Relation-Back Doctrine Condemns Administrative Tax Lien & Levy

Fourth Revision, June 2002

by Dan Meador

The "relation-back doctrine" controls government interest in private property that arises as the consequence of an obligation imposed by law. In sum, the principle is this: While any given statute may give the government right, title and interest in property at the time of whatever act or omission the statute specifies, the claim isn't perfected and transfer may not be executed until the matter is adjudicated. Once a lien is perfected by way of a judgment from a court of competent jurisdiction, it is retroactive to the date of the act or omission that gave rise to the claim. This longstanding common-law doctrine has variously been incorporated in statutes, but the necessity of judicial procedure to perfect government interest isn't dependent on statutory language. Even when the relation-back doctrine isn't written into a statute that conveys interest in private property for noncompliance with performance requirements, it still controls statute construction.

The requirement for judicial due process is secured by the Fourth, Fifth, Sixth and Seventh Amendments to the Constitution of the United States. The Fourth Amendment controls pre-judgment searches and seizures (there must be a complaint under oath and a probable cause hearing before a magistrate in a court of competent jurisdiction; the exception is a criminal admiralty or maritime warrant, which can be issued by a court clerk), and the Fifth controls conversion: "No person shall be deprived of life, liberty or property without due process of law."

Relation-back doctrine is confirmed by U.S. Supreme Court decisions in 1806, 1890 and 1993, all cited in this memorandum, and is acknowledged in the Internal Revenue Manual, which prescribes operating procedure for Internal Revenue Service personnel. The doctrine governs how civil (non-criminal) claims of the United States must be perfected and executed. Virtually all IRS seizures where there is no lien or notice of lien are based on Code sections 7301 or 7302, or money laundering statutes classified in Titles 18 and 31, and are predicated on underlying presumptions that the property seized was involved in criminal activity. In either event, even when the action is predicated on a maritime cause, there must be judicial due process under one of two jurisdictional clauses in Article III § 2 of the U.S. Constitution.

In *Miranda v. United States*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), former Chief Justice Earle Warren penned the following: "As courts have been presented with the need to enforce constitutional rights, they have found means of doing so. That was our responsibility when *Escobedo* was before us and it is our **[*491]** responsibility today. Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them."

Prior to addressing particulars of relation-back doctrine, it will be useful to dispose

of the notion that Internal Revenue Service personnel have authority to unilaterally seize bank accounts, wages, salaries and the like with notices of levy that aren't supported by judgments from courts of competent jurisdiction. The due process clause is among the substantive rights the Supreme Court was referring to in *Miranda v. United States*. In *Fuentes v. Shevin, Attorney General of Florida, et al,* (1972) 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556, Supreme Court justices addressed essentials of the due process clause as it appears in the Fifth and Fourteenth Amendments:

> **[***HR3] [***HR4]** For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin v. Hale, 1 Wall. 223, 233.* See *Windsor v. McVeigh, 93 U.S. 274; Hovey v. Elliott, 167 U.S. 409; Grannis v. Ordean, 234 U.S. 385.* **[***570]** It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo, 380 U.S. 545, 552.*
>
> **[***HR5] [***HR6]** The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not **[*81]** only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. See *Lynch v. Household Finance Corp., 405 U.S. 538, 552.*
>
> **[***HR7]** The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision-making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. ... [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-172* (Frankfurter, J., concurring).
>
> **[***HR8]** If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly **[**1995]** taken in the first place. Damages may even be **[*82]** awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. **[***571]** "This Court has not ... embraced the general proposition that a wrong may be done if it can be undone." *Stanley v. Illinois, 405 U.S. 645, 647.*
>
> **[***HR9] [***HR10]** This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the *form* of a hearing "appropriate to the nature of the case," *Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 313,* and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]," *Boddie v. Connecticut, 401 U.S. 371, 378,* the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect. *E. g., Bell v. Burson, 402 U.S. 535, 542; Wisconsin v. Constantineau, 400 U.S. 433, 437; Goldberg v. Kelly, 397 U.S. 254; Armstrong v. Manzo, 380 U.S., at 551; Mullane v. Central Hanover Tr. Co., supra, at 313; Opp Cotton Mills v.*

Administrator, 312 U.S. 126, 152-153; United States v. Illinois Central R. Co., 291 U.S. 457, 463; Londoner v. City & County of Denver, 210 U.S. 373, 385-386. See *In re Ruffalo, 390 U.S. 544, 550-551.* "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut, supra, at 378-379* (emphasis in original).

The Supreme Court of Florida wrote one of the better analytical summaries of U.S. Supreme Court decisions concerning procedural due process secured by the Fifth and Fourteenth Amendment clauses in *Ray Lien Construction, Inc. v. Jack M. Wainwrite,* (1977) 346 S.2d 1029:

> Garnishment is but one form of summary remedy historically available to the creditor. It is a method whereby a person's property, money, or credits in the possession, under the control, or owing by another are applied to payment of the former's debt to a third person by proper statutory process against the debtor and garnishee. Because this remedy works a deprivation of debtor's property, it must comply with the requirements of procedural due process.
>
> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard, and in order that they may enjoy that right, they must first be notified." *Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233, 17 L. Ed. 531. Fuentes v. Shevin, 407 U.S. 67,* **[**4]** *80, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).*
>
> The United States District Court for the Middle District of Florida recently reviewed the statutes in question and held the procedure, as outlined in Chapter 77, Florida Statutes, unconstitutional. See *Bunton v. First National Bank of Tampa, 394 F. Supp. 793 (M.D.Fla.1975).* In arriving at its decision, the District Court relied upon the Supreme Court's decision in *North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975),* wherein a similar Georgia prejudgment garnishment statute was declared unconstitutional. In *North Georgia Finishing*, the Court referred to its earlier decision in *Fuentes v. Shevin, supra,* wherein the Florida and Pennsylvania replevin statutes were held invalid. Those statutes permitted a secured installment seller to repossess goods sold without prior notice and without opportunity for a hearing or other safeguard against mistaken repossession. A writ was issuable by a clerk of the court upon ex **[*1032]** parte application and posting of bond. It was not necessary to show that the goods were wrongfully detained. Nor was provision made for prompt post-seizure **[**5]** hearing. Thus, the debtor was deprived of his property until final outcome of the repossession suit. The Georgia statute was condemned on similar grounds. A writ of garnishment was issuable at the behest of the seller, without notice or opportunity for early hearing and without participation by a judicial officer. As in *Fuentes*, debtor's only remedy was to post a security bond.
>
> We read *North Georgia Finishing, supra,* and *Mitchell, supra,* to require a hearing either before the alleged taking or promptly thereafter. In *Unique Caterers v. Rudy's Farm Co., supra,* we found Chapter 76 constitutionally deficient because it did not require an immediate post-seizure hearing. Rather, it simply kept the court open at any time to hear motions for dissolution …
>
> We also stated:
>
> It is constitutionally imperative that a writ issue only after an impartial factual determination is made concerning the existence of the essential elements necessary for issuance of **[**8]** the writ. Consequently, a writ must be issued by a judicial officer based upon a prima facie showing rather than pro forma by the clerk of court, unless the initial pleading is made under oath to a clerk who makes an independent factual determination that the requirements of the statute have been complied with. Only then can the individual have his use and enjoyment of **[*1033]**

property protected from arbitrary encroachment. (footnote omitted)

