeiture to the United States when involved, used, or intended to be used, in violation of the internal revenue laws other than Chapters 51, 52 and 53 of the Internal Revenue Code of 1954;

2. To estimate the value of seized personal property, and if valued at $100,000 or less ($2,500 or less for property seized prior to October 22, 1986), to cause a list to be prepared and appraisal to be obtained and to attest such list and appraisement, and to publish notice; and

3. To cause notice of sale to be placed in accordance with 26 CFR 403.55 and to re-advertise the property, when necessary, in accordance with 26 CFR 403.57.

(b) The Assistant Commissioner (International), District Directors and Regional Inspectors are authorized:

1. To make the determinations concerning type and conditions of cost bonds as provided in 26 CFR 403.27;

2. To exercise the authority of the Commissioner concerning disposition of perishable goods provided in 26 CFR 403.30;

3. To execute the declaration of forfeiture showing that personal property has been forfeited to the United States;

4. To acquire for official use seized property by exercising the authority of the Commissioner provided in 26 CFR 403.44;

5. To determine that seized property shall be sold at public auction as provided in 26 CFR 403.55;

6. To order the destruction of any coin-operated gaming device under the provisions of 26 CFR 403.65.

(c) The Assistant Commissioner (Criminal Investigation), and the Director, Internal Security Division, are authorized:

1. To allow or deny petitions for remission or mitigation of forfeiture, accept or reject any offer in compromise of the liability to forfeiture of personal property, and to make the necessary determinations and notifications, as provided in 26 CFR 403.43, and to authorize the Assistant Commissioner (International), the District Directors or Regional Inspectors to notify the petitioner or offer or of the action taken on the petition or offer.

(2) The authority delegated herein may not be redelegated.

(3) To the extent that the authority previously exercised consistent with this Order may require ratification, it is hereby affirmed and ratified.

(4) Delegation Order No. 157 (Rev. 4) effective May 12, 1986 is superseded.

Dated: June 15, 1987.

James I. Owens

Deputy Commissioner

D.O. No. 157 REV. 5, 1988-1 C.B. 470, 1988-9 I.R.B. 5, 1987 WL 91095 (IRS DLO)

Authorities cited for the Treasury Delegation Order include 26 CFR 403 through 403.65, IRC 7325 and Treasury Department Order No. 150-10.

Section 7325 merely sets valuation of seized property at $100,000 or less; it does not alter or replace § 7302 as the basic authority for seizure. The link with “property used in violation of internal revenue laws” is restored in the regulation. In the meantime, Treasury Order #150-10, which succeeded T.O. #150-37, has never been published in the Federal Register in compliance with requirements of the Federal Register Act. Per the Federal Register Act, it cannot have general application. These defects aside, the more interesting and important authority where matters at hand are concerned is 26 CFR § 403 as this regulation prescribes procedure for judicial forfeiture of seized property with value

in excess of $2,500 and also clarifies that seizures under the combined authority of 26 U.S.C. § 7203 and 26 CFR Part 403 are based on drug-related commercial crimes. The authority paragraph is § 403.1:[25]

> § 403.1 Personal property seized by the Internal Revenue Service.
>
> Regulations in this part relate to personal property seized by officers of the Internal Revenue Service as subject to forfeiture as being involved, used, or intended to be used, as the case may be in any violation of the internal revenue laws other than Chapters 51 (distilled spirits), 52 (tobacco) and 53 (firearms), of the Internal Revenue Code of 1954 (I.R.C.).
>
> HISTORY: [T.D. 7433, 41 FR 39312, Sept. 15, 1976, as amended by T.D. 7525, 42 FR 64344. Dec. 23, 1977]
>
> AUTHORITY: (Sec. 7325, 68A Stat. 870, as amended (26 U.S.C. 7325, (1), (4)); sec. 7326, 72 Stat. 1429, as amended (26 U.S.C. 7326 (a)))

The drug-related commercial crimes that are presumed as the underlying cause of a seizure are listed in the regulation subpart that prescribes content of a petition to recover whatever property has been seized:

> § 403.38 Contents of the petition.
>
> (a) Description of the property. The petition should contain such a description of the property and such facts of the seizure as will enable the Commissioner or his delegate to identify the property.
>
> (b) Statement regarding knowledge of seizure. In the event the petition is filed for the restoration of the proceeds derived from sale of the property pursuant to an administrative forfeiture, it should contain, or be supported by, satisfactory proof that the petitioner did not know and could not have known of the seizure prior to the declaration of forfeiture. (See also § 403.39)
>
> (c) Interest of petitioner. The petition should clearly and concisely indicate the nature and amount of his interest in the property on the date the petition is filed, and the facts relied upon to show that the petitioner was not willfully negligent and did not intend that the property be involved or used in violation of the internal revenue laws. Such petition may allege such other circumstances which in the opinion of the petitioner would justify the remission or mitigation of the forfeiture.
>
> (d) Petitioner innocent party. If the petitioner did not commit the act which caused the seizure of his property, the petition should state how the property came into the possession of the person whose act did cause the seizure, and it should also state that the petitioner had no knowledge or reason to believe that the property would be involved or used in violation of the internal revenue laws. If the petitioner knows, at the time he files the petition, that the person in whose possession the seized property was at the time of the seizure had a record or reputation for committing commercial crimes, the petitioner should state in the petition whether the petitioner knew of such record or reputation before the petitioner acquired his interest in the property or before such other person came into possession of the property, whichever occurred later. For purposes of this paragraph, the term "commercial crimes" includes, but is not limited to any of the following federal or state crimes:
>
> (1) Offenses against the revenue laws; burglary; counterfeiting, forgery; kidnapping; larceny; robbery; illegal sale or possession of deadly weapons; prostitution (including soliciting, procuring, pandering, white slaving, keeping house of ill fame, and like offenses); extortion;

[25] The Bureau of Alcohol, Tobacco and Firearms has regulatory authority for administration of 26 U.S.C. ' 7302 via 27 CFR ' 72. The authority relates to imported distilled spirits. While classified in the Internal Revenue Code, this section applies almost exclusively to imported items that are regulated under customs laws. With a few exceptions, 26 CFR ' 403 and 27 CFR ' 72 are almost identical.

swindling and confidence games; and attempting to commit, conspiring to commit, or compounding any of the foregoing crimes. Addiction to narcotic drugs and use of marihuana will be treated as commercial crimes.

(e) Documents supporting claim. The petition should be accompanied by copies, certified by the petitioner under oath as correct, of contracts, bills of sale, chattel mortgages, reports of investigators or credit reporting agencies, affidavits, and any other documents that would support the claims made in the petition.

(f) Costs. The petition should contain an undertaking to pay any costs assessed as a condition of allowance of the petition. Such costs include but are not limited to all expenses incurred in seizing and storing the property; the costs borne or to be borne by the United States; the taxes, if any, payable by the petitioner or imposed in respect of the property to which the petition relates; the penalty, if any, asserted by the Internal Revenue Service; and, if the property has been sold, or is in the course of being sold, the expenses incurred relating to such sale.

HISTORY: T.D. 7433, 41 FR 39312, Sept. 15, 1976. [Underscore added for emphasis]

If there has been no crime listed in 26 CFR § 403.38(d)(1), the Internal Revenue Service does not have seizure authority. The crimes listed are all drug-related commercial crimes, with authority originating in Title 19 of the United States Code. The regulation verifies this conclusion at § 403.35:

§ 403.35 Laws applicable.

Remission or mitigation of forfeitures shall be governed by the customs laws applicable to remission or mitigation of penalties as contained in 19 U.S.C. 1613 and 19 U.S.C. 1618.

HISTORY: T.D. 7433, 41 FR 39312, Sept. 15, 1976.

AUTHORITY: (Sec. 613, 46 Stat. 756, as amended, sec. 618, 46 Stat. 757, as amended, sec. 7327, 68A Stat. 871; (19 U.S.C. 1613, 1618, 26 U.S.C. 7327))

The question of how IRS exits from the Internal Revenue Code to Title 19 is explained by 26 U.S.C. § 7327, cited as authority for 26 CFR § 403.35:

§ 7327. Customs laws applicable.

