A NOTICE OF LEVY IS NOT A LEVY

The Internal Revenue Service routinely sends out thousands, and maybe hundreds of thousands, of forms to banks, credit unions and employers each year in perhaps its most egregious method of separating Americans from their money. These forms are called Notice of Levy, and are usually either a Form 668-A or Form 668-W. And, just as routinely, these private companies confiscate money and send it off to the IRS. It seems apparent that there is nothing the American can do to avoid this confiscation. Once the form is mailed by the IRS, there seems to be no action on the part of individuals that can stop, or even stall, the process of confiscation. Yet the Notice of Levy is a document that has absolutely no legal authority for use against individual Americans. The IRS knows this. It is well documented in various court cases around the country. It is clarified in the Internal Revenue Manual. In fact, the IRS software doesn't even allow for the recording of this action against individual Americans unless the Individual Master File has false and fraudulent data in it to override the programming constraints that keep the Notice of Levy from being used against individuals.

The Notice of Levy is fraudulent and illegal when used against individual Americans who are not engaged in an activity that is taxable for revenue purposes, who are just trading labor or knowledge for a paycheck. Yet banks and employers claim they have no option when in receipt of this ominous form from the IRS. Generally speaking, no amount of authoritative legal documentation will stop that financial institution or that employer from following through in its confiscation of the funds demanded by the IRS. When asked about this clear and obvious theft of the funds, the answer, if any answer is given at all, is, "The law requires us to obey the IRS." or "We have always done it this way."

Any defense to this action raises substantial and critical questions of Constitutional significance as to whether a notice of levy by the IRS amounts to a levy. A court case against an employer or bank would not be ripe if a levy has actually been perfected, but said levy is not perfected. A reasoned and knowledgeable Plaintiff could submit all sorts of arguments, including the plainly expressed Congressional intent, that warrants of distraint are required to effect an IRS levy. Additionally, better-reasoned case law *requires* warrants of distraint. And since banks and employers are required to know this, violation of these legal restrictions render criminal charges valid, and dramatic increases in civil damages unavoidable.

All civil lawsuits must bear these essential issues in mind. Levies in the 1939 version of the Internal Revenue Code directly and explicitly required warrants of distraint. In addition, ongoing levies on wages were not permitted. Would Congress extend so destructive a power as the ability to effect continuing levies on wages and withdraw the

requirement of warrants of distraint without saying so through specific tax legislation? Would it even be legal to remove those restrictions without specific tax legislation? I think not, particularly in light of the decision in ***Sniadach v. Family Finance Corp***., 395 U.S. 337 (1969), where regular paychecks were held to be special funds in the context of prejudgment garnishment under the 14th Amendment. So such extensive a power must offend 5th Amendment due process. In violation of these legal requirements, a court must decide 1) whether there has been a valid levy; and 2) if not, whether there has been a valid exercise of the fiduciary responsibilities of the confiscating company. It is only when there has been a valid exercise of the government's taxing power that more limited due process standards apply, so the question of an individual's lawsuit against the bank or employer is valid in that context. The court must then decide, ***if*** there was a valid levy and a valid exercise of the taxing power, whether 3) the limits of 5th Amendment due process have been exceeded by the prejudgment exercise of that power, particularly in light of ***Sniadach***; additionally, a Plaintiff would contend that, even if the court agreed with the bank or employer on all of the above, the court would have to consider whether allowing the government so extensive a power to seize property without any local control and without a sworn affidavit, violates the 4th Amendment prohibition on unreasonable seizures or violates any State laws concerning collections and garnishments.

Plaintiff contends that by stealthy encroachment the banks and employers, with the IRS, seek to erase the Congressionally-mandated requirement that warrants of distraint issue before the IRS may seize property. The Fourth Amendment to the United States Constitution requires:

> 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.
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> United States Constitution, Bill of Rights, Article IV. (Emphasis added.)

It is the duty of courts to protect the people from stealthy encroachment on their rights. In violation of federal and State law, no warrants of distraint were issued in this case. No one made "Oath or affirmation" of probable cause concerning the alleged indebtedness, as the Constitution's warrant requirement mandates. A careful reading of the notice of levy shows the IRS does not even claim that it was a levy. A Plaintiff would assert he is not subject to liability for the alleged tax, that no proper assessment has been made, that he has not received the requisite notice and demand, and that no lawful "seizure" has been made. Small wonder the IRS has not sworn to the debt as required by law. Allowing a notice of levy to operate as a levy violates the 4th and 5th Amendments to the **United States Constitution**, the limitation on delegation of the lawmaking powers under the separation of powers doctrine, the clear intent of the legislators in the crafting and passing of legislation concerning levies, and State laws concerning collections and garnishments.

A defense counsel in court, when properly challenged, would have the burden of proving that there was a lawful levy. Thus far, all defense counsels have failed in their obligation to advise the courts of the applicable law. Calling this case "frivolous", as defense counsels have done so often, works a fraud on the court. A Plaintiff should assert his right to a trial in part to determine exemplary damages for this legally unauthorized levy on his property, for which the defense counsel would have frivolously failed to present its affirmative defense. A Plaintiff should assume defense counsel's obligation to advise the court of the law and require said obligation to be fulfilled.

Damages and punitive relief would be appropriate because the individual would be irreparably harmed without it and because the individual would have a high likelihood of success on the merits, given the clearly expressed Congressional intent at the time of passage of I.R.C. Sec. 6331, the plain language of Sec. 6331(a), and the Constitutional clauses which would be violated by holding a notice of levy to be a levy.

I. A NOTICE OF LEVY IS NOT A LEVY

A. The 6th Circuit Court of Appeals (and other courts) holds that a notice of levy does not effect a levy; Congress specifically expressed its intent to continue levy and distraint procedures which recognize this law.

Better reasoned and on-point case law, and particularly the law of the 6th Circuit, holds that a notice of levy is not a levy and does not accomplish the distraint required by I.R.C. Title 26 Section 6331. ***United States v. O'Dell***, 160 F.2d 304 (1947); ***Williamson v. Boulder Dam Credit Union****, Justice Court, Boulder Township, Nevada,* Case #97A017, decided May 19, 1998, a recent case which made a fresh and more thorough examination of the question of whether a notice of levy effects a levy and held it does not.