Circumstances where the executive branch can seize property without judicial due process are extremely limited, and the notion that seized property can be administratively converted without judicial due process even in the event of exigent circumstances that require immediate action is absurd. One of the more comprehensive and expansive statements on the requirement for judicial due process of law was written in *United States v. Lee; Kaufman v. Lee*, 106 U.S. 196; 1 S. Ct. 240; 27 L. Ed. 171 (1882). In this case, the son of Robert E. Lee, who commanded the Confederate army, recovered the family estate he inherited from his maternal grandfather. The grandfather had given his daughter, Robert E. Lee's wife, a lifetime estate in the property, but ownership as heir passed to the grandson. The estate was absconded through a trumped-up tax sale rigged to gratify personal hostility of the President. Supreme Court justices who joined in the decision weren't overly accommodating. Although this cite is a little longer than would normally be included in what is intended to be a reasonably short memorandum, it is on point particularly where an administrative agency such as the Internal Revenue Service has a half-century history of encumbering and converting private property without judicial due process of law:

> What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery.
>
> It is not pretended, as the case now stands, that the President had any lawful authority to do this, or that the legislative **[*220]** body could give him any such authority except upon payment of just compensation. The defence stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation.
>
> These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground, as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the government established by that Constitution. As we have already said, the writ of habeas corpus has been often used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on **[***182]** the part of the executive and the legislative branches of the government. See *Ex parte Milligan, 4 Wall. 2; Kilbourn v. Thompson, 103 U.S. 168.*
>
> **[**261]** No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.
>
> It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.
>
> Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government; and the docket of this court is crowded with controversies of the latter class.

> Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the **[*221]** courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession?
>
> If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.
>
> It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, Stop here, I hold by order of the President, and the progress of justice must be stayed. That, though the nature of the controversy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, though one of the three great branches of the government to which by the Constitution this duty has been assigned has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen. [Underscore added for emphasis]

If administrative agencies have the right to encumber, seize and/or dispose of private property without judicial due process, there is no reason to have courts. When King George III subjected British colonies in North America to that kind of foolishness, American founders employed the word "despotism" to describe his actions. In 1882, justices of the U.S. Supreme Court articulated the obvious: "If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights."

Fortunately, the law doesn't authorize administrative encumbrance, levy, seizure, garnishment or any other adverse action that compromises life, liberty or property without judicial due process of law. Administrative notices of lien and notices of levy issued by Internal Revenue Service personnel when claims have not been adjudicated are bogus instruments – they are not backed by the force of law. However, these administratively-issued instruments are routinely filed and/or executed by county recorders, banks, employers and others who are either ignorant of the law or are too intimidated to risk reprisal. While there may be no cure for cowardice, the relation-back doctrine clarifies the law.

Where the American people are concerned, judicial due process characteristically falls either under the "arising under" clause (law and equity) or the admiralty and maritime jurisdiction clause, both of which are in Article III § 2 of the Constitution of the United States. Actions at law ("arising under" clause; Fifth, Sixth and Seventh Amendments) must proceed in the course of the common law; equity, admiralty and maritime actions follow the course of the civil law. See *Wayman v. Southard*, 23 U.S. 1, 6 L.Ed. 253, 10 Wheat 1, and the judiciary act of 1792. The relevant portion of Article III § 2, paragraph 1 is as follows:

> 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…

The relation-back doctrine is to understanding of administration and enforcement of internal revenue laws as the missing link is to evolution theory. It explains why administratively-issued notices of lien and levy are bogus instruments used for fraudulent conversion.

One of the better contemporary Supreme Court cases on the relation-back doctrine is *United States v. A Parcel of Land, Buildings, Appurtenances and Improvements, known as 92 Buena Vista Avenue, Rumson, New Jersey* (1993), 507 U.S. 111; 113 S.Ct. 1126; 122 L.Ed. 2d 469.

The Buena Vista case was an *in rem* (admiralty/maritime) case involving proceeds of illegal drug trafficking. The alleged drug dealer made a gift of money to a woman for purchase of the house located on Buena Vista Avenue. Several years later, the drug dealer was prosecuted and the government initiated a civil forfeiture action against the property even though the woman owned it, the government claiming that its interest dated to the time of the illegal transaction that produced the money. Whether or not the woman was aware of the illegal activity was irrelevant since the government's interest dated to the time of the original illegal transaction. Even though she might be innocent by virtue of what she did or didn't know, she could not enjoy fruits of the illegal enterprise.

Writing for four of the justices joining the plurality decision, Justice Stevens traced the relation-back doctrine to an 1806 decision written by former Chief Justice John Marshall:

> **[***HR1D]** **[***HR3A]** Chief Justice Marshall explained that forfeiture does not automatically vest title to property in the Government:
>
> "It has been proved, that in all forfeitures accruing at common law, nothing vests in the government until some legal step shall be taken for the assertion of its right, after which, for many purposes, the doctrine of relation carries back the title to the commission of the offence." *United States v. Grundy, 7 U.S. 337, 3 Cranch 337, 350-351, 2 L. Ed. 459 (1806).* n20
>
> **[*126]** **[**1136]** The same rule applied when a statute (a statute that contained no specific **[***484]** relation back provision) authorized the forfeiture. In a passage to which the Government has referred us, n21 we stated our understanding of how the Government's title to forfeited property relates back to the moment of forfeitability:
>
> "By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, *although their title is not perfected until judicial condemnation;* the forfeiture constitutes a statutory transfer of the right to the United States at the time the offence is committed; and **[*127]** the condemnation, *when obtained*, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith." *United States v. Stowell, 133 U.S. at 16-17* (emphases added).
>
> If the Government wins a judgment of forfeiture under the common-law rule -- which applied to common-law forfeitures and to forfeitures under statutes without specific relation back

> provisions -- the vesting of its title in the property relates back to the moment when the property became forfeitable. Until the Government does win such a judgment, however, someone else owns the property. That person may therefore invoke any defense available to the owner of the property before the forfeiture is decreed. [Underscore added for emphasis; *italics* in original]

Section 6321 of the Internal Revenue Code, which gives rise to what is commonly described as a statutory lien, is obviously subject to the common-law relation-back doctrine:

> Sec. 6321. Lien for taxes.
>
> 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 and rights to property, whether real or personal, belonging to such person.

Likewise, 26 U.S.C. § 6331(a), the basic authority for levy and distraint, is subject to the common-law relation-back doctrine:

> Sec. 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. 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. [Underscore added for emphasis]

Contrary to appearance of the two Code sections, the government's interest in property, either for purposes of lien or levy, does not attach to or encumber rights, title or interest until the appropriate judicial action is initiated. This principle was articulated by the Ninth Circuit Court of Appeals (March 18, 2002) in *United States of America v. Real Property at 2659 Roundhill Drive, Alamo, California*, No. 00-16772.