The provisions of law applicable to the remission or mitigation by the Secretary of forfeitures under the customs laws shall apply for forfeitures incurred or alleged to have been incurred under the internal revenue laws.

Before explaining this leap, it is useful to demonstrate that even where property is seized in relation to crimes, anything with value in excess of $2,500 must be judicially forfeited:

§ 403.26 Forfeiture of seized personal property.

(a) Administrative forfeiture. (1) Personal property seized as subject to forfeiture under the internal revenue laws and this part which has an appraised value of $ 2,500.00 or less shall be forfeited to the United States in administrative forfeiture proceedings except as otherwise provided in this section.

(2) If the Commissioner or his delegate seizes personal property which is forfeitable under the internal revenue laws and this part and which in his opinion is valued at $ 2,500.00 or less, he shall cause a list containing a particular description of the seized property to be prepared in duplicate and an appraisal thereof to be made by three sworn appraisers, selected by the Commissioner or his delegate, who shall be respectable and disinterested citizens of the United States residing within the internal revenue district wherein the seizure was made. Such list and appraisement shall be properly attested by the Commissioner or his delegate and such appraisers.

(3) If such forfeitable personal property is found by the appraisers to be of the value of $ 2,500.00 or less, the Commissioner or his delegate shall publish a notice once a week for three consecutive weeks, in some newspaper of the judicial district where property was seized, describing the articles and stating the time, place, and cause of their seizure, and requiring any person claiming them to appear and make such claim within 30 days from the date of the first publication of such notice.

(4) Any person claiming the personal property so seized, within the time specified in the notice, may file with the District Director of the internal revenue district in which the property was seized a claim, stating his interest in the articles seized, and may execute a bond to the United States in the penal sum of $ 250, conditioned that, in case of condemnation of the articles so seized, the obligors shall pay all the costs and expenses of the proceedings to obtain such condemnation. The District Director shall transmit such claim, together with the duplicate list or description of the property seized, to the United States Attorney for the district in which such property was seized. Both the claim and the cost bond should be executed in quadruplicate.

(b) Judicial condemnation. Personal property seized as subject to forfeiture under the internal revenue laws and this part which has an appraised value of more than $ 2,500 and such seized property which has an appraised value of $ 2,500 or less with respect to which a bond has been filed pursuant to paragraph (a)(4) of this section, shall be forfeited to the United States in judicial condemnation proceedings, as authorized by the Director, General Legal Services Division, Office of Chief Counsel, Internal Revenue Service, or his delegate.

HISTORY: [T.D. 7433, 41 FR 39312, Sept. 15, 1976, as amended by T.D. 7525, 42 FR 64344, Dec. 23, 1977]

AUTHORITY: (Sec. 7323, 7325, 7326, 7401, 68A Stat. 869, 870, 873, 72 Stat. 1429, as amended; (26 U.S.C. 7323, 7325, 7326(a), 7401)) [Underscore added for emphasis]

The provision at § 403.26(b) closes the door on the notion that the Internal Revenue Service has authority to administratively levy, seize or garnish anything of significant value without judicial process, even where property is being used in violation of internal revenue laws and the forfeiture is effectively a criminal action. In the meantime, garnishment of salaries, bank accounts and other assets must be executed in compliance with requirements of 28 U.S.C. § 3205 in the Federal Debt Collection Act.

Necessity of a Competent Witness

All process treated in previous sections, even when legitimate, rests on a single question: Does the government have a witness who has first-hand knowledge of facts? It makes no difference if it is a civil or criminal action, prosecution cannot be sustained unless there is a competent witness.

The Fourth Amendment requires probable cause supported by oath or affirmation, and the complaint must be specific. The particularity clause is enhanced by Sixth Amendment nature and cause disclosure requirements.

Where criminal actions are concerned, there is little or no flexibility. The witness must have first-hand knowledge of facts. Blanket requirements for a complaint are set out in Rule 3 of the Federal Rules of Criminal Procedure:

Rule 3. The Complaint

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate judge.