Boulder is one of the few contemporary, competent efforts to more thoroughly review the relevant precedent, but even ***Boulder***, which held that a notice of levy is not a levy, did not have the clearly expressed intention of the legislature before it to consider. It is now even more obvious than it was at the time of the ***Boulder*** opinion that a notice of levy is not a levy.

While ***O'Dell*** was decided prior to implementation of the 1954 Code, Congressional intent was clearly to continue the existing law relating to distraint and levy:

> Sec. 6331. Levy and distraint
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> This section continues in effect the provisions of existing law relating to distraint and levy (see secs. 3690 and 3692 of the present Internal Revenue Code). *U.S. Code Congressional and Administrative News*, Vol. 3 (1954).

As to those "provisions of existing law" and whether a notice of levy effects a levy, ***United States v. O'Dell***, 160 F.2d 304 (1947), is directly on point. There it was held that a Collector's notice to a trustee in bankruptcy that there were unpaid taxes due from the bankrupt, and that all money and other property in his hands belonging to the bankrupt was seized and levied upon for payment of the taxes did not constitute a seizure of such property but was only a statement or notice of claim

> 'Nothing alleged to have been done amounts to a levy, which requires that the property be brought into legal custody through seizure, actual or constructive, levy being 'an absolute appropriation in law of the property levied upon.' Levy is not effected by mere notice. No warrants of distraint were issued here.' (Emphasis added) ***O'Dell***, *supra*, 160 F.2d at 307. [emphasis added]

The 7th Circuit followed ***O'Dell*** in ***Givan v. Cripe***, 187 F.2d 225 (1951):

> "As we read the allegations of the petition, it asserts a threat to distrain rather than an actual distraint… The facts here, insofar as the procedure is concerned, appear to be quite similar to those in ***United States v. O'Dell***, 6 Cir., 160 F.2d, 304, 307. There it was held that a Collector's notice to a trustee in bankruptcy that there were unpaid taxes due from the bankrupt, and that all money and other property in his hands belonging to the bankrupt was seized and levied upon for payment of the taxes did not constitute a seizure of such property but was only a statement of notice of claim… We think the same is true in our case. So far as the petition shows, there was no seizure, but only a threat of seizure - the petition alleges that the Collector threatens to issue a warrant of distraint." ***Givan v. Cripe***, 187 F.2d at 227-228. [emphasis added]

O'Dell has never been overruled and is still the law in the 6th Circuit.

In ***Freeman v. Mayer***, 152 F. Supp 383 (1957), the court held that a levy for delinquent taxes pursuant to the 1939 Internal Revenue Code, required execution of warrant for distraint:

> "The distress authorized by Sec. 3690 is different from anything known to the common law, both because it authorizes a sale of the property seized, and because it extends to other personalty than chattels. By its very nature it requires that the demands of procedural due process of law be rigorously honored. In the case at bar there was no lawful acquisition of possession of the property representing the surplus funds held by defendant, whether those funds were derived from the corporeal or intangible resources of ***Brokol***. The surplus should be returned to the Trustee to be administered under the Bankruptcy Act." ***Freeman v. Mayer***, supra, 152 F.Supp. at 87.

The ***Freeman*** court's insight into the distinctions between the common law and more contemporary due process should be remembered, particularly in view of the simplistic rationalizations of the ***Eiland*** and ***Rosenblum*** courts discussed *infra*.

In Re Holdsworth, 113 F.Supp. 878 (1953), in a proceeding upon petition of a bankruptcy trustee for adjudication that certain tax liens in favor of the United States were invalid, the court said, "We are of the opinion that in the absence of a warrant of distraint a mere notice of levy is not tantamount to an effective levy upon and distraint of 'all sums of money due' from the said debtors of the bankrupts." ***In Re Holdsworth***, supra, 113 F. Supp. at 880. (Citations omitted) [emphasis added]

The court further stated:

> "An actual or constructive seizure is essential to a valid levy and distraint; where, as here, the subject matter is an account receivable or chose in action, the seizure may be effected by a levy and the service of a warrant of distraint upon the debtor. ***Ibid.*** The reported cases would indicate that this was the usual practice followed by the Collector of Internal Revenue." ***In Re Holdsworth***, supra, 113 F. Supp. at 880.

As noted in ***United States v. Manufacturers National Bank***, 198 F.Supp. 157 (1961), even the Government acknowledged in its supplemental brief in ***La Salle Music Corp. v. Magarian Rest., Inc.***, 183 N.Y.S.2d 599, (1959), "that under the 1939 Internal Revenue Code a warrant of distraint was, in most cases, a necessary prerequisite to an effective levy." ***La Salle***, supra, 183 N.Y.S.2d (1959). In ***Manufacturers***, supra, a bank refused to surrender the funds in a bank account upon receiving a notice of levy for the collection of a tax liability. This should eliminate any claim that Plaintiff's suit is "frivolous", as was threatened by Defendants' attorney, and should render null his threat to file a Motion for Sanctions based on this erroneous claim of our suit being frivolous. If ***Manufacturer's National Bank*** did not believe it had received a lawful levy on these facts under the 1954 Code in 1959, since this question has never been definitively resolved by the Supreme Court, and the 6th Circuit opinion in ***O'Dell*** has never been overturned, the question is very much alive, particularly in light of the decisions in ***Sniadach*** and ***Boulder***, supra. ***Manufacturer's*** is poorly reasoned, relying on ***Eiland***, which did not conclude that warrants of distraint were unnecessary, but which incredibly equated warrants of distraint and notices of levy. Additionally, the court in ***Manufacturer's*** disregarded the plain statement of legislative intent on a faulty pretext:

> "It is true that the clarity of purpose, from my viewpoint, as expressed by the new combined levy and distraint provisions in Section 6331, is somewhat clouded by legislative expression in the House and Senate Reports that the new section continues in effect the provisions of existing law relating to distraint and levy with particular reference to Sections 3690 and 3692 of the 1939 Code. (Vol. 3, *U.S. Code Cong. & Ad. News*, 83rd Congress, 2nd Session (1954) pgs. 4555, 5225). However, there is the hopeful statement in the general statement of the House Committee and the acceptance by the Senate Committee, now relied on by the government here, that the law is clarified with respect to the right of distraint and levy (seizure) for the collections of the tax liability. (Vol 3, *U.S. Code, Cong. & Ad. New*, 83rd Congress, 2nd Session (1954) pgs. 4133, 4776).

Manufacturer's, supra, 198 F.Supp. at 159.

