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Judicial Review of Jeopardy Tax Collection: Sentence First, Verdict Afterwards*

Charles H. Gustafson†

The Internal Revenue Service's jeopardy and termination powers, coupled with the Anti-Injunction Act, give the Service almost uncontrolled discretion to seize taxpayer's property to assure tax collection. Recently, these powers have been used to further the accomplishment of non-revenue-collection goals such as drug enforcement. The author traces the history of the powers and the judicial vacillation on the reviewability of Service action. Acknowledging the legitimate intent of the Service, the author suggests several approaches the Supreme Court might take in deciding three cases presently before it which deal with the difficult questions of judicial review of the Service's power.

I. INTRODUCTION

THE TAX COLLECTION PROCESS was in other times but one aspect of the Crown's activities that could not be subjected to suit.¹ While the scope of sovereign immunity has been modified substantially by time and practice in the United States, the federal tax collector has resisted these changes and, to a large degree, has been able to withstand the trend toward judicial reviewability of governmental action. Such an anomaly stems directly from the remarkable longevity of the dogma that revenue collection by government is so fundamentally necessary to the continuing operation of governmental activities that judicial intervention in the collection process cannot be tolerated. While the origins of this dogma predate the Republic, the dogma was affirmatively reiterated by Congress during the period immediately following the Civil War as part of the first

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* This procedural formulation, when originally pronounced, induced the following immediate criticism: "STUFF AND NONSENSE!" The procedure was, however, highly efficient, and there is no indication that the criticism affected the Crown's determination to use it.

1. See *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1855). See also *THE FEDERALIST* No. 78, at 519 (P. Ford ed. 1898) (A. Hamilton): "The judiciary . . . has no influence over either the sword or the purse."

federal income tax law² and has been a part of the federal taxing statute ever since. This tenet has been uttered again and again during this century by various courts from whom taxpayers have sought judicial relief from the powers of the Internal Revenue Service.³ The government's summary power was reaffirmed by the Supreme Court in a 1972 decision recognizing that constitutional infirmities may attend governmental takings of property without opportunity for prior judicial review,⁴ and it was the basis of the Court's refusal to enjoin the Internal Revenue Service's revocation of the tax-exempt status of a university⁵ and of a nonprofit, educational corporation.⁶

The application of old rules is not surprising, even when the old rules are based upon considerations that have, in other areas, been abandoned or rejected. In this instance, however, the viability of the dogma is being subjected to further test. During its 1975 Term, the Supreme Court will hear three cases which will test the outer limits of the unreviewable collection powers of the Internal Revenue Service and which should elicit guidance with respect to the nature of any review which may be permissible.⁷ At the same time, the Congress has been urged to consider legislation that would assure judicial review of jeopardy collections.⁸

Denial of prior review is likely to affect taxpayers most dramatically where the tax collector exercises broad discretionary powers. It is not, therefore, surprising that the new strains on the old rule derive from the implementation of the extraordinary collection powers available to the Internal Revenue Service in jeopardy situations.⁹ Those powers are very broad. They may be invoked when an officer of the Service determines that the collection of taxes is in jeopardy. There are no meaningful statutory guidelines for making such determinations. Accordingly, the risks of abuse are peculiarly high, and the need for wisdom in the exercise of the power is great. The

2. "[A]nd no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Act of March 2, 1867, ch. 169, § 10.

3. *See Enochs v. Williams*, 370 U.S. 1 (1962); *Phillips v. Commissioner*, 283 U.S. 589 (1931).

4. *Fuentes v. Shevin*, 407 U.S. 67, 91-92 (1972).

5. *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974).

6. *Alexander v. "Americans United," Inc.*, 416 U.S. 752 (1974).

7. *Shapiro v. Secretary of State*, 499 F.2d 527 (D.D.C. 1974), *cert. granted sub nom. Commissioner v. Shapiro*, 420 U.S. 923 (1975) (No. 74-744); *Laing v. United States*, 496 F.2d 853 (2d Cir.), *cert. granted*, 419 U.S. 824 (1974) (No. 73-1808); *United States v. Hall*, 493 F.2d 1211 (6th Cir.), *cert. granted*, 419 U.S. 824 (1974) (No. 74-75).