As was the case for the Buena Vista decision by the Supreme Court, the Roundhill case was drug-related. In this particular instance, part of the property purchase price was allegedly money derived from drug trafficking, but a healthy sum was also borrowed from a financial institution. When the government attempted to forfeit the property, the financial institution perfected its claim as the superior lien holder, the mortgage lien having been filed at the time the property was purchased. The financial institution subsequently held a non-judicial foreclosure sale; an investment group purchased the property at the auction. In the interim, the government filed a lis pendens (pending litigation notice) in the United States

District Court. In spite of the lis pendens, the financial institution proceeded with sale and the investment group made the purchase. The government subsequently attempted to forfeit the property in an *in rem* action (admiralty/maritime). The district court judge ruled in favor of the government; the Ninth Circuit, basing its decision on the 1993 Buena Vista decision, ruled against the government:

> The district court ruled that (1) the government's acquiescence in the foreclosure sale did not constitute a release of its forfeiture interest in the property; (2) the government's interest vested prior the purchasers' interest by virtue of *21 U.S.C. § 881*(h), n4 the forfeiture statute's "relation back" provision; and (3) the purchasers were not "innocent owners "since the notice of lis pendens was sufficient to alert them to the forfeiture proceedings. While the forfeiture action was pending, the purchasers sold the property (with the court's approval) and placed the proceeds in escrow. The district court granted summary judgment to the United States, which left the purchasers sustaining a net loss on their investment in the Roundhill property. The purchasers appealed.
>
> We reversed, holding that the government had no legal interest in the property. *United States v. 2659 Roundhill Drive, 194 F.3d 1020, 1027 (9th Cir. 1999)* ("Roundhill I"). We applied United States v. 92 Buena Vista Ave., 507 U.S. 111 (1993), which held that the relation-back rule of *21 U.S.C. § 881*(h) cannot be invoked until a final judgment of forfeiture has been entered; the United States had never obtained a final judgment. Therefore, according to Buena Vista, the government's interest in the Roundhill property could not have related back to 1974 (when the Paytons engaged in drug trafficking), but rather dated back only to October 19, 1994, when it recorded its lis pendens. Since the lis pendens was recorded after the date World recorded its deed of trust (which also was the effective date of the purchasers' interest) the government's interest was extinguished by normal operation of long-standing California foreclosure law. n5 Thus, the purchasers took title to the property free and clear of the government's interest. *Roundhill I, 194 F.3d at 1027.*

The *in rem* action is against the thing, the *res*, where so-called civil actions are against the party who is allegedly liable. The Internal Revenue Code segregates the two forms of action at 26 U.S.C. §§ 7323 & 7404:

> Sec. 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.

> Sec. 7402. Jurisdiction of district courts.
>
> (a) To issue orders, process, 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 two sections cited above specify the two forms of judicial action federal government has available when and if there is an act or omission contrary to internal revenue laws of the United States. Even though any given Code section may give rise to an interest, the interest isn't perfected until there is a judgment from a court of competent jurisdiction. The interest is perfected via the judgment, but it dates to the act or omission

that gave rise to the interest. This is the essence of relation-back doctrine, which is a common-law doctrine that predates the Constitution of the United States.

The definition of "relation back" in *Black's Law Dictionary*, Sixth Edition, is useful in understanding the relation of the original act to the time of a judgment perfecting a statutory lien:

> **Relation Back**. General rule of "relation back" is that a pleading may not be amended to allege a new or different claim or defense unless it arose out of, or is based on or related to, claim, transaction or occurrence originally set forth or attempted to be set forth. [Cites omitted]
>
> A principle that an act done today is considered to have been done at an earlier time. A document held in escrow and finally delivered is deemed to have been delivered as of the time at which it was escrowed.

Where actions filed in courts of law are concerned, the principle more or less says, "You can't change horses in the middle of the stream." The second definition more closely characterizes the lien process. Internal Revenue Code § 6321 is the primary section that gives rise to statutory liens where there is a failure to perform, and the date of lien existence is determined by the date of non-performance, but only after there is a judgment for a delinquent tax debt (Federal Debt Collection Procedure Act, 28 U.S.C. § 3201). The lien is choate, or perfected, after judgment; it is inchoate or unperfected prior to judgment. Definitions from *Black's Law Dictionary*, Sixth Edition, are again useful:

> **Choate lien**. Lien which is perfected so that nothing more need be done to make it enforcible. Identity of lienor, property subject to lien and amount of lien are all established. Walker v. Paramount Engineering Co., C.A.Mich., 353 F.2d 445, 449; U.S. v. City of New Britain, Conn., 347 U.S. 81, 74 S.C. 367, 369, 98 L.Ed. 520. The lien must be definite and not merely ascertainable in the future by taking further steps. Gower v. State Tax Commission, 207 Or. 288, 295 P.2d 162.
>
> **Inchoate.** Imperfect; partial; unfinished; begun, but not completed; as a contract not executed by all the parties. State ex rel. McCubbin v. McMillian, Mo.App., 349 S.W.2d 453, 462.

A federal tax lien, i.e., a "notice of lien," that is issued prior to there being a judgment to perfect the lien is at best inchoate. It is incomplete, imperfect:

> Under the law of California as declared in Puissegur v. Yarbrough, 29 CAL. 2D 409, 412, 175 P.2D 830, 831-832, an attaching creditor obtains "only a potential right or a contingent lien" until a judgment perfecting the lien is rendered, and that meanwhile, the lien is contingent or inchoate – merely a lis pendens notice that a right to perfect a lien exists. Id, At 50. *United States v. R.F. Ball Construction Co, Inc.* 355 U.S. 587

The United States Attorney's Manual confirms this same principle with respect to notices of lien issued by the Internal Revenue Service. The notice must include the abstract

of judgment on the back of the Form 668-Y used as the notice of federal tax lien:

> 3-10.200 Civil Postjudgment Financial Litigation Activity – Perfecting the Judgment
>
> Immediately following expiration of the 10-day automatic stay after entry of the judgment (whether by default, stipulation, court determination, or by the referral of a judgment from another district), see Fed. R. Civ. P. 62(a), immediate action shall be taken to perfect the judgment as a lien in accordance with the Federal Debt Collection Procedures Act. See 28 U.S.C. § 3201.
>
> Special care should be taken to ensure that the judgment is perfected as a lien by filing a 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 § 6323(f) of the Internal Revenue Code of 1986. A lien should be filed in accordance with state law filing requirements and should be filed in any state where the debtor owns real property.
>
> 6-8.000 POST-JUDGMENT COLLECTION MATTERS
>
> 6-8.400 Differences Between Tax Judgments and Other Civil Judgments – Collection Procedures
>
> The Tax Division's Judgment Collection Manual should be consulted for an in depth discussion of special procedures for the collection of tax judgments that are not available for, or are different from, the procedures for collecting other judgments in favor of the United States. For example, an IRS levy can be used to collect a tax judgment; the state exemption statutes are inapplicable to tax judgments; federal tax liens have special characteristics; and post-judgment interest on tax judgments accrues at a different rate than the normal judgment rate and is compounded daily. [Underscore added for emphasis]

Although it is rarely if ever completed, the Form 668-Y has a designated space on the back for the abstract of judgment. The purpose of the abstract is to enable interested parties to locate the judgment so they can review particulars. Unless the notice has the abstract on the back, the paper trail necessary to verify that there is a judgment and the nature, amount and object of the judgment is incomplete. If the document is incomplete with respect to essential elements, or includes vague or misleading information, it is an uttered instrument.