Congress specified who is authorized to make a complaint for infractions of revenue laws at 18 U.S.C. § 3045:

> § 3045. Internal revenue violations
>
> Warrants of arrest for violations of internal revenue laws may be issued by United States magistrates upon the complaint of a United States attorney, assistant United States attorney, collector, or deputy collector of internal revenue or revenue agent, or private citizen; but no such warrant of arrest shall be issued upon the complaint of a private citizen unless first approved in writing by a United States attorney.

At first blush it would appear that government attorneys have blanket authority to submit complaints in probable cause hearings, but that isn't the case. An attorney involved in an investigation might submit the complaint, but only if he has first-hand knowledge of facts and is therefore a competent witness who will or may be compelled testify at trial. Per the Sixth Amendment, the defendant has the right to confront adverse witnesses, e.g., to cross-examine witnesses and to compel testimony. If an attorney made a complaint but didn't testify as a prosecution witness, the defendant would have the right to compel him to testify and sit for cross-examination.

Attorneys are rarely if ever competent witnesses. What they put in pleadings and say in court does not qualify as testimony unless they are under oath, in which case the adversary always has the right to cross-examine them.

Civil complaints are somewhat different than criminal in that the affidavit supporting a complaint can be made on information and belief. This relaxed standard is codified at 28 U.S.C. § 3006:

> § 3006. Affidavit requirements
>
> Any affidavit required of the United States by this chapter [*28 USCS § § 3001* et seq.] may be made on information and belief, if reliable and reasonably necessary, establishing with particularity, to the court's satisfaction, facts supporting the claim of the United States.

The government cannot simply manufacture complaints, whether for civil or criminal prosecution. Somebody has to have sufficient knowledge of fact circumstance or event to support the complaint. The defendant is entitled to know who is responsible and he always has the right to cross-examine adverse witnesses.

This brings up another question: Are revenue officers and other Internal Revenue Service personnel competent witnesses? Normally they aren't. Most are office drones and paper-pushers who base conclusions they make on information submitted by other people. Those who submit the paperwork, which might be a return, a W-2, a 1099 or some other report, have first-hand knowledge of the transaction, event or circumstance that gave rise to whatever paperwork was submitted. Precious little paperwork people submit to the Internal Revenue Service rises to the level of testimony. Even tax returns are merely declarations made under penalties of perjury. At best, most Internal Revenue Service personnel only have knowledge of the paper that crosses their desks. Other than form numbers and figures, they are in the dark. All they have is information other people supply and the belief that the information relates to taxes imposed by internal revenue laws of the United States. They have no way of knowing if the person who submitted any given return or form knows for certain what tax he is or isn't liable for.

There are three forms of testimony, all of which must be submitted under oath or affirmation. The first is the affidavit. Under laws of most states, affidavits must be notarized. Notary publics are commissioned officers of their respective states and are authorized to administer oaths.[26] The second form of testimony is the deposition. The adversarial party has the right to cross-examine witnesses at depositions. The third is oral examination in open court. The adversary has the right to cross-examine the witness. If an adversarial party wishes to challenge an affidavit, he can compel whoever made the affidavit to testify in open court so the witness can be cross-examined.

Consider a hypothetical situation where John Doe is accused of shooting and killing Jerry Short. At the trial, the prosecuting attorney plops a revolver down on the evidence table, points at Mr. Doe and tells the jury, "John Doe, sitting at the defense table, used this gun to shoot and kill Mr. Short."

After the prosecuting attorney spiel, the jury adjourns for deliberations, decides whether or not the defendant is guilty, and subsequently returns a verdict.

Hardly. After opening statements, the prosecuting attorney will call eyewitnesses, if any are available, he will call witnesses who know the revolver belongs to John, he will call ballistics experts who verify that the bullet responsible for killing the victim matches bullets fired from the gun, etc. Even in simple, straightforward murder trials, prosecuting attorneys frequently call six to ten fact and expert witnesses.

Testimony is the vehicle by which evidence comes before and is verified in a court of law. If there is no witness, there is nothing before the court. It's that simple. A prosecuting attorney could fill a courtroom with evidence, but if he didn't have a competent witness, his evidence would be invisible in the eyes of the law.