8. *See, e.g., Hearings on Internal Revenue Service—Taxpayer Assistance and Compliance Programs Before the Senate Committee on Appropriations*, 93d Cong., 2d Sess. (1974).

9. INT. REV. CODE OF 1954, § 6851(a).

appearance of a lack of wisdom and possible abuse of the Service's extensive authority has, during the last decade, led a number of federal district courts and courts of appeals to find avenues for providing prior judicial review of jeopardy collection actions despite the apparently unassailable doctrine of nonreviewability.

The evolution of circumstances leading to the Supreme Court's present focus on the extent of judicial review in jeopardy situations is attributable largely to a decision by the executive branch to use the broad discretionary powers created for tax collection to thwart those suspected of engaging in illegal drug traffic.¹⁰ It is not uncommon for new law to develop from new and different applications of an established legal mechanism. This may become such an instance. The old dogma was derived from one set of judgments based upon the importance of public finance; it will now be tested from a different perspective because of the new uses to which it has been put by the Internal Revenue Service. It is not without irony that the Internal Revenue Service, wishing understandably to preserve its unfettered powers, is asking the Supreme Court to make the old leap of faith again. But this time the chasm has been widened by the Service's use of its expansive collection powers to assist other agencies in making matters difficult for suspected drug dealers. The Court cannot determine that the old imperatives survive intact without first confronting the consequences of vesting vast uncontrolled collection powers in the federal tax collector in a context where the extent of the government's power and the vulnerability of the lone taxpayer are particularly evident. If the Court concludes that no meaningful prior review is possible in jeopardy collections, efforts to modify the statutory powers of the Internal Revenue Service are likely to be redoubled.

There follows a brief description of the normal collection powers vested in the Internal Revenue Service and the special jeopardy powers, an examination of the use of jeopardy collection powers for criminal enforcement generally and in cases pending before the Supreme Court specifically, and an analysis of the issues of judicial review which the Court is being asked to decide. The article concludes with some observations about proposals for legislative modification of the special jeopardy collection powers.

II. THE NORMAL (NON-JEOPARDY) COLLECTION PROCESS

The principal consequence of the use of jeopardy powers by the Internal Revenue Service is an acceleration of the collection process.

10. See note 106 *infra*.

An analysis of the issues now being posed to the Supreme Court must begin, therefore, with a review of the elements of the normal collection process and the impact of the jeopardy provisions.

Voluntary taxpayer compliance is the primary source of tax revenues in the United States. Such voluntary compliance is encouraged, however, by the arsenal of collection powers available to the Service in the event that a federal tax liability is not paid.

The beginning of nonvoluntary collection activities by the Service is the issuance of an "assessment" of taxes owed against a particular taxpayer.¹¹ Federal income tax assessments may result, in some cases, from arithmetic errors in the returns filed by the taxpayer. Such errors are normally discovered during the first check of the income tax return upon which an Assessment Certificate is immediately issued.¹² Other income tax assessments arise from Service decisions, during the audit process, that substantive errors have been made by the taxpayer in the preparation of his return. If the Service auditor believes that such mistakes have been made, a Report of Examination is sent to the taxpayer, along with a form signifying the taxpayer's agreement with the Service's proposed adjustments.¹³ If the taxpayer does not agree with the Service's conclusions, he is advised of his entitlement to a conference with Service representatives to discuss their differences.¹⁴

If no agreement is reached, because of an unsuccessful conference or the failure of the taxpayer to respond to the original report, a potential "deficiency" exists.¹⁵ Such a deficiency, however, normally may not result in an assessment until a "notice of deficiency" (generally known as a "90-day letter") is sent by certified or registered mail to the taxpayer.¹⁶

A taxpayer who has received his 90-day letter has several options. First, he may pay the tax and end the matter. Second, he may pay the alleged deficiency and sue for a refund in the United States dis-

11. INT. REV. CODE of 1954, §§ 6201-04.

12. I.R.S. Form 23-C.

13. Internal Revenue Service, Internal Revenue Manual § 4430.

14. *Id.* § 4432-2.