Since promulgation of the Internal Revenue Code of 1954, the Form 668-B Levy has been the proper form for legitimate levies. The “notice of levy” merely conveys information and is supposed to provide notice to the party a levy is executed against, not third parties. The notice of levy, which is commonly sent to third-party custodians of financial assets, is not an enforceable levy instrument. The Form 668-B Levy must be accompanied by the applicable writ issued from a court of competent jurisdiction in order for it to be enforceable – third-party custodians are supposed to receive the actual levy and writ.

In the criminal forfeiture handbook, the Internal Revenue Manual acknowledges effect of relation-back doctrine at § [9.7] 14.17.6 (04-30-1998):

> 6. The Relation Back Doctrine maintains that property is actually forfeited at the time it is used illegally, unless the statute states otherwise. At that instant, all rights and legal title to the asset pass to the government. Seizure and formal proceedings simply confirm, or proclaim, the

> forfeiture that has already taken place. Therefore, any liens placed on the property after the date the asset is used illegally will be a lien filed against government property. Theoretically, no third party can acquire a legally recognizable interest in the property after the illegal use. However, the Supreme Court ruled that a good faith purchaser can assert an Innocent Owner defense prior to the government obtaining a judgment of forfeiture U.S. v. 92 Buena Vista Ave., Rumson, N.J. 113 S.Ct. 1126 (1993). In all instances, District Counsel shall be consulted prior to releasing a tax lien or to releasing the seized property to satisfy a tax lien. [Underscore added for emphasis]

Although the IRM section is phrased in a manner that probably doesn't convey the substance of the Buena Vista decision, cited *supra*, unless someone actually reads the decision, Internal Revenue Service attorneys and ranking officers, if not lower-level IRS personnel, are obviously aware of the need for judicial due process before government agencies can lawfully encumber or convert private property. The Fifth Amendment due process clause is as much a barrier to civil action as the right to remain silent is to criminal. See *United States v. Miranda*, cited *supra*.

Two erroneous perceptions contribute to misunderstanding of federal tax administration and enforcement. The first, and possibly most serious, is that the Internal Revenue Code (Title 26 of the United States Code) is organized in such a fashion that administration follows the order of Code sections. The second is that the Internal Revenue Code contains all federal law relating to federal tax administration and enforcement. Neither is the case.

So far as Internal Revenue Code section and other arrangement is concerned, the matter is addressed by 26 U.S.C. § 7806(b):

> (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.

The United States Code is a classification system for laws of the United States. Annual session laws are published sequentially in the Statutes at Large; each section in any given statute Congress enacts is then "codified" in one or more titles of the United States Code. In order to determine "legislative construction" of any given Code section (it's proper application), it is necessary to go to the section genesis in original legislation. Just because one Internal Revenue Code section follows another, or one categorical subtitle or chapter follows another, does not mean that the two sections, chapters, subtitles or whatever have more than passing relationship to each other unless there is internal reference that establishes the link.

Lien and levy authority (26 U.S.C. §§ 6321 & 6331) are in Subtitle F, Chapter 64 of the Internal Revenue Code. Crimes, seizures and forfeitures, and the judicial authority

for seizures (§ 7323), are in Chapter 74. Proceedings for judicial action (civil action; § 7402) are in Chapter 75. If these sections were interpreted to be applicable in numerical sequence, it would appear that the Internal Revenue Service has unilateral authority to issue notices of lien and levy without judgments from courts of competent jurisdiction. However, the relation-back doctrine demonstrates that judicial process must be antecedent to encumbering and converting privately owned assets on behalf of the government. This is the reason § 7806(b) of the Internal Revenue Code, and comparable disclaimers for each of the other titles, withholds implications of legislative construction.

Analogously, the United States Code is somewhat like a library card catalog organized by subject. At least ten titles in addition to Title 26 have sections and sometimes complete chapters relating to administration and enforcement of internal revenue laws. For example, administration of Subtitle E (alcohol, tobacco and firearms) of the Internal Revenue Code crosses over to Title 27. Section 7327 of the Internal Revenue Code acknowledges another expanded application crossover:

> Sec. 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 to forfeitures incurred or alleged to have been incurred under the internal revenue laws.

Unfortunately, the links between titles may work in the inverse and may not be as conspicuous as the two examples above. This is the case for Federal Debt Collection Procedure Act in Chapter 176 of Title 28, which contains federal judicial procedure and rules. At 28 U.S.C. § 3001, application is prescribed:

> Sec. 3001. Applicability of chapter
>
> (a) In general. – Except as provided in subsection (b), the chapter provides the exclusive civil procedures for the United States –
>
> (1) to recover a judgment on a debt; or
>
> (2) to obtain, before judgment on a claim for a debt, a remedy in connection with such claim.
>
> (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.

Are delinquent taxes classified as debts? According to definitions applicable to the Federal Debt Collection Procedure Act, they are:

> Sec. 3002. Definitions
>
> As used in this chapter:
>
> (3) "Debt" means –
>
> (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]

Per § 3001, Federal Debt Collection Procedure in Chapter 176 of Title 28 provides exclusive civil procedure (judicial process) for the United States to collect debts "to the extent that another Federal law" doesn't provide alternative procedure. Section 3002(3)(B) defines tax "owing to the United States" as a "debt" for purposes of Federal Debt Collection Procedure prescribed in Chapter 176 of Title 28. While there are technical exceptions for enforcement of tax law at 28 U.S.C. § 3003(b), the only alternative jurisdictional authority for judicial action to collect delinquent tax obligations is the admiralty/maritime *in rem* action accounted for at 26 U.S.C. § 7323 – jurisdiction of courts of the United States fall under the "arising under" clause or the admiralty/maritime clause. In either jurisdiction, whenever an alleged liability is contested, the matter must be adjudicated.

In either forum, the claim must be verified by a witness competent as a matter of law to make a complaint. Where the civil action is concerned, the requirement for a claim to be supported by affidavit is at 28 U.S.C. § 3006:

> Any affidavit required of the United States by this chapter 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.

In the event the United States secures a favorable judgment on the claim, it may be filed as a lien, per 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 a certified copy of the abstract of the judgment in the manner in which a notice of tax lien would be filed under paragraph (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.