It would seem that there is nothing that is clear which cannot be clouded by one who wishes to cloud it. This clearly seems to be true of the court in ***Manufacturer's***. The legislative intent does not cloud the clarity of purpose of Sec. 6331. It illuminates it for those who would interpret and not make law. Sec. 6331 must be read with the intent to continue the existing law wherever possible. The statement that the law is clarified does not sanction a departure from the legislative intent to continue in effect "the provisions of existing law", but the ***Manufacturer's*** court takes that license. The ***Eiland***, ***Rosenblum***, ***Manufacturer's*** and ***Schiff*** (see *infra*) courts exhibited their willingness to evade plain Congressional intent long ago. If anything needs to be "clarified" it would seem to be the notion that distraint is a "right", rather than a power delegated in limited fashion.

The ***La Salle*** court did perhaps the best job of characterizing the distinctions between the 1939 Code Sec. 3690 and Sec. 3692 and the 1954 Code Sec. 6331:

> "Section 3690 of the 1939 Code, 26 U.S.C.A. Sec. 3690 provided for the collection of taxes by distraint and sale, and section 3692 thereof provided for a levy in case of neglect or refusal under section 3690. Section 6331 of the present Code of 1954 provides for the collection of taxes by levy, and further provides that a levy includes the power of distraint and seizure by any means. Likewise, under section 3710 of the former Code any person in possession of property subject to distraint, upon which a levy had been made, had to surrender same on demand. Section 6332 of the present Code provides for the surrender on demand of any property *subject to levy* upon which a levy has been made.
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> However, regardless of the procedure now deemed sufficient to constitute an effective levy against property of delinquent taxpayers, I cannot consider the enactment of either section 6331 or 6332 to constitute a repeal by implication of the original section 3672, as re-enacted by section 6323, which holds invalid the Government's lien for taxes as against a judgment creditor until notice thereof has been filed. Nor can such enactment be held to override the case of ***Sport-Craft, Inc., v. Lasker***, supra, wherein a warrant of distraint was actually served by the Government. As a matter of fact both the House and Senate reports, in a detailed discussion of the technical provisions of the bill, stated that 'section (6331) *continues in effect the provisions of existing law relating to distraint and levy* (see secs. 3690 and 3692 of the present Internal Revenue Code'. *1954 U.S. Code Congressional and Administrative News*, pp. 4555 and 5225, respectively.
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> If the Congress had intended to change in any way the existing law as it pertained to the steps necessarily to be taken by the Government in order for it to secure priority of its lien, over judgment creditors, whether it be under section 6323 by filing of notice thereof, or by an actual levy under section 6331 as construed by case law, it would have specifically so provided."
> ***La Salle Music Corp***., supra, 183 N.Y.S.2d at 601. [emphasis added]

Any court must uphold the clearly expressed Congressional intent that "the provisions of existing law relating to levy and distraint" "continue in effect", as well as the ***O'Dell*** court's decision that "(l)evy is not effected by mere notice" where no warrants of distraint are issued. The individual's property has not been levied by the Notice of Levy - levy is only threatened by that Notice. The company was under no legal obligation to turn over the individual's property, and had no legal right to do so. The company is indebted to the individual for all amounts wrongfully withheld.

B. The plain language of the Internal Revenue Code, particularly of Section 6331, compels the conclusion that a notice of levy is not a levy.

I.R.C. Section 6331 provides in pertinent part with emphasis added:

> Section 6331. Levy and distraint
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> (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.
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> (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 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).
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> (c) Successive seizures.-Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.
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> (d) Requirement of notice before levy.-

(1) In general.-Levy may be made under subsection (a) upon the salary or wages or other property of any person with respect to any unpaid tax only after the Secretary has **notified** such person in writing of his intention to make such levy.
(2) 30-day requirement.-The notice required under paragraph (1) shall be-
    (A) given in person,
    (B) left at the dwelling or usual place of business of such person, or
    (C) sent by certified or registered mail to such person's last known address, no less than 30 days before the day of the levy.
(3) Jeopardy.-Paragraph (1) shall not apply to a levy if the Secretary has made a finding under the last sentence of subsection (a) that the collection of tax is in jeopardy.
(4) Information included with notice.-The notice required under paragraph (1) shall include a brief statement which sets forth in simple and nontechnical terms -
    (A) the provisions of this title relating to levy and sale of property,
    (B) the procedures applicable to the levy and sale of property under this title,
    (C) the administrative appeals available to the taxpayer with respect to such levy and sale and the procedures relating to such appeals,
    (D) the alternatives available to taxpayers which could prevent levy on the property (including installment agreements under section 6159)
    (E) the provisions of this title relating to redemption of property and release of liens on property, and
    (F) the procedures applicable to the redemption of property and the release of a lien on property under this title.

(e) Continuing levy on salary and wages.-

(1) Effect of levy.-The effect of a levy on salary or wages payable to or received by a taxpayer shall be continuous from the date such levy is first made until the levy is released under section 6343.

The plain language of Sec. 6331(a) distinguishes between a levy and a notice of levy. A notice of levy by the plain language of the statute is a method of levy that applies only to "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…" This is the only instance wherein the IRC states that the service of a notice of levy is sufficient to make a levy. In Sec. 6331(d), a notice requirement is imposed on the Secretary, is a benefit to a tax debtor, and does not use the expression "notice of levy".

One reason for the notice of levy as to government employees may be that the Secretary does not have to seize the money of these officers, employees, or elected officials. Their money is already in the Secretary's possession in the national treasury. This was the argument of the attorney for the ***Williamson's*** on appeal in the ***Boulder*** case, supra. In all other cases Sec. 6502(b) points out that a levy is completed only when a notice of seizure is given, and that this must have been preceded by an assessment, notice of deficiency, and a demand to be effective. ***Brewer v. United***

States, 764 F.Supp. 309, 315 (S.D.N.Y. 1991). By the time circumstances have progressed to this point, the individual has usually denied that these procedures have been followed in his case, and notified the company of this procedural error in letters before the funds were wrongfully confiscated.

A better reason the case of government employees is distinguishable is that the sentence refers to the "accrued salary or wages" of officers… A notice of levy is sufficient to levy only on the "accrued wages" of the named parties. A "continuing levy on salary and wages", Sec. 6331(e) is distinguishable, and requires a complete levy. "The accrued salary or wage of an employee, held by an employer subject to the order of such employee, is an evidence of debt and may be levied upon as any other simple contract debt, such as a bank deposit." I.T. 1557, II-1 CB172 (CCH ¶1501.11 3/1/39). Continuing levies on wages were not permitted under earlier versions of the Code. Would Congress extend so comprehensive a power as the ability to effect continuing levies on wages and withdraw the requirement of warrants of distraint without saying so? I think not.