15. INT. REV. CODE OF 1954, § 6211(a) defines "deficiency" as [T]he amount by which the tax imposed . . . exceeds the excess of—
(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates . . . made.

16. *Id.* § 6212.

strict court or the Court of Claims. Finally, the taxpayer may choose to defer payment of the amount demanded and petition the Tax Court for a redetermination of the deficiency.

The Tax Court option must be selected within a 90-day period initiated by receipt of the deficiency notice.¹⁷ The notice of deficiency has, therefore, been described repeatedly as the "ticket to the Tax Court."¹⁸ During the 90 days, no collection activity may be undertaken by the Service,¹⁹ nor may an assessment be made against the taxpayer.²⁰ If a petition is made to the Tax Court, the Service is precluded from issuing an assessment or taking collection action until the Tax Court determination has been made.²¹ If the taxpayer does not petition the Tax Court²² or if the Tax Court determines that a deficiency exists,²³ an assessment may be made by the Service.²⁴

The imposition of an assessment, by whatever means, is the statutory precondition for use of the Service's broad powers of collection. Section 6321 of the Code creates a lien in favor of the United States in the amount of any tax which the taxpayer "neglects or refuses to pay . . . after demand."²⁵ The lien also applies to interest, additional amounts, additions to tax, assessable penalties, and any costs that may accrue with respect to these liabilities.²⁶ Although the lien arises when the assessment is made,²⁷ collection activity may not be taken by the Service during the ten days following receipt by the taxpayer of the notice of assessment.²⁸ The lien continues in effect until the liability is satisfied or until it becomes unenforceable because of lapse of time.²⁹

The Government's tax lien is very broad. It attaches to "all property and rights to property, whether real or personal."³⁰ Further, it applies even to property acquired by the taxpayer after the time when the original lien arises.³¹ Once the lien is filed in the manner directed by the Code, the Government has a claim to the taxpayer's

17. *Id.* § 6213(a).

18. *Corbett v. Frank*, 293 F.2d 501, 502 (9th Cir. 1961).

19. *INT. REV. CODE OF 1954*, § 6213(a).

20. *Id.*

21. *Id.*

22. *Id.* § 6213(c).

23. *Id.* § 6214(a).

24. *Id.* § 6322.

25. *Id.* § 6321.

26. *Id.*

27. *Id.* § 6322.

28. *Id.* § 6331(a).

29. *Id.* § 6322.

30. *Id.* § 6321.

31. *Treas. Reg.* § 301.6321-1 (1971).

assets which is prior to all but a few specifically enumerated competing claimants.³²

The establishment of the lien against the taxpayer's properties and property rights enables the Service to seize properties in the possession of the taxpayer or to levy against properties or property rights in the possession of others. Summary distraint powers established by the Code are exercisable without resort to court order and have, therefore, almost completely replaced the use of judicial proceedings by the Service for purposes of tax collection.³³

The Code provides that forcible collections may be used when, ten days after notice to the taxpayer of the amount owed, the liability has not been satisfied due to the "neglect or refusal" of the taxpayer.³⁴ The Internal Revenue Manual indicates, however, that the taxpayer should be given "a reasonable chance to settle voluntarily" and provides that a series of notices be sent to the taxpayer before a levy or seizure action is taken.³⁵ This policy generally permits several months to pass after assessment before any forcible action is taken to collect the tax.³⁶

Even these normal nonsummary collection powers of the Service are substantial. Operating with a very high priority among creditors, the Service can effectively terminate a taxpayer's income producing