Enforcement, execution and other particulars are prescribed by §§ 3202, etc., and garnishment by § 3205. These are all post-judgment remedies. The alternative administrative collection process preserved by 28 U.S.C. § 3003(b) vests the "delegate" of the Secretary of the Treasury (26 U.S.C. § 7701(a)(12)) with pre-judgment and post-judgment collection authority within internal revenue districts established in compliance with requirements of 26 U.S.C. § 7621 and Executive Order #10289, as amended. The U.S. Marshal for the judicial district would otherwise be responsible for execution.

This hair-splitting is essential to understanding of lawful judicial process as courts

of the United States must sit either as admiralty and maritime courts or courts of common law – one jurisdiction is exclusive of the other. In another of his precedent decisions, former Chief Justice John Marshall addressed the matter in definitive terms. In *The Sarah*, 21 U.S. 391, 5 L.Ed. 644, 8 Wheat 391 (1823), he stated the following:

> By the act constituting the judicial system of the United States, the District Courts are Courts both of common law and admiralty jurisdiction. In the trial of all cases of seizure, on land, the Court sits as a Court of common law. In cases of seizure made on waters navigable by vessels of ten tons burthen and upwards, the Court sits as a Court of Admiralty. In all cases at common law, the trial must be by jury. In cases of admiralty and maritime jurisdiction, it has been settled, in the cases of the Vengeance, **[***5]** (reported in 3 Dallas' Rep. 297.) the Sally, (in *2 Cranch's Rep. 406.)* and the Betsy and Charlotte, (in *4 Cranch's Rep. 443.)* that the trial is to be by the Court.
>
> Although the two jurisdictions are vested in the same tribunal, they are as distinct from each other as if they were vested in different tribunals, and can no more be blended, than a Court of Chancery with a Court of common law.
>
> The Court for the Louisiana District, was sitting as a Court of Admiralty; and when it was shown that the seizure was made on land, its jurisdiction ceased. The libel ought to have been dismissed, or amended, by charging that the seizure was made on land.
>
> The direction of a jury, in a case where the **[**645]** libel charged a seizure on water, was irregular; and any proceeding of the Court, as a Court of Admiralty, after the fact that the seizure was made on land **[*395]** appeared, would have been a proceeding without jurisdiction.

The Fifth, Sixth and Seventh Amendments preclude and condemn admiralty and maritime seizures on land within States of the Union. See *Wayman v. Southard*, cited *supra*. Therefore, the *in rem* action prescribed by 26 U.S.C. § 7323 cannot pass muster where it involves property "seized" on land within States of the Union; the Internal Revenue Service, when and if the agency has a legitimate claim, must file a civil action in a court of competent jurisdiction (26 U.S.C. § 7402) and, with colorable exceptions prescribed at § 3003(b), proceed according to the general procedure prescribed in the Federal Debt Collection Procedure Act (26 U.S.C. §§ 3001, et seq.).

In the Internal Revenue Manual for the Chief Council of the Criminal Division, the right to trial by jury is preserved at § 31.8.6.1.2 (04-08-1998):

> 2. Jury Trials. A forfeiture arising from a seizure of land is a common-law action in rem and not an action within the admiralty jurisdiction of the district court; therefore, the Seventh Amendment applies so as to guarantee a jury trial. See, C.J. Hendry Co. v. Moore, 318 U.S. 133 (1948) and United States v. One 1976 Mercedes-Benz 280S, 618 F.2d 453 (7th Cir. 1980). The Supplemental Rules for Certain Admiralty and Maritime Claims are nevertheless applicable because these rules also apply to actions analogous to maritime actions in rem. See Rules A and C, Supplemental Rules for Certain Admiralty and Maritime Claims; 28 U.S.C. § 2461.

Suffice it to say that the seizure or forfeiture contemplated by § 31.8.6.1.2 (04-08 -1998) presumes an underlying criminal cause of action that has an admiralty or maritime nexus, i.e., that the act or omission that gives rise to the cause of action falls within the

scope of Congress' authority to regulate international commerce. Without that nexus, the court would have to set as a court of common law; per *The Sarah*, *supra*, common law and admiralty jurisdictions are mutually exclusive. Courts of the United States must convene under the "arising under" clause or the admiralty and maritime clause; they are prohibited from exercising hybrid or mixed jurisdictions.

All Internal Revenue Service criminal seizure authority falls under delegation orders 157 and 158. The former applies to Internal Revenue Code seizures under authority of 26 U.S.C. §§ 7301 & 7302; the latter applies to money laundering statutes in Titles 18 & 31. Both orders authorize seizures under admiralty criminal (Rule 41, Federal Rules of Criminal Procedure) and/or civil (Supplemental Admiralty and Maritime Rules) procedure. The reason is because both the money laundering statutes in Titles 18 & 31 and IRS' Internal Revenue Code seizure authority link to controlled substance laws in Titles 19 & 21, with basic procedure prescribed in Title 19. The link for money laundering sections in Titles 18 & 31 is clearly states in the introduction to the Memorandum of Understanding Regarding Money Laundering Investigation (IRM Exhibit 31.8.1-3 (06-29-1994):

> This Memorandum of Understanding (MOU) constitutes an agreement among the Secretary of the Treasury ("the Secretary"), the Attorney General and the Postmaster General as to the investigatory authority and procedures of Treasury and Justice bureaus and the Postal Service under 18 U.S.C. sections 1956 and 1957, as amended by the Anti-Drug Abuse Act of 1988, Pub. L. 100-690 (Nov. 18, 1988). This replaces a previous MOU on this subject between the Secretary and the Attorney General effective May 20, 1987.

The memorandum of understanding, delegation orders #157 & #158, and IRS' sole regulation governing seizures and forfeitures, 26 CFR § 403, all link to Title 19 procedure and drug laws in admiralty and maritime jurisdiction. Although the subject is beyond the scope of this memorandum, it follows that any crime prosecuted by the Internal Revenue Service is predicated on the underlying presumption that it is a drug-related offense. Therefore, courts in which IRS is the principal agency responsible for prosecution are convened as admiralty rather than common law courts. This practice is contrary to substantive rights secured by the Fifth, Sixth and Seventh Amendments, assuming admiralty jurisdiction cannot be affirmatively established in record, as these amendments secure due process in the course of the common law. See *Wayman v. Southard*, cited *supra*.

It is useful to examine the genesis of 26 U.S.C. §§ 6321, et seq. (lien) and §§ 6331, et seq. (levy and distraint) as these sections all originate in 1860's legislation applicable exclusively to alcohol, cotton, and in some instances, tobacco. This is the reason that the only surviving regulation listed in the Parallel Table of Authorities and Rules for §§ 6321 & 6331 is 27 CFR § 70, which is under Bureau of Alcohol, Tobacco and Firearms jurisdiction, as applicable to Subtitle E of the Internal Revenue Code.