Summary and Conclusion

The Internal Revenue Service is successor of the Bureau of Internal Revenue, Puerto Rico. The first civil governor of Puerto Rico administratively created predecessors to the Bureau of Internal Revenue on May 1, 1900. The first Puerto Rico legislature enacted legislation to accommodate them the following year. There were originally five offices or agencies that were eventually merged.[27]

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[26] The common law affidavit requires two or more witnesses. The requirement has biblical origins.

[27] In the organizational and historical statement published in the Internal Revenue Manual until the last few years, and published in the Federal Register at least twice, former Commissioners of Internal Revenue acknowledged that Congress did not legislatively create the Internal Revenue Service, or its predecessor, the Bureau of Internal Revenue. The statement claimed that Congress intended to create the Bureau of Internal Revenue in 1862 legislation in which the office of Commissioner of Internal Revenue was created. However, the 1862 legislation created the offices of assessor and collector, both of which were appointed offices somewhat on the order of the current office of the United States Attorney. They were political patronage offices. The offices continued until President Harry Truman unilaterally abolished them via Reorganization Plan #26 of 1950 and Reorganization Plan #1 of 1952, which were implemented with promulgation of the Internal Revenue Code of 1954 (Vol. 68A of the Statutes at Large).

The Bureau of Internal Revenue, Puerto Rico and the Bureau of Internal Revenue, Philippines[28] were authorized to administer trade under commercial treaties for regulation of opium, cocaine and citric wine by the China Trade Act in 1904. China Trade Act corporations are still taxed for foreign source income. See 26 CFR § 1.861-8(f)(1)(vi)(I).

As an agency of an insular possession, the Internal Revenue Service is not a department or agency of Government of the United States as such. Since Congress did not create a Bureau of Internal Revenue or an Internal Revenue Service, authority of the Service cannot extend to States of the Union as Article I § 8, clause 18 of the Constitution requires Congress and Congress alone to legislatively create offices, departments and agencies necessary to carry out powers enumerated in the Constitution. Authority the Constitution vests in one branch of government cannot be delegated to another.

However, Congress has plenary power in territory belonging to the United States so can theoretically confer authority wherever it is convenient. This appears to have been the case via 26 U.S.C. § 7701(a)(12)(B):

> (12) Delegate.
>
> (A) In general. The term 'or his delegate'--
>
> (i) when used with reference to the Secretary of the Treasury, means any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the context; and
>
> (ii) when used with reference to any other official of the United States, shall be similarly construed.
>
> (B) Performance of certain functions in Guam or American Samoa. The term 'delegate,' in relation to the performance of functions in Guam or American Samoa with respect to the taxes imposed by chapters 1, 2, and 21, also includes any officer or employee of any other

[28] Both Puerto Rico and the Philippines were ceded to the United States by Spain following the Spanish-American War (1898). In 1900, the Chinese rebelled against Western encroachment in what is known as the Boxer Rebellion. After putting the rebellion down, conquering nations more or less divided China up then established treaties among themselves for regulation of trade in opium, tea and other commodities China produced. The “Bureau of Internal Revenue” appears to have made its first significant appearance in States of the Union for purposes of enforcing Congress’ first effort to regulate controlled substances via 1914 legislation. The U.S. Supreme Court made a decision adverse to the effort. Congress subsequently amended the act in 1918. By then prohibition forces were on the verge of getting the Eighteenth Amendment ratified and there was strong sentiment against any habituating substance. The next significant step for the Bureau of Internal Revenue was via Reorganization Plan #3 of 1940. In the plan, President Franklin Roosevelt unilaterally abolished the Federal Alcohol Administration established by the Federal Alcohol Administration Act of 1935 and transferred administration authority in the Bureau of Internal Revenue. In December 1935, the U.S. Supreme Court had ruled that with repeal of the Eighteenth Amendment (December 1933), federal government lost concurrent jurisdiction for enforcement of state laws pertaining to distilled spirits (*U.S. v. Constantine*), so enforcement of the 1935 legislation was put on hold until Roosevelt transferred administration to the insular possession agency. The Philippines was granted independence in 1946. The sequence of historical events leaves the Bureau of Internal Revenue, Puerto Rico as the only Bureau of Internal Revenue within the American domain to have been created by a legislative body. The name Bureau of Internal Revenue was changed to Internal Revenue Service via Treasury Order in 1953. It appears that Roosevelt replaced the original office of Commissioner of Internal Revenue with his own office via E.O. #6166 of June 10, 1933, then Truman replaced the Roosevelt office with his own via the 1950 & 1952 reorganization plans.