32. Section 6323 of the Internal Revenue Code of 1954 sets forth a list of creditors whose competing interests have been protected in whole or part from the impact of the federal tax lien. The priority of the government's lien was diminished by the Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125 (codified in scattered sections of 26, 28 U.S.C.), which enlarged the protection for competing interests. The position of the government, however, is a source of continuing concern among segments of the business community adversely affected by the high priority of the tax creditor. Suggestions for the further reduction of the government's priority may be found regularly in legal periodicals. See, e.g., Babitt & Freiman, *The Priority of Federal Claims: Selected Problems and Theoretical Considerations*, 24 CASE W. RES. L. REV. 521 (1973); Olsen, *The Appropriation of Deposits for Debts: Levies, Liens and Setoffs*, 90 BANKING L.J. 827 (1973); Plumb, *The Relative Priority of Federal and Business Claims: Yesterday, Today and Tomorrow*, 27 BUS. LAWYER 1195 (1972); Comment, *The Superpriority of a Possessing Lien Under Federal Tax Lien Act of 1966*, 4 CREIGHTON L. REV. 146 (1970).

33. Summary distraint powers were created at the time of the first federal income tax laws. Act of July 13, 1866, ch. 184, § 9. The federal revenue agency has, however, always had the alternative of initiating a court action to collect from delinquent taxpayers. In connection with such collection suits, the court could be asked to exercise its powers of attachment in aid of the tax creditor. INT. REV. CODE OF 1954, § 7403; see G. HOLMES, FEDERAL INCOME AND PROFITS TAXES (1919).

34. INT. REV. CODE OF 1954, § 6331.

35. Internal Revenue Service, Internal Revenue Manual § 5311(3) (May 16, 1975).

36. The Internal Revenue Manual directs a collection officer to advise a taxpayer "specifically" of a contemplated levy or seizure and to give the taxpayer an opportunity to pay voluntarily before the action is taken. *Id.* §§ 5311(4) *et seq.* Written notice of a proposal action is required in some circumstances. *Id.* § 5311(6).

activity by seizing his business assets. Use of these powers may cause an employee to lose his job because "the Government" has garnished his wages. An asset can be seized and disposed of in a forced sale which is unlikely to result in the recovery of the fair market value of the asset, let alone the value of the asset to the taxpayer. Extraordinary degrees of discretionary authority are vested in Internal Revenue Service employees, even in these normal collection activities. The timing of decisions to file notices of lien, to levy or to seize, and the method of conducting a forced sale are all left to administrative discretion. Little guidance is provided for the exercise of that discretion.³⁷

Despite the vastness of the collection powers and the arbitrariness with which those powers may be exercised, there are some elements of the process which afford a taxpayer an opportunity to protect his interests. He has previously received a 30-day letter and has had an opportunity for at least one conference with Service employees. The taxpayer has also received a 90-day deficiency letter and has been advised of his opportunity to take his case to the Tax Court. After these steps have been completed he is entitled by law to a ten-day notice before distraint actions are taken; and in actuality, under Service practice, he is likely to have received several additional warnings of the imminence of forcible collection measures.³⁸ These various steps tend to mitigate the harshness of the collection process by affording opportunities to prevent mistakes and effect settlement. No such steps are prescribed, however, where jeopardy collection power is exercised.³⁹

III. THE COLLECTION PROCESS— JEOPARDY SITUATIONS

Sections 6851⁴⁰ and 6861⁴¹ of the Code define two situations in which the Service is empowered to undertake forcible collection ac-

37. The Manual does, however, counsel the collection officer that "[j]udicious use of the levy authority is important to both the taxpayer and the Service." *Id.* § 5311(9).

38. See generally *id.* § 5311(3), which states that reasonable chance for voluntary settlement should be given "except in jeopardy cases."

39. *Id.*

40. INT. REV. CODE OF 1954, § 6851: TERMINATION OF TAXABLE YEAR.

(a) INCOME TAX IN JEOPARDY—

(1) IN GENERAL—If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceding taxable year unless such proceedings be brought without delay, the Secretary or his delegate

tivity without pursuing the relatively measured process followed in normal collection actions. While the two situations are defined differently and give rise to somewhat different consequences, in each the authority can only arise when the "Secretary or his delegate" determines that the collection of tax is in jeopardy. The language of the Code suggests that the two situations constitute varying degrees of risk to the collection process. In the jeopardy assessment provision, the risk derives merely by the passage of time; in the termination provision, the risk is created by the intentional conduct of the taxpayer. Section 6861 authorizes a jeopardy assessment where the "Secretary or his delegate believes that the assessment or collection of a deficiency . . . will be jeopardized by delay." Section 6851 authorizes a termination of the taxable year and provides that the tax for such year shall be "immediately due and payable" where:

the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or preceding taxable year.