Allowing a notice of levy to operate as a levy on the accrued wages of government employees creates a burden in exchange for a benefit. To ensure that government employees are not harassed by levies, a new levy is required and continuing levies would not be allowed, runs this argument. However, the notes to the 1954 Code Sec. 6332 and case law say government employees are not to be treated differently from other taxpayers. Since it is not clear that Congress intended to eliminate the full levy requirement as to the specified employees, and since it would probably not be Constitutional not to accord them the necessary protections, a better interpretation would be that the assets of employees may be frozen by the notice of levy. See ***Givan v. Cripe***, supra, at p. 228: "As we interpret the facts, the notice of levy operated to freeze the assets of the taxpayer in the hands of the Bank, and no more." No where does Congress say that a notice of levy may effect a levy on other taxpayers or individuals, or be used to effect a "continuing levy on wages", which is covered by Sec. 6331(e)(1). It has merely been said that the named class may not generally be treated differently from taxpayers in general, and not that taxpayers in general may be treated as the named class. If the provision as to accrued salary works too great a departure from the general treatment of taxpayers, it must fail or be interpreted to fall within what the law allows. Needless to say, regulations cannot expand the statute.

When Congress added the language that government employees' accrued salary may be levied by notice of levy and placed it in Sec. 6331, it could be argued that it intended to change the authorization. Under the notes to Sec. 6332, Congress states, "The provisions as to levy on salaries of Government employees are the same as those applicable to any other delinquent taxpayer." *U.S. Code Congressional & Administrative News*, Vol 3, (1954) 83rd Congress, 2nd Session. The rules as to all government employees must therefore conform to the rules applicable to any other delinquent “taxpayers", and not the other way around. If the Congressional intent behind Sec. 6332 is not deemed to have changed when the clause as to government employees was added to Sec. 6331, then either the clause must fail, or it must be distinguished as *not* a

clause pertaining to enforcement, but rather a clause governing what is subject to distraint - accrued wages only. Sec. 6331 may be deemed to deal with what property may be levied on - accrued wages. Sec. 6331 deals with ***authority*** to levy. The earlier expressed intent to Sec. 6332 dealt with ***procedures***. The intent behind Sec. 6331 and the intent behind Sec. 6332 need not be the same.

In any event, it is incredible to suggest that Congress would intend that something so significant as a warrant requirement could be abrogated in so backhanded a way. Congress clearly expressed its will that "the provisions of existing law relating to distraint and levy" continue in effect when the 1954 Code was passed. The requirement of warrants of distraint was an integral part of that existing law. Congress allowed continuing levy on salaries for taxpayers in general. The opportunity for abuse in such a situation is too great to allow seizure without warrants of distraint, as the individual's position would suggest. Levy without warrant would violate the due process clause of the 5th Amendment and the prohibition against unreasonable seizures of the 4th Amendment.

It is important to note that, while Congress may have intended to allow levy on wages and even continue them, following the reasoning in ***Sniadach v. Family Finance Corp***., 395 U.S. 337 (1969) and ***Fuentes v. Shevin***, 407 U.S. 67 (1972), prejudgment levy on wages and other property is impermissible under the 5th Amendment to the *United States Constitution.*

If a federal statute does not clearly establish a prejudgment remedy, state law must be followed. See Fed. R. Civ. P. 64. A notice of levy is not a levy under federal law. Federal law does not permit seizure by using the notice of levy used in this case. Garnishment is an extraordinary remedy that does not permit recovery unless all proper ingredients are present. There is no such thing as a constructive garnishment under State law. Unless the company can plainly show that the IRS has followed federal law, it has no defense to an individual's suit. Nor has company any immunity under 26 U.S.C. Sec. 6332(e) because under that section, immunity is provided when honoring an IRS levy. However, in the instant case, the company was apparently sent only a notice of levy. As a result, the law providing for immunity when releasing funds pursuant to a "levy" is clearly not applicable. ***Boulder***, supra, at 2.

Allowing a notice of levy to operate as a levy violates the due process clause of the 5th Amendment and the 4th Amendment prohibition on unreasonable searches and seizures because, among other reasons, no one is required to swear under penalty of perjury that plaintiff owes a tax debt. Additionally, under the distraint and levy procedures Congress expressed its intent to continue:

> "In serving warrants of distraint, as provided in the Revenue Act of 1918, where it is necessary to enforce the collection of income, war-profits, and excess-profits taxes, the mode of procedure followed should conform to the mode of procedure prescribed by the State or Territory in which the warrant of distraint is to be

> served, for the service of other process." ***Treasury Decision 3042***, 3 CB 300 [CCH 1501.21].

The requirement that State procedures be followed was not obeyed in this case.

The company, the IRS and some of those courts that have not looked at the stated Congressional intent have made a great deal of the language of Sec. 6331(b). It provides:

> Sec. 6331(b) Seizure and sale of property.
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> 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 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).

The claim is that the statement, "'levy' as used in this title includes the power of distraint and seizure by any means" expands the authority granted in Sec. 6331(a). Would it mean by illegal means, then, if taken literally? So taken is the typical company with this language, it entirely overlooks the fact that the IRS leaves out Sec. 6331(a) in the disclosure statements on the back of its forms. It is entirely possible that the language was chosen because the distraint procedures required state process, so there were various allowable procedures, *but they were warrant of distraint procedures*. The distinction as to jeopardy levies, Sec. 6331(d)3, or as to successive levies, Sec. 6331(c), may have been intended. Also, there is the procedure for levy by filing a civil action in addition to the administrative levy process. Further, since the Sec. 3692 language distinguishing between the Collector and his deputy was omitted, those "means" may have been intended.

In any event, the Congress plainly expressed its intent to "continue in effect the provisions of existing law relating to distraint and levy", and warrants of distraint were integral to that process, so any argument that eliminating the word "warrant" eliminated the warrant requirement must fail.

Warrant of distraint requirements were specified in the 1939 Code Sec. 3690:

> Sec. 3692 Levy
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> In case of neglect or refusal under section 3690, the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property.