Chapter 75, Subchapter C, Part I of the Code, "property subject to forfeiture," is specific with respect to what property may be forfeited in the *in rem* action specified by 26

U.S.C. § 7323. There are two primary categories: § 7301 obviously applies to production and distribution of alcohol products where § 7302, property used in violation of internal revenue laws, which is not quite so obvious, applies to alcohol products and controlled substances in admiralty and maritime jurisdiction of the United States (foreign commerce). The two sections follow:

> § 7301. Property subject to tax.
>
> (a) Taxable articles. Any property on which, or for or in respect whereof, any tax is imposed by this title which shall be found in the possession or custody or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of such tax, or which is removed, deposited, or concealed, with intent to defraud the United States of such tax or any part thereof, may be seized, and shall be forfeited to the United States.
>
> (b) Raw materials. All property found in the possession of any person intending to manufacture the same into property of a kind subject to tax for the purpose of selling such taxable property in fraud of the internal revenue laws, or with design to evade the payment of such tax, may also be seized, and shall be forfeited to the United States.
>
> (c) Equipment. All property whatsoever, in the place or building, or any yard or enclosure, where the property described in subsection (a) or (b) is found, or which is intended to be used in the making of property described in subsection (a), with intent to defraud the United States of tax or any part thereof, on the property described in subsection (a) may also be seized, and shall be forfeited to the United States.
>
> (d) Packages. All property used as a container for, or which shall have contained, property described in subsection (a) or (b) may also be seized, and shall be forfeited to the United States.
>
> (e) Conveyances. Any property (including aircraft, vehicles, vessels, or draft animals) used to transport or for the deposit or concealment of property described in subsection (a) or (b), or any property used to transport or for the deposit or concealment of property which is intended to be used in the making or packaging of property described in subsection (a), may also be seized, and shall be forfeited to the United States.

> § 7302. Property used in violation of internal revenue laws.
>
> It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal revenue laws.

Levy and distraint (26 U.S.C. § 6331) are seizure and forfeiture actions. It stands to reason that where Congress specifies what property is subject to forfeiture, the bureau or agency responsible for administration of internal revenue laws may not expand the object of its authority beyond what is authorized by Congress. As previously seen, the only expanded authority in § 6331 specifically applies to government agencies and personnel. There is no corresponding expansion of § 6321 (lien), so it is obvious that a judgment lien

(28 U.S.C. § 3201) must be secured against government personnel when and if a government employee is liable for delinquent tax debts.

Per *The Sarah*, *supra*, simply declaring that the seizure, levy or whatever was on land deprives the court of admiralty and maritime jurisdiction. Assuming the government has sufficient evidence to sustain a claim where there is no maritime nexus, the court must sit as a court of common law, thereby preserving substantive due process rights secured by the Fifth, Sixth and Seventh Amendments. Both of these sections are predicated on underlying presumptions of criminal conduct; BATF administers § 7302 under 27 CFR § 24, 72 & 252 where IRS colorably administers the section under 26 CFR § 403. Both 27 CFR § 72 and 26 CFR § 403 are applicable solely in admiralty and maritime jurisdiction of the United States.

The acid test to determine whether or not judicial due process is required where liabilities are contested is to examine the requirement for judicial process in admiralty and maritime jurisdiction and common law jurisdiction.

Particulars concerning requirements for judicial forfeiture of property seized by the Internal Revenue Service under the presumption that the property has been used in violation of internal revenue laws are at 26 CFR § 403.26(b):

> (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.

The Internal Revenue Service is successor of the Bureau of Internal Revenue. Original BIR authority as agent of government of the United States was enforcement of the China Trade Act (1904) in insular possessions of the United States. The China Trade Act was shell legislation that accommodated trade treaties relating to opium, cocaine and citric wines. Although the China Trade Act itself has been repealed, there are still many China Trade Act corporations, and older treaties have generally been displaced by more inclusive treaties that apply to the spectrum of what are classified as controlled dangerous substances. This residual IRS jurisdiction is preserved by 26 CFR § 403, and virtually all IRS seizures are predicated on the underlying presumption that a drug-related commercial crime listed at § 403.38(d)(1) has been committed:

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

Even in this colorable admiralty jurisdiction, property valued in excess of $2,500, or property valued at less than $2,500 where there is a claim against it, must be judicially forfeited.

Per the Internal Revenue Manual, the dollar limit prescribed by 26 CFR § 403.38(d)(1) are obsolete since promulgation of 26 U.S.C. § 7325, personal property valued at $100,000 or less, and a $500,000 minimum for money laundering seizures. However, provisions for remission or mitigation of forfeitures are still in effect (See Internal Revenue Manual § 31.8.5.4), and if the seizure is on land, simply declaring that it was on land forces judicial forfeiture with trial by jury even if there is a legitimate maritime cause of action. See IRM § 31.8.6.1.2, *supra*. Providing the rightful owner contests a seizure, the Internal Revenue Service doesn't have lawful authority to convert as much as a toothpick without judicial due process of law.

The at law or common law trail picks up with the sentence relating to government agencies and personnel grafted into 26 U.S.C. § 6331: "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."

As is the case for the Federal Debt Collection Procedure Act, which is classified in Title 28 of the United States Code, administration of tax and debt collection for government agencies and personnel isn't in the Internal Revenue Code. It is classified at 5 U.S.C. §§ 5512 through 5520a.

A government employee may voluntarily consent to garnishment in the event he has a debt owing to the United States. He must sign a waiver to do so. However, if the employee contests the obligation and otherwise does not consent to administrative garnishment, the Attorney General must initiate a civil action for collection. This requirement is set out at 5 U.S.C. § 5512:

> § 5512. Withholding pay; individuals in arrears
>
> (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 the language is convoluted, § 5512(b) preserved the Fifth Amendment judicial due process clause even for government personnel. When challenged, the creditor, even government of the United States, must prove the claim in a court of competent jurisdiction. If the claim is contested, the government's fiduciary responsibility as employer

protects the employee's claim on compensation until the controversy is adjudicated via judicial due process of law in the course of the common law. All cases and controversies "arising under" the Constitution and laws of the United States must be resolved by judicial due process of law. Just as the Constitution vests Congress with exclusive legislative authority via Article I § 8, clause 18, it vests exclusive jurisdiction for Article III courts of the United States to adjudicate cases and controversies "arising under" the Constitution and laws of the United States.

The only way the Internal Revenue Service or any other administrative office or agency may administratively use forced collection instruments without a judgment from a court of competent jurisdiction is when the target of the collection action knowingly and intentionally waives his or her substantive rights and thereby consents to administrative collection. This principle is fundamental to the so-called republican form of government. Legislative, administrative and judicial departments are co-equal branches and one may not perform functions vested in the other. Where the administrative branch has exclusive responsibility for administering laws enacted by Congress, only the judicial may authorize anything beyond voluntary compliance when issues of fact and law are contested or compliance isn't otherwise voluntary.

The relation-back doctrine resolves otherwise ambiguous lien and levy powers codified at §§ 6321, et seq., & 6331, et seq., of the Internal Revenue Code. Cause for a lien or levy may arise at the time someone fails to perform a duty imposed by internal revenue laws of the United States, but the encumbrance, seizure, garnishment or whatever is not perfected (does not come into lawful existence and is not enforceable) until it has been properly adjudicated by a court of competent jurisdiction. If a seizure is on land within States of the Union, the court must sit as a court of common law.