The jeopardy assessment provisions of section 6861 do not depend upon some intentional misconduct of the taxpayer. The Service need only "believe" that "the assessment or collection of a deficiency . . . will be jeopardized by delay." When such a belief is held,⁴² the Service is entitled immediately to assess the deficiency

shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy.

41. INT. REV. CODE OF 1954, § 6861:

JEOPARDY ASSESSMENTS OF INCOME, ESTATE, AND GIFT TAXES

(a) AUTHORITY FOR MAKING—If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

42. Authority to approve jeopardy assessment actions has been delegated to the district director. Treas. Reg. § 301.6861-1(a) (1961).

and is directed to make notice and demand for payment.⁴³ When the jeopardy assessment is made, the Government's lien against the assets of the taxpayer is created and the usual collection mechanisms become available.⁴⁴ Because of the risks perceived by the Service, however, forcible collection actions may be taken immediately upon assessment, notice and demand "without regard" to the usual ten days after notice and demand.⁴⁵

Where a jeopardy assessment is made under section 6861, collection action may be taken without sending a 30-day letter, without conferring with the taxpayer, and without sending a 90-day letter.⁴⁶ But section 6861(b) requires that a deficiency notice be sent within 60 days after the jeopardy assessment in situations where no prior notice was given.⁴⁷ Accordingly, the taxpayer subjected to a jeopardy assessment eventually receives his ticket to the Tax Court and may, therefore, petition the Tax Court for review of the alleged deficiency despite the fact that an assessment has already been made.

In a jeopardy assessment situation, the Service's collection authority is not automatically suspended during the Tax Court's consideration of the matter. Pursuant to the provisions of section 6863, the taxpayer is entitled to a stay of collection actions if he files a bond equal to the amount as to which a stay is sought.⁴⁸ In addi-

43. Section 6861(a) provides that the Service "shall . . . immediately assess" a deficiency when it holds the requisite "belief" in the risks of delay. At one point the Service was so concerned with the mandatory language of that provision that it questioned its own authority to abate the assessment if its original judgment of the risks was found to be in error. Section 6861(g) of the Internal Revenue Code of 1954 was, therefore, enacted to make it clear that the Service could abate the jeopardy assessment if it "finds that the jeopardy does not exist."

44. INT. REV. CODE OF 1954, § 6322.

45. *Id.* § 6331(a).

46. *Id.* § 6861(a).

47. *Id.* § 6861(b).

48. INT. REV. CODE OF 1954, § 6863: STAY OF COLLECTION OF JEOPARDY ASSESSMENTS.

(a) BOND TO STAY COLLECTION.—When a jeopardy assessment has been made under section 6861 or 6862, the collection of the whole or any amount of such assessment may be stayed by filing with the Secretary or his delegate, within such time as may be fixed by regulations prescribed by the Secretary or his delegate, a bond in an amount equal to the amount as to which the stay is desired, conditioned upon the payment of the amount (together with interest thereon) the collection of which is stayed, at the time at which, but for the making of the jeopardy assessment, such amount would be due. Upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be stayed. The taxpayer shall have the right to waive such stay at any time in respect of the whole or any part of the amount covered by the bond, and if as a result of such waiver any part of the amount covered by the bond is paid, then the bond shall, at the request of the taxpayer, be proportionately reduced. If any portion of the jeopardy assessment is abated, the bond shall, at the request of the taxpayer, be proportionately reduced.