No warrant of distraint was obtained in this case. It is this warrant requirement that the IRS and some courts have sought to eliminate by ignoring the clearly expressed intent of Congress that the existing law relating to distraint and levy are to be carried into effect under the 1954 Code (see *infra*). In its amicus brief (they're getting friendlier all the time) in ***Boulder***, supra, the IRS makes plain that it seeks by stealthy encroachment to eliminate a warrant requirement as to property:

> "In support of its decision in this matter the court relied on ***United States v. O'Dell***, 160 F.2d 304 (6th Cir. 1947). The ***O'Dell*** court found that, in addition to serving a notice of levy, a warrant of distraint must be issued and served to properly levy on property. The court's reliance on ***O'Dell*** in this matter is misplaced. ***O'Dell*** was decided under the Internal Revenue Code of 1939, which included a specific reference to a "warrant" which is not present in the applicable Internal Revenue Code of 1986, as amended. (Footnote omitted). Indeed, the reference to a 'warrant' was removed by Congress in the comparable provision of the Internal Revenue Code of 1954. See ***Rosenblum v. United States***, 300 F.2d 843, 845 (1st Cir. 1962)."

The omitted footnote mis-cited Sec. 3692 of the 1939 Code as Sec. 3690. Sec. 3692 is cited above. It states in pertinent part: "In case of neglect or refusal under section 3690, the collector may levy, or by warrant may authorize a deputy collector to levy upon all property and rights to property…" The IRS works a fraud on the ***Boulder*** court by failing to offer the plain statement of legislative intent that the existing law be retained. Again, this statement of Congressional intent has almost never been offered in post-1954 cases that research has found. Nor did the ***Rosenblum*** (error in IRS brief) court look at this intent when it drew its ill-founded conclusion that warrants of distraint were no longer necessary.

Considering the language of Sec. 3692, which gave some appearance of narrowing the warrant requirement to only delegates of the Collector, Congress most probably eliminated the section to avoid the confusion because it fully understood that a warrant has a definite meaning under the 4th Amendment, requiring an Oath or affirmation supporting probable cause. Rather than eliminating the warrant requirement, the change, together with the statement of legislative intent, enhances the requirement, so there can be no question that the Collector himself must swear to the existence of the debt and obtain a warrant of distraint. See the quotation from ***Givan v. Cripe***, supra, at p. 228, cited at page 3, supra: So far as the petition shows, there was no seizure, but only a threat of seizure - the petition alleges that the Collector threatens to issue a

warrant of distraint. Again, Congress stated its plain intention to continue existing procedures and warrants of distraint, or a court case, to effect levy, were most definitely part of the existing procedure that Congress understood it was endorsing.

The ***Rosenblum*** court also mis-characterizes and then relies on its mis-characterization of the decision in ***United States v. Eiland***, 223 F.2d 118 (4th Cir. 1955). The ***Eiland*** court did not hold that warrants of distraint were unnecessary. It held that under the facts of the case, warrants of distraint were served. Analysis would disagree with the ***Eiland*** court's statement that "no particular virtue inheres in the name ascribed to the notice," ***Eiland***, supra, 223 F.2d at 121. The court attempts to equate a notice of levy with a warrant of distraint because the notice of levy stated "that the money owing 'is seized and levied upon' for the payment of the tax and that demand is made upon the debtor for the amount necessary to satisfy the tax, he is serving a 'warrant of distraint'." ***Eiland***, supra, 223 F.2d at 121. This is nonsense when a warrant has clear and specific requirements which attach to it under the 4th Amendment, among those being the requirement of oath or affirmation as to probable cause. Such affidavits are a routine requirement of garnishment and attachment statutes.

The ***Eiland*** court continued its disingenuous line of argument by forgetting about the word "warrant", and taking off on "distraint":

> "…he is serving a 'warrant of distraint'. No peculiar virtue inheres in the name ascribed to the notice. As said in ***Raffaele v. Granger***, 3 Cir., 196 F.2d 620, 623: 'Distraint is a summary, extra-judicial remedy having its origin in the common law. There, a form of self-help, it consisted of seizure and holding of personal property by individual action without intervention of legal process for the purpose of compelling payment of debt."
>
> "A creditor ordinarily perfects a lien upon a debt by attachment and garnishment with service of notice thereof upon the debtor. See ***Miller v. United States***, 11 Wall. 268, 297, 20 L.Ed. 135; ***Kennedy v. Brent***, 6 Cranch 187, 3 L.Ed. 194; ***Rickman v. Rickman***, 180 Mich. 224, 146 N.W. 609, Ann.Cas.1916C, 1237, 1248; ***Strawberry Growers' Selling Col v. Lewellyn***, 158 La. 303, 103 So. 823, 39 A.L.R. 1502; 4 *Am.Jur*. p. 896; 5 *Am. Jur*. P. 94; 7 *C.J.S*., Attachment, Sec. 224."
> ***United States v. Eiland***, supra

By ignoring the plain understanding of "warrant" and the equally plain understanding of attachment and garnishment proceedings, and without consulting the Congressional intent behind Sec. 6331 that the "existing law relating to distraint and levy" "continues in effect", the ***Eiland*** court's fatally flawed opinion, in a case decided shortly after passage of the 1954 Code, without more, goes on to conclude that the federal statute allows a notice of levy to operate as a warrant of distraint. So ***Rosenblum*** misconstrued ***Eiland***, which erroneously equated a warrant of distraint with a notice of levy. This is where the poorly reasoned chain letter of cases that implied or perhaps held, that a notice of levy could serve as a levy, began. All are inadequate and must be ignored because clear

Congressional intent was not given due consideration. And it is this very chain letter of cases that companies and the IRS heavily relies upon in their claims that the IRS procedures requires their unquestioned and unsubstantiated obedience.

Fortunately, the 6th Circuit reasoned better, as did the ***Freeman*** court, when it said, "The distress authorized by Sec. 3690 is different from anything known to the common law, both because it authorizes a sale of the property to be seized, and because it extends to other personalty than chattels. By its very nature it requires that the demand of procedural due process of law be rigorously honored. In the case at bar there was no lawful acquisition of possession of the property representing the surplus funds held by Defendant." ***Freeman***, supra, 152 F.Supp. at 387.