An obvious question necessarily needs to be resolved: Do regulations governing Internal Revenue Service conduct preserve the Fifth Amendment due process clause?

The answer is affirmative. The first rule of administrative appeal procedure at 26 CFR § 601.106(f)(1) speaks to the matter:

> (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. Accordingly, an Appeals representative in his or her conclusions of fact or application of the law, shall hew to the law and the recognized standards of legal construction. It shall be his or her duty to determine the correct amount of the tax, with strict impartiality as between the taxpayer and the Government, and without favoritism or discrimination as between taxpayers. [Underscore added for emphasis]

With or without the intentionally vague regulation, the Fifth Amendment due process clause speaks to the matter in unequivocal terms: No person shall be deprived of life, liberty or property without due process of law. Until such time as the amendment is repealed, it serves as a cornerstone to secure our republican form of government. The relation-back doctrine resolves the mystery of how the government's interest arising from

nonperformance required by a statute must be perfected. The executive branch cannot unilaterally proceed against life, liberty or property of the American people until a claim or other cause of action has been perfected through litigation in a court of competent jurisdiction.

In *Ex parte Mulligan*, 71 U.S. 2, 18 L.Ed. 281, 4 Wall 2, at 104 (1866), the U.S. Supreme Court addressed this very issue:

> We submit that a person not in the military or naval service cannot be punished at all until he has had a fair, open, public trial before an impartial jury, in an ordained and established court, to which the jurisdiction has been given by law to try him for that specific offence.
>
> Our proposition ought to be received as true without any argument to support it; because, if that, or something precisely equivalent to it, be not a part of our, then the country is not a free country. Nevertheless, **[***105]** we take upon ourselves the burden of showing affirmatively not only that it is true, but that it is immovably fixed in the very framework of the government, so that it is impossible to detach it without destroying the whole political structure under which we live.
>
> In the first place, the self-evident truth will not be denied that the trial and punishment of an offender against the government is the exercise of judicial authority. That is a kind of authority which would be lost by being diffused among the masses of the people. A judge would be no judge if everybody else were a judge as well as he. Therefore, in every society, however rude or however perfect its organization, the judicial authority is always committed to the hands of particular persons, who are trusted to use it wisely and well; and their authority is exclusive; they cannot share it with others to whom it has not been committed. Where, then, is the judicial power in this country? Who are the depositaries of it here? The Federal Constitution answers that question in very plain words, by declaring that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as **[***106]** Congress may from time to time ordain and establish." Congress has, from time to time, ordained and established certain inferior courts; and, in them, together with the one Supreme Court to which they are subordinate, is vested all the judicial power, properly so called, which the United States can lawfully exercise. At the time the General Government was created, the States and the people bestowed upon that government a certain portion of the judicial power which otherwise would have remained in their own hands, but they gave it on a solemn trust, and coupled the grant of it with this express condition, that it should never be used in any way but one; that is, by means of ordained and established courts. Any person, therefore, who undertakes to exercise judicial power in any other way, not only violates the law of the land, but he tramples upon the most important part of that Constitution which holds these States together.
>
> We all know that it was the intention of the men who founded this Republic to put the life, liberty, and property of every person in it under the protection of a regular and permanent judiciary, separate, apart, distinct, from all other branches of the government, **[***107]** whose sole and exclusive business it should be to distribute justice among the people according to the wants and needs of each individual. It was to consist of courts, always open to the complaint of the injured, and always ready to hear criminal accusations when founded upon probable cause; surrounded with all the machinery necessary for the investigation of truth, and clothed with sufficient power to carry their decrees into execution.

For a time during the Civil War, normal judicial process was suspended. Congress authorized the President to suspend the writ of habeas corpus, and through the war it was suspended in many areas. During the time of armed conflict, the executive branch exercised extraordinary powers. When hostilities ceased, special procedure was prescribed to expedite normalization and the writ of habeas corpus was reinstated. In the Milligan

decision, the Supreme Court took the opportunity to declare and re-establish the proper role of the judiciary. The meaning of "due process of law" was no mystery for justices who joined in the decision. The requirement for a court with an independent judge to dispense due process of law is so obvious as to be classified as self-evident truth that shouldn't need further explanation.

In *Wayman v. Southard*, *supra*, former Chief Justice John Marshall undertook to answer two questions relating to jurisdiction of federal courts: (1) What does the Constitution empower Congress to do so far as implementing Article III jurisdiction by way of legislation for courts of the United States; and (2) What has Congress done? Almost in passing, Marshall stated the obvious: With ratification of the Fifth, Sixth and Seventh Amendments, Congress "had no choice." Where the judiciary act of 1789 did not definitively establish forms of action, the 1792 judiciary act, enacted subsequent to ratification of the Bill of Rights, specified that all actions at law would proceed in the course of the common law while equity, admiralty and maritime cases would proceed in the course of the civil law.

The same two questions are as relevant in the twenty-first century as they were in the nineteenth: What does the Constitution empower Congress to do and what has Congress done? Since declaratory and restrictive clauses in the First, Fourth, Fifth, Sixth and Seventh Amendments haven't been amended or repealed, it is just as obvious that the contemporary Congress has no choice when it comes to preserving substantive rights. Thus, Marshall's explanation of relation-back doctrine in *United States v. Grundy, 7 U.S. 337, 3 Cranch 337, 350-351, 2 L. Ed. 459 (1806)* was valid in 1890 when Justice Gray wrote the opinion in *United States v. Stowell,* 133 U.S. at 16-17: "By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offence is committed; and **[*127]** the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith."

The relation-back doctrine was also preserved by the U.S. Supreme Court in 1993 via the Buena Vista decision, 507 U.S. 111; 113 S.Ct. 1126; 122 L.Ed. 2d 469.

Unfortunately, there would appear to be contrary judicial decisions extrapolated from *Bull v. United States*, 295 U.S. 247, at 259260, 55 S.Ct. 695, 79 L.Ed. 1421 (1935):

> A tax is an exaction by the sovereign, and necessarily the sovereign has an enforceable claim against every one within the taxable class for the amount lawfully due from him. The statute prescribes the rule of taxation. Some machinery must be provided for applying the rule to the facts in each taxpayer's case, in order to ascertain the amount due. The chosen instrumentality for the purpose is an administrative agency whose action is called an assessment. The assessment may be a valuation of property subject to taxation which valuation is to be multiplied by the statutory rate to ascertain the amount of tax. Or it may include the calculation and fix the amount of tax payable, and assessments of federal estate and income taxes are of this type. Once the tax is assessed the taxpayer will owe the sovereign the amount when the date fixed by law for payment

> arrives. Default in meeting the obligation calls for some procedure whereby payment can be enforced. The statute might remit the Government to an action at law wherein the taxpayer could offer such defense as he had. A judgment against him might be collected by the levy of an execution. But taxes are the life-blood of government, and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic **[*260]** means of collection. The assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt.