tion, however, the Service is stayed from selling seized assets when a Tax Court Petition has been filed, or where section 6861(b) is applicable and the time for filing a petition with the Tax Court has not yet expired, except where perishable goods have been seized or where the net proceeds will be greatly reduced by the expenses of conservation and maintenance.⁴⁹

If collection action is taken and the taxpayer succeeds in whole or in part before the Tax Court, the Service is, of course, required to return the seized properties to the taxpayer along with any monies that may have been levied.⁵⁰ If the properties have been sold, the taxpayer is entitled to recover only the amount of the proceeds realized by the Service upon the distress sale of the properties, reduced by the costs of the seizure and sale.⁵¹

Section 6851 is implemented by a finding of a Service employee⁵² that the taxpayer "designs" to do an act which tends to "prejudice" or render "wholly or partly ineffectual" tax collection "proceedings" unless such proceedings are undertaken "without delay."⁵³ Accordingly, while section 6861 jeopardy assessments may arise only because of the risks of "delay" to the tax collection process, section 6851 is based upon the behavior of the taxpayer himself. If the Service makes such a finding with respect to a taxpayer, it is prepared to initiate distraint actions as soon as notice of such finding and a demand for payment is transmitted to the taxpayer.⁵⁴ Section 6851 does not authorize or require an "assessment"; it provides only that the taxes "are immediately due and payable." Section 6851 makes no reference to a "deficiency" determination and does not require even the subsequent mailing of a deficiency notice. Accordingly, the Service has long held that a termination action under section 6851 does not entitle the taxpayer to seek review in the Tax Court,⁵⁵ and the Tax Court has agreed that it has no jurisdiction in termination cases where no deficiency notice was issued.⁵⁶

49. *Id.* § 6863(b)(3).

50. Treas. Reg. § 301.6861-1(d) (1961).

51. *Oil City Nat'l Bank v. Dudley*, 198 F. Supp. 849 (W.D. Pa. 1961); INT. REV. CODE OF 1954, §§ 6342, 6343.

52. Authority to make the required finding has been delegated to the district directors. Treas. Reg. § 1.6851-1(a) (1959).

53. While the statutory criteria established for the exercise of the termination powers differ markedly from those for jeopardy assessments, the Internal Revenue Manual directs a collection officer considering a termination action that "the criteria and procedure related to jeopardy assessments should be followed." Internal Revenue Service, Internal Revenue Manual § 5213.3(1) (Nov. 25, 1974).

54. *Id.*

55. *See, e.g., Ludwig Littauer & Co.*, 37 B.T.A. 840 (1938).

56. *Puritan Church of America*, 10 CCH Tax Ct. Mem. 485 (1951), *aff'd per curi-*

There are other differences between the consequences of a termination action under section 6851 and a jeopardy assessment under section 6861. A jeopardy assessment under section 6861 is permissible at any time after a return has been filed or should have been filed until the expiration of the applicable statute of limitations.⁵⁷ A termination action under section 6851 may only be taken in respect of the current or immediately preceding taxable year.⁵⁸ Since a termination action may occur in the middle of a taxable year, section 6851(b) provides for reopening of the year by either the Service or the taxpayer so that the annual tax liability can be calculated according to usual practice. Section 6851(e) provides that payment of taxes shall not be enforced under the termination section if the taxpayer provides a bond to insure the timely filing of a return and payment of taxes due.⁵⁹

IV. JUDICIAL REVIEW OF JEOPARDY COLLECTION ACTIONS

The broad discretionary power vested in the Service by sections 6851 and 6861 is not accompanied by meaningful statutory criteria for their implementation. The Service has been largely left alone to define the elements of "jeopardy" and to ascertain when a taxpayer's "design" is likely to "prejudice" or "render wholly or partly ineffectual" tax collection proceedings.

The potential for abuse in the exercise of such ill-defined discretion is substantial. One court of appeals referred to the powers created in the jeopardy areas as the "sovereign's stranglehold."⁶⁰ Another court of appeals, asked to distinguish between sections 6851 and 6861, concluded that, whichever applied in the particular situation, "to the neck there is no difference."⁶¹

Taxpayers against whom jeopardy powers have been exercised have not surprisingly turned to the courts for relief. Relief has, however, come in very small doses. Section 7421(a) of the Code provides

am, 209 F.2d 306 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 975 (1954); Ludwig Littauer & Co., 37 B.T.A. 840 (1938).