All individuals can be sure the IRS is glad to be able to "self-help" itself to his funds. We cab be sure that in fifty years or less, the agency and others like it will eliminate the warrant requirement as to people, unless the courts put a stop to such unlawful practice. The real nature of the common law action referred to by the ***Eiland*** court is better and differently explained in ***Fuentes v. Shevin***, 407 U.S. 67 (1972):

> "Although these prejudgment replevin statutes are descended from the common-law replevin action of six centuries ago, they bear very little resemblance to it. Replevin at common law was an action for the return of specific goods wrongfully taken or 'distrained.' Typically, it was used after a landlord (the 'distrainor') had seized possessions from a tenant (the 'distrainee') to satisfy a debt allegedly owed. If the tenant then instituted a replevin action and posted security, the landlord could be ordered to return the property at once, pending a final judgment in the underlying action. However, this prejudgment replevin of goods at common law did not follow from an entirely ex parte process of pleading by the distrainee. For '[t]he distrainor could always stop the action of replevin by claiming to be the owner of the goods; and as this claim was often made merely to delay the proceedings, the writ de proprietate probanda was devised early in the fourteenth century, which enabled the sheriff to determine summarily the question of ownership. If the question of ownership was determined against the distrainor, the goods were delivered back to the distrainee [pending final judgment].'" *3 W. Holdsworth, History of English Law 284* (1927); ***Fuentes***, supra, at 79.

The ***Eiland*** court was wrong to resort to the history of distraint to conclude that it was appropriate to turn a warrant of distraint into a self-help proposition. If the court had been fair, it would have noted that the distraint remedy arose from the need to protect a weaker party, the tenant, from the landlord. It was the weaker party who was to have resort to self-help, and not the IRS, to protect itself from arbitrary and wrongful seizures of the type the IRS seeks to accomplish here.

In the same vein, it must be stated that the ***Fuentes*** court, in a lengthy post-***Sniadach*** review of whether the "necessity" of the property seized affected due process under the 14th Amendment, concluded it did not:

> “While ***Sniadach*** and ***Goldberg*** emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine. Nor did they carve out a rule of "necessity" for the sort of nonfinal deprivations of property that they involved. That was made clear in ***Bell v. Burson***, 402 U.S. 535, holding that there must be an opportunity for a fair hearing before mere suspension of a driver's license. A driver's license clearly does not rise to the level of 'necessity' exemplified by wages and welfare benefits. Rather, as the Court accurately stated, it is an 'important interest,' *id*, at 539, entitled to the protection of procedural due process of law. The household goods, for which the appellants contracted and paid substantial sums, are deserving of similar protection. While a driver's license, for example, 'may become [indirectly] essential in the pursuit of a livelihood,' *ibid*., a stove or a bed may be equally essential to provide a minimally decent environment for human beings in their day-to-day lives. It is, after all, such consumer goods that people work and earn a livelihood in order to acquire. No doubt, there may be many gradations in the 'importance' or 'necessity' of various consumer goods. Stoves could be compared to television sets, or beds [407 U.S. 67, 90] could be compared to tables. But if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions. The Fourteenth Amendment speaks of 'property' generally. And, under our free-enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights, are 'necessary.' “

As the ***Fuentes*** court points out, the due process clauses do not make some classes of property more protected than others. Courts must also recognize that these clauses do not disparage property rights compared with liberty rights, so that cases such as ***Phillips v. Commissioner of Internal Revenue***, 283 U.S. 589 (1931), that imply that property rights are inferior to liberty rights, must be reconsidered.

> There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. *Boddie v. Connecticut*, 401 U.S., at 379. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing.
> *Fuentes*, supra, at 91.

Even if the collection of Congressionally-mandated taxes were such a circumstance, this court may not use the due process standard applicable to taxes in determining what level of due process he is entitled to. The IRS has not seen fit to perfect a levy.

Additionally, under the 5th Amendment and the decision in ***Sniadach v. Family Finance Corp***., 395 U.S. 337 (1969), wages are special, and any prejudgment garnishment cannot be allowed, certainly not without adequate safeguards such as those that were required to be provided and which were practiced prior to the enactment of the 1954 Internal Revenue Code and which Congress expressed its

intention to continue after passage of the 1954 Code.

C. The IRS itself uses forms that distinguish the difference between a Levy and a Notice of Levy.

When the IRS attempts to levy real or personal property, it uses a Form 668B, which it entitles "Levy." This levy is taken to a court of competent jurisdiction, along with any relevant documentation, and the debt is sworn to by the government in a petition to the court for a Warrant of Distraint or some other court order. Then, armed with the Form 668B and the court order, the government approaches the county Sheriff to enlist his help in confiscating the assets in question in payment of a ***documented*** tax debt. This process which the IRS follows in every attempt to confiscate real or personal property is a tacit admission of the legal requirement of a court issued warrant in order to confiscate property owned by a person accused of owing a tax debt.

On the other hand, the IRS issues a Form 668-A Notice of Levy to a financial institution or a Form 668-W Notice of Levy to an employer in order to obtain cash assets in the payment of an ***alleged*** tax debt. The IRS expects the financial institution or employer to honor the unperfected and unsworn Notice if Levy by confiscating the cash assets of the individual accused of a tax debt. No additional documentation is offered along with the Notice of Levy to show that any legal or lawful requirements have been accomplished by the IRS in its efforts to claim assets of the accused. This unperfected instrument is the only evidence of any due process offered by the IRS, if such could be called due process. Since the IRS claims that the Form 668-B is the same as a Form 668-A or Form 668-W, knowing that this is untrue, can there be any reason to believe the IRS in its claim of lawful execution of the legal requirements alleged in the Notice of Levy? A court ordered warrant is a reasonable requirement in order to avoid this potential travesty of individual rights.

If the IRS admits that a court ordered warrant is required to confiscate real or personal property from someone accused of a tax debt, is there any reason that Congress would pass laws lifting this legal requirement from the process of confiscating cash assets from a person accused of owing a tax debt? And this is true especially in light of the various United States Supreme Court decisions wherein money (as in cash, wages, salaries, tips, compensation, and savings) is clearly deemed property. See ***Coppage v. State of Kansas****,* 236 U.S. 1; ***Eisner v. Macomber****,* 252 U.S. 189; ***Butcher's Union Company v. Crescent City Co.***, 111 U.S. 746

Again, a court-ordered warrant is a reasonable requirement in order to avoid this potential travesty of individual rights.