> department or agency of the United States, or of any possession thereof, duly authorized by the Secretary (directly, or indirectly by one or more redelegations of authority) to perform such functions. [Underscore added for emphasis]

Another constitutionally related question helps comprehend how encroachment took place over a period of time. The question is this: If it required a constitutional amendment to impose national prohibition against distilled spirits, and national prohibition was repealed when the amendment was repealed, wouldn't it require a constitutional amendment to impose national prohibition against controlled substances?

The next logical question is, "Has an amendment imposing national prohibition against controlled substances been ratified?"

Answers to the questions are obvious. Yes, it would require a constitutional amendment to impose national prohibition against controlled substances, and no, no such amendment has been enacted. However, we for all practical purposes have national prohibition against controlled substances. In fact, approximately 60% of the federal prison population is incarcerated for drug-related crimes and the rate is 35 to 40% in state prisons.

The situation is somewhat like the lady who went home unannounced one afternoon and found her husband in bed with another woman. However, the husband didn't panic. While he was putting his pants on, he asked the wife, "Are you going to believe me or your lying eyes?"

Does the Tenth Amendment ban against Government of the United States exercising powers not enumerated in the Constitution say what it says and mean what it says in unambiguous terms or not? The Fifth Amendment ban against depriving the American people of life, liberty or property without due process of law is just as obvious. When and if someone contests a government claim that originates from a legislative or administrative office, government bears the burden of proving its claim in a court of competent jurisdiction. If that isn't the case, the American people stand in very little better stead than the million or so summarily executed in the killing fields of Cambodia. Unrestrained executive power amounts to license. How the license is used is a matter of degree, not substance. Usurpation of power is usurpation of power.

In the Declaration of Independence, American founders proclaimed that there are self-evident truths. If they aren't self-evident, constraints imposed by declaratory and restrictive clauses contained in the Fourth, Fifth, Sixth and Seventh Amendments are at least obvious. What isn't obvious is how federal law preserves them.

All tax collection activity, beginning with the requirement to keep books and records and file returns, depends on there being a tax liability prescribed by law. This is the first fact the tax collection agency must prove in a court of competent jurisdiction when allegations of liability are contested. Once there is controversy that cannot be resolved by stipulation and agreement, the executive must pursue judicial determination and enforcement. Any time an administrative officer assumes authority of prosecutor, judge and jury, the usurpation abridges substantive rights.

William Shakespeare wrote, “A rose is a rose is a rose by any other name.” This has consistently been the position of the Supreme Court of the United States. The name of a thing is irrelevant, what it is and what its purpose is are determined by use.

Summons, subpoena and warrant instruments all have the same objective. They are designed to access information, i.e., they are search instruments, or are used to seize property and/or people. Liens, levies and seizures are all encumbrances, whether constructive or actual, that deprive people of full enjoyment of property. They are all seizure instruments. All of these devices are adversarial in nature and are subject to restrictive and declaratory clauses in the Fourth, Fifth, Sixth and Seventh Amendments.

When government and/or quasi-government personnel are challenged, they must prove venue, standing, subject matter jurisdiction, jurisdiction over person and necessary facts to support a claim in judicial forum. Unless there is an admiralty or maritime nexus, the judicial proceeding falls within the scope of the arising under clause in Article III § 2 of the Constitution and must proceed in the course of the common law. Defendant rights include but are not limited to the right to trial by jury, rights to know the nature and cause of action, the right to confront adverse witnesses, the right to compel testimony, and the right to public and speedy trial. A complaint must be submitted under oath or affirmation (an affidavit), and in criminal forums, there must be a probable cause hearing before a committing magistrate. An affidavit must support civil complaints.

The antipodes is this: We are a nation under law or a nation under the edict of capricious men. If the will of the prince is law, the latter is the case. However, there is precious little wrong with the law as it is written.