The Bull case concerned Mr. Bull's estate in a partnership due to the Commissioner of Internal Revenue double-dipping. The executor of Bull's estate paid income tax on partnership earnings the year following Mr. Bull's death, then several years later the same earnings were fully assessed as estate taxes. The estate executor paid both assessments then sued for recovery of the excessive tax. Government attorneys attempted to avoid repayment, alleging that recoupment was prohibited by the statue of limitations.

At no time was there an effort to levy or seize property belonging to the estate or the executor. The Supreme Court comment cited above was merely "dicta" (extraneous comment) concerning effects of assessment and the "pay now, sue later" policy that is generally prescribed for recoupment when a liability is disputed. The notion that an assessment is or can be a judgment that rises to the level of a judicial order must be understood as an analogous statement. In reality, an assessment, even when there is a lawful, procedurally proper assessment, merely creates a statutory presumption that shifts the burden of proof to whomever it is against. By creating a presumption, the assessment has characteristics on the order of a judgment, but it is still an administrative act and would be repugnant to the Fifth Amendment if clothed with true judicial character. In fact, presumptions such as those created by lawful, procedurally proper assessments are rebuttable – Congress has no authority to create conclusive, irrefutable presumptions, much less authorize enforceable administrative judgments.

Irrefutable presumptions were addressed in *Heiner v. Donnan* 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772 (1932). The case was contemporary with the Bull decision:

> **[*321]** The executors paid the tax, and, after rejection of a claim for refund, brought this action in the federal district court for the western district of Pennsylvania to recover the amount of the tax attributable to the inclusion of the property in question by the commissioner. The trial court found that neither the transfer in trust nor the advancement was made in contemplation of death. Judgment was rendered in favor of the executors on the ground that the foregoing provision of § 302 (c) was unconstitutional as contravening the due process clause of the Fifth Amendment, and void as being repugnant to other sections of the act. *48 F.2d 1058.* An appeal was taken, and the circuit court of appeals has certified to this court two questions of law upon which instruction is desired:
>
> "1. Does the second sentence of section 302 (c) of the revenue act of 1926 violate the due process clause of the fifth amendment to the Constitution of the United States?
>
> "2. If the answer to the first question be in the negative, is the second sentence of section 302 (c) of the revenue act of 1926 void because repugnant to sections 1111, 1113 (a), 1117, and 1122 (c) of the same act?"

The Heiner case involved the estate of a reasonably young man who put money in trusts for minor children and evidently gave some directly to an older son. Not quite two years later, he was killed by a lightening strike. The estate tax section at issue was from the 1926 revenue act; it created a conclusive presumption that any gift given in the two years prior to death should be taxed as part of the estate. If the conclusive presumption were permitted to stand, it would have the effect of taxing the estate additional tax based on money set aside for and given to the children, thereby reducing the estate that went to the executor. The decision hinged on the age of the deceased, who at the time he established the trusts and gave money to his children wouldn't have been contemplating death. The Supreme Court ruled that conclusive presumptions that prohibit challenges are unconstitutional:

> **[***HR1] [***HR2] [***HR3]** There is no doubt of the power of Congress to provide for including in the gross estate of a decedent, for purposes of the death tax, the value of gifts made in contemplation of death; and likewise no doubt of the power of that body to create a rebuttable presumption that gifts made within a period of two years prior to death are made in contemplation thereof. But the presumption here created is not of that kind. It is made definitely conclusive -- incapable of being overcome by proof of the most positive character. Thus stated, the first question submitted is answered in the affirmative by *Schlesinger v. Wisconsin, 270 U.S. 230,* and *Hoeper v. Tax Commission, 284 U.S. 206.* The only difference between the present **[*325]** case and the *Schlesinger* case is that there the statute fixed a period of six years as limiting the application of the presumption, while here it is fixed at two; and there the Fourteenth Amendment was involved, while here it is the Fifth Amendment. The length of time was not a factor in the case. The presumption was held invalid upon the ground that the statute made it conclusive without regard to actualities, while like gifts at other times were not thus treated; and that there was no adequate basis for such a distinction. "The presumption and consequent taxation," the court said (p. 240), "are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B.' Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."
>
> The *Schlesinger* case has since been applied many times by the lower federal courts, by the Board of Tax Appeals, and by state courts; * and **[***779]** none of them seem to have been **[**361]** at any loss to understand the basis of the decision, namely, that a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment.
>
> **[***HR4] [***HR5]** Nor is it material that the Fourteenth Amendment was involved in the *Schlesinger* case, instead of the Fifth Amendment, as here. The restraint imposed upon legislation by the due process clauses of the two amendments is the same. *Coolidge v. Long, 282 U.S. 582, 596.* That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the Fifth Amendment is settled. *Nichols v. Coolidge, 274 U.S. 531, 542; Brushaber v. Union Pac. R. Co., 240 U.S. 1, 24-25; Tyler v. United States, supra, p. 504.*
>
> In *Hoeper v. Tax Commission, supra,* this court had before it for consideration a statute of Wisconsin which provided that in computing the amount of income taxes payable by persons residing together as members of a family, the income of the wife should be added to that of the husband and assessed to and payable by him. We held that, since in law and in fact the wife's income was her separate property, the state was without power to measure his tax in part by the income of his wife. At page 215 we said:
>
> "We have no doubt that, because of the fundamental conceptions which underlie our

> system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income. Compare *Nichols v. Coolidge, 274 U.S. 531, 540.*"
>
> The suggestion of the state court that the provision was valid as necessary to prevent frauds and evasions of the tax by married persons was definitely rejected on the ground that such claimed necessity could not justify an otherwise unconstitutional exaction. [Underscore added for emphasis]

A lawful, procedurally proper assessment has the same character as any other presumption created by statute. It may shift the burden of proof, but the government's right of action is merely the right to perfect the claim, and subsequently execute a "choate" lien, by securing favorable judgment from a court of competent jurisdiction. Depending on the cause of action, the claim may be perfected as an action at law under the "arising under" clause or an *in rem* action within admiralty and maritime jurisdiction of courts of the United States. Administrative agencies simply do not have unilateral authority to encumber, seize or dispose of life, liberty or property without judicial due process of law. Even an IRS admiralty criminal forfeiture cannot be administratively executed if the seizure is on land; the victim is entitled to jury trial if he submits a claim and petitions for remission or mitigation.

In light of the Heiner and Buena Vista decisions, and particularly in light of the Milligan decision, the Bull comment, which wasn't essential to the ruling, must be understood as rhetorical. The claim that arises from § 6321 of the Internal Revenue Code is inchoate until there is a judgment from a court of competent jurisdiction, and any levy, seizure, garnishment or other adverse action predicated on an inchoate lien is a nullity as it is condemned by the Fifth Amendment due process clause. *Fuentes v. Shevin, Attorney General of Florida, et al,* and *Ray Lien Construction, Inc. v. Jack M. Wainwrite*, cited extensively in the first portion of this memorandum, condemn administrative wage and bank account garnishments without judicial due process of law that complies with essentials of the due process clause.