D. The IRS usually knows the individual has no lawfully established tax liability, and so did not perfect its levy.

It is entirely possible that one goal of the IRS in relying on third parties to turn over property without complying with the Congressional intent of I.R.C. Sec. 6331, is

to avoid a test of whether the federal government may levy on wages or other personal property under the 5th Amendment after the decision in ***Sniadach*** limited the prejudgment remedy to the states under the 14th Amendment.

It also avoids a test of the other IRS procedural violations which can be outlined, infra, including whether there has been an lawful and perfected assessment; the question of whether the individual is or is not a "taxpayer" - one subject to the tax; and whether a natural private person such as most individual Americans can have "taxable income" given that the "income tax" has been held by the Supreme Court and the 6th Circuit to be an excise tax, which must therefore be a tax on a license or privilege, with the income being the measure of the tax and not the subject of the tax.

The IRS gives new meaning to the term "legal fiction".

In *Mutiny on the Amistad*, Oxford University Press, 198 Madison Avenue, New York, New York, Copyright 1987, author and researcher Howard Jones recounts how the Cuban slave trade, at the time of the Amistad incident in1839, relied on a fiction:

> Another business had developed from Spain's haphazard enforcement of the law: Cuban authorities accepted illegal payments for ignoring importations of slaves from Africa. From the captain general down to customs officers at the ports, bribes in the form of "fees" became a standard practice. Since Spanish law forbade such assessments, officials referred to them as voluntary. According to Turnbull, these officials were "sharers in a common enterprise." In Havana the money was 'paid from habit, as a matter of course.' So many public officials were involved that slave importers found the payment difficult to evade. Yet the tax did not appear to result either from an act of the Spanish legislature or from royal decree. As evidence for this statement, Turnbull noted that 'the parties who pay it have never yet succeeded in obtaining anything in the nature of a receipt or other written acknowledgment for the money.' *Mutiny on the Amistad*, supra, at p. 21. (Emphasis added).

History seems to repeats itself. The IRS knows the law is not in its favor, and so relies on voluntarism, too. The individual should not be willing to allow the company for which he works to voluntarily contribute his hard earned wages to the IRS when there is no requirement to do so.

The obscure language of the Notice of Levy reveals it is **not** a levy. "This is your copy of a Notice of Levy we have sent to collect this unpaid amount. We will send other levies if we don't get enough with this one." (Emphasis added.) Doesn't say this one is a levy. It goes on to say, "This levy requires the person who received it to turn over to us…" Which levy? The one they're going to send, since they haven't said this one is a levy? Come on. It is tragic that America has sunk so low in the slough of doublespeak and deceit.

Treating a notice of levy as a levy violates the plain language of I.R.C. Sec. 6331,

the clearly expressed legislative intent to continue the existing provisions relating to distraint and levy in Secs. 3690 and 3692 of the pre-1954 Code, better reasoned and controlling case law, violates the *Fourth* and *Fifth Amendments* to the *United States Constitution*, and exceeds permissible delegation of the power to delegate lawmaking authority, an aspect of the separation of powers doctrine.

E. Other cases suggesting a notice of levy is a levy are not well reasoned, were often only dictum, did not consult the Congressional intent, and were in some cases not properly adverse.

Many individuals have discussed and even challenged these unfortunate excursions into stealthy encroachment and judicial activism that have predictably plagued so strategic an issue. Cited by those in defense of this travesty as dispositive of the question of whether a notice of levy constitutes a levy is ***United States v. National Bank of Commerce***, 472 U.S. 713 (1985). However, the issue in this case, as stated by the Supreme Court was "whether the Internal Revenue Service (IRS) has a right to levy on those accounts for delinquent federal income taxes owed by only one of the persons in whose names the joint accounts stand in order that the IRS may obtain provisional control over the amount in question." ***National Bank of Commerce***, supra, 472 U.S. at 715. Whether a notice of levy amounted to a levy was never at issue in the case, and the Supreme Court reviewed the procedure in a backhand way:

> "A federal tax lien, however, is not self-executing. Affirmative action by the IRS is required to enforce collection of the unpaid taxes. The Internal Revenue Code provides two principal tools for that purpose. The first is the lien-foreclosure suit. Section 7403(a) authorizes the institution of a civil action in federal district court to enforce a lien 'to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax.' The second tool is the collection of unpaid tax by administrative levy. The levy is a provisional remedy and typically 'does not require any judicial intervention.' The governing statute is Sec. 6331(a)…
>
> "In the situation where a taxpayer's property is held by another, a notice of levy upon the custodian is customarily served pursuant to Sec. 6332(a). This notice gives the IRS the right to all property levied upon. ***United States v. Eiland***, 223 F.2d 118, 121 (CA4 1955)." ***National Bank of Commerce***, supra, 472 U.S. at 720. (Emphasis added)

First, it is interesting to note how well "means", as in "power of distraint and seizure by any means", would substitute for "tool" as used by the Supreme Court. It is also important to note how tentative the Court is about the levy remedy - "typically" and "customarily" do not address mandates. In any event, the excursion into notices of levy was not necessary to the holding in the case since it was not at issue. It is unfortunate to see the U.S. Supreme Court citing a case such as ***Eiland***, but then dictum matters little. The Court cites ***Phelps v. U.S.***, 421 U.S. 330 (1975), but neither ***Phelps*** nor

National Bank of Commerce looked at the warrant of distraint question, Congressional intent, or the cases reviewing them. ***Phelps*** is additionally distinguishable as a bankruptcy case, in which the court cited the administrative regulations without consulting the legislative intent. Additionally, the ***Phelps*** court relied on ***United States v. Pittman***, 449 F.2d 623 (CA7 1971). But ***Pittman*** held that the taxpayer relied on the notice of levy and it should be seen more as an estoppel case. 'Where the Government serves notice of levy, compels transfer of legal title to itself and exercises the rights of an owner to control property by insuring it, renting it and compelling payment of rent to itself and no else, so that the taxpayer justly concludes he has no further right to deal with the property, there has been an effective levy and seizure within the meaning of 26 U.S.C. Sec. 6331'. (Emphasis added.) ***United States v. Pittman***, 449 F.2d 623 (1971). It is interesting to see that the ***Phelps*** court did not even agree with the ***Eiland*** court on whether ***Miller***, supra, 11 Wall. at 297, required attachment or found notice to be sufficient.