57. Saltzman, *The Termination of a Taxable Year*, 28 TAX LAWYER 91, 93 (1974). If a return was filed, the assessment must be made within three years. INT. REV. CODE OF 1954, § 6501(a). If no return was filed, the assessment may be made at any time. *Id.* § 6501(c)(3).

58. *Id.* § 6851(a).

59. Section 6851(e) also provides that no collection action will be taken "prior to the expiration of the time otherwise allowed for paying such taxes" if an adequate bond is furnished. The stay provision of section 6863(b) provides only for a stay by bonding until a Tax Court decision is reached or until the time for petitioning the Tax Court has expired.

60. *Homan Mfg. Co. v. Long*, 242 F.2d 645, 651 (7th Cir. 1957).

61. *Clark v. Campbell*, 501 F.2d 108, 122 (5th Cir. 1974).

that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."⁶² There are, however, statutory and judicially created exceptions to this flat prohibition which are potentially relevant in jeopardy situations and which are currently before the Supreme Court.⁶³ While these exceptions are analyzed more fully in connection with the pending litigation, a brief summary establishes the background against which the Court is being asked to determine the extent of judicial review in jeopardy collection actions.

Section 7421(a) expressly contemplates possible injunctions where the Service undertakes assessment or collection activities in respect to matters before the Tax Court or where the Service has failed to issue a deficiency notice that would provide access to Tax Court review.⁶⁴ In 1962, after decades of vascillation as to the extent to which the predecessor of section 7421(a) literally applied, the Supreme Court, in *Enochs v. Williams Packing & Navigation Co.*,⁶⁵ concluded that an injunction against the Service could issue where equitable relief was appropriate under traditional standards and where it was "apparent that, under the most liberal view of the law and facts, the United States cannot establish its claim."⁶⁶

The position of the Service with respect to possible judicial review in jeopardy situations is straightforward:

1. No deficiency notice is required by section 6851. Accordingly a taxpayer against whom a termination action has been taken has no recourse to the Tax Court, and the statutory exception does not apply.
2. The good faith "belief" under section 6861 that tax collection would be prejudiced by delay, or "finding" under section 6851 that a taxpayer is possessed of an odious "design" that would "tend to prejudice" or "render wholly or partly ineffective" collection proceedings, is sufficient in itself to support a termination action or jeopardy assessment, and no injunctive relief could be granted in the face of such belief or finding under the Supreme Court's 1962 tests.
3. The first two propositions are justified in part because

62. This provision, generally referred to as the Anti-Injunction Act, has been a part of internal revenue laws of the United States since the earliest days of a federal income tax. See note 2 *supra*.

63. *United States v. Hall*, 493 F.2d 1211 (6th Cir.), cert. granted, 419 U.S. 824 (1974) (No. 74-75).

64. The prohibition applies "[e]xcept as provided in sections 6212(a) and (c), 6213(a)" INT. REV. CODE OF 1954, § 7421(a).

65. 370 U.S. 1 (1962).

66. *Id.* at 7.

the taxpayer will eventually have recourse to judicial review by initiating a refund suit in the district court or the Court of Claims, and may petition the Tax Court in jeopardy assessment actions.

The taxpayers now before the Supreme Court in *Hall*⁶⁷ and *Laing*⁶⁸ are contending that, as a matter of statutory construction, termination actions under section 6851 do not deprive a taxpayer of Tax Court review, and that the denial of such review would constitute a denial of rights to due process and equal protection. In those cases and in *Shapiro*,⁶⁹ the taxpayers are asserting that the Service cannot rest solely upon its "findings" or "beliefs" without showing the evidence upon which such findings or beliefs have been based.