It is critical that the Supreme Court in the ***National Bank of Commerce*** case, when discussing the notice of levy in dictum, was quoting ***Phillips v. Commissioner***: "'The underlying principle' justifying the administrative levy is 'the need of the government promptly to secure its revenues… The constitutionality of the levy procedure, of course, 'has long been settled,' " ***United States v. National Bank of Commerce***, 472 U.S. at 721, supra, quoting ***Phillips v. Commissioner***, 283 U.S. at 596 and 595. So the Court in ***National Bank of Commerce*** relied on ***Phillips***, for the ultimate constitutionality of the levy process. ***Phillips*** was of course a pre-1954 case. The Supreme Court could not have comprehended the issue under discussion in the instant case in its dictum in ***National Bank of Commerce***.

Perhaps even more important is what was actually stated by the Court and then ignored by that same Court. Quoting ***Phillips*** and recognizing its authority, the Court stated that "[t]he constitutionality of the levy procedure, of course, 'has been long settled…'" And ***Phillips*** was decided under the Code of 1939, which demanded the use of a warrant of distraint in order to perfect a levy. So the *constitutionality of requiring a warrant of distraint to accompany a Notice of Levy* has long been established by and even before ***Phillips***. But the Court was asked to address the constitutionality of using a Notice of Levy against an individual working for a private corporation *without* the required warrant. So did the Court here make a mistake, or did it just plain misrepresent the issues in ***United States v. National Bank of Commerce***? The only conclusion possible from ***United States v. National Bank of Commerce*** and ***Phillips*** is that using a Notice of Levy absent the warrant of distraint has NOT been deemed constitutional by the United States Supreme Court. While it may not have been deemed unconstitutional, it most certainly has not been deemed constitutional.

It is also interesting to note that the Supreme Court of the United States is careful to point out as follows, as it did in the above-cited passage:

> Section 6331(a) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. Sec. 6331(a), provides that the government may collect taxes of a delinquent

> taxpayer 'by levy upon…" ***National Bank of Commerce***, supra, 472 U.S. at 714-715.

This distinction is routinely drawn, even by the IRS in its brief in the ***Boulder*** case:

> "Under Section 6321 of the Internal Revenue Code… unpaid taxes are a 'lien in favor of the United States upon all property and rights to property whether real or personal, belonging to' a delinquent taxpayer. (Citations omitted). This lien 'arise[s] at the time the assessment is made' (citations omitted)… and attaches to all property or property rights the taxpayer owns at the time the lien arises or subsequently acquires…" IRS Brief at 2.

The question of whether a notice of levy effects levy has never been properly and fully aired before the Supreme Court. Cases that argue a notice of levy effects levy have been poorly argued and poorly decided. ***O'Dell*** must be followed as binding precedent.

F. Regulations cannot exceed the scope of the statute.

"He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance." ***Declaration of Independence.***

26 U.S.C. Sec. 6331 requires a levy to seize property amenable to prejudgment seizure. Regulations may not go beyond the scope of the statute. In its amicus brief in the ***Boulder*** case, the IRS claims that "because these regulations have long been in effect without substantial change, they are 'deemed to have received congressional approval and have the effect of law.' ***Helvering v. Winmill***, 305 U.S.79, 83 (1938) (footnote omitted)." It is easy to understand why the IRS omitted the cases in the footnote, for they dispel the myth that stealthy encroachment has a magic wand. Even the ***Winmill*** case does not suggest that regulations long in effect are deemed to have Congressional approval when Congress clearly expressed its intention to the contrary at the outset. In ***U.S. v. Dakota-Montana Oil Co.***, 288 U.S., 459 (1933), one of the cases cited in the omitted footnote, states: "For the issue before us, whether the statute requires the former to be treated as depletion, is resolved by the history of the legislation and the administrative practice under it." ***Dakota***, supra, at 463. The defending company and the IRS want courts to ignore the history part. Certainly the IRS cannot be allowed to benefit from its own wrongdoing because its "administrative practice" has been to consistently mislead courts and ignore the legislative history expressing intent to retain the existing distraint procedures which required warrants. A recent GAO report indicated that the GAO was unable to determine whether the IRS was routinely using lawful enforcement practices or not, so how can Congress be presumed to know?

> To determine whether information existed to evaluate IRS' use of collection enforcement authorities, we (1) asked IRS to provide us with available basic statistics on its use, and misuse, of lien, levy and seizure authority from 1993 to 1996; (2) reviewed a small and subjectively selected sample of seizure, revenue officer appeals, and problem resolution case files to identify the types of

> information that may be available from those files; and (3) interviewed IRS employees involved in these areas to determine how and when collection enforcement authorities were used, the controls for preventing misuse of those authorities, and the results of taxpayer complaints about the inappropriate use of the authorities.
>
> In summary, while IRS has some limited data about its use, and misuse, of collection enforcement authorities, these data are not sufficient to show (1) the extent of the improper use of lien, levy, or seizure authority; (2) the causes of the improper actions; or (3) the characteristics of taxpayers affected by improper actions.

In short, the IRS either did supply to the OMB many details about its abuse of the American people in pursuit of lien, levy, or seizure actions, or it has neglected to keep any of those statistics. And it is not difficult to imagine why.

Conclusion

The Internal Revenue Code must be viewed as maintaining the requirement of warrants of distraint to perfect a levy. We cannot assume that Congress would eliminate its regard for the due process rights of individuals just because some in the IRS would suggest it is easier or simpler for the IRS to collect taxes. Such construction presumes that the Congress had the authority to override the Amendments without the going through the Amendment process, allowing for Congress to grant authority to the IRS to violate the Constitutional Amendments. Congress had no such authority and made no such attempt. Quite the reverse, when Congress authorized the revisions resulting in the Internal Revenue Code of 1954, it clearly stated that it wanted the procedural requirements of a warrant of distraint to continue accompanying a Notice of Levy.

The individual should claim that he cannot be held accountable to the imperfections of a government notice of levy, and that no company is required to honor that notice of levy in light of its clear imperfections.

The requirements of the Internal Revenue Code do not and cannot exceed the clear restrictions placed on the government by the Constitution, absent an amendment to that Constitution. To participate in that violation of the Constitution places the company at odds with its mandate to obey the laws of this State and of this country.

Authors Note:

This brief was prepared by:

Blue Ridge Group
-an unincorporated Common Law Constitutional Business Trust
478 East Altamonte Drive
Suite 108-530
Altamonte Springs, Florida 32701
www.FreedomSite.net

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