V. TAX COURT REVIEW OF TERMINATION ACTIONS UNDER SECTION 6851

The taxpayers in *Hall* and *Laing* sought to enjoin the Service from taking distraint actions primarily on the ground that the Service had failed to issue the deficiency notice that would provide an avenue for Tax Court review prior to the time when seized assets would be sold by the Service.⁷⁰ The cases arise from quite different circumstances. In *Laing*, the taxpayer was preparing to leave the country, an act specifically described in section 6851 among those in respect of which termination action might be desirable. The *Hall* termination appears to have been the result primarily of the decision to use summary termination powers against suspected drug traffickers.⁷¹

On February 1, 1973, the taxpayer, Jane Hall, was handed a termination notice and demand for payment of income taxes in the amount of \$52,680.25 for the period from January 1 through January 30, 1973. This action followed the arrest and conviction of the taxpayer's husband in Brownsville, Texas, for trafficking in marijuana and a search of the taxpayer's home in Kentucky on January 31, 1973, by ten state policemen. During the search a quantity of drugs was discovered in her home.

Service representatives demanded payment at once and undertook seizure of the taxpayer's personal assets. The taxpayer alleged

67. *United States v. Hall*, 493 F.2d 1211 (6th Cir.), *cert. granted*, 419 U.S. 824 (1974) (No. 74-75).

68. *Laing v. United States*, 496 F.2d 853 (2d Cir.), *cert. granted*, 419 U.S. 824 (1974) (No. 73-1808).

69. *Shapiro v. Secretary of State*, 499 F.2d 527 (D.C. Cir. 1974), *cert. granted sub nom. Commissioner v. Shapiro*, 420 U.S. 923 (1975) (No. 74-744).

70. While both suits are based upon the failure of the Service to issue a deficiency notice, the plaintiffs seek the recovery of all seized assets.

71. See note 106 *infra*.

that she had no assets with which to post a bond to avoid sale of her assets and, instead, initiated an action in the United States District Court for the Western District of Kentucky, asking that the Service be enjoined from selling her property. The district court granted a preliminary injunction requiring the immediate return of the taxpayer's car upon her posting a bond equal to its value and barring the Service from "seizing or levying upon any of her property by whatever nature" ⁷² The grounds for the action of the district court were that the Service had failed to provide a deficiency notice that would have entitled the taxpayer to petition the Tax Court and that, therefore, the Anti-Injunction Act did not apply. ⁷³ The district court decision was affirmed *per curiam* by the Sixth Circuit Court of Appeals. ⁷⁴ The Supreme Court granted certiorari. ⁷⁵

The *Hall* case was consolidated for argument ⁷⁶ in the Supreme Court with *Laing*, in which the propriety of the Internal Revenue Service termination actions had been challenged unsuccessfully.

On May 31, 1972, Laing, a New Zealand citizen, had entered the United States from Canada on a visitor's visa. On June 24, 1972, he had attempted to return to Canada, but was denied entry by Canadian officials. The taxpayer returned to the United States where he was stopped and searched by customs officials. A case containing approximately \$310,000 was discovered in the engine compartment of the automobile in which the taxpayer and two companions were riding.

Later that day, a Service official took steps to terminate the 1972 taxable years of all three occupants of the car. Agents interviewed the three and demanded payment of income tax liabilities of \$310,000 from each. When payment was refused, the agents requested and received orally a tax assessment upon each person in the amount of \$310,000. After a second refusal to make payment, the agents seized the cash.

On June 29, 1972, the Service sent the taxpayer a written declaration under section 6851 indicating that the taxable year had been terminated and that a tax of \$195,985.55 was assessed and made payable for the period from January 1, 1972, through June 24, 1972.

On July 15, 1972, the taxpayer initiated an action, based primarily upon the failure of the Service to issue a deficiency notice, seeking to enjoin the Service from continued possession of his properties and

72. (Unreported district court opinion and order).

73. Petitioner's Brief for Certiorari at 5, *United States v. Hall*, No. 74-75 (U.S., filed Aug. 5, 1974).

74. *Hall v. United States*, 493 F.2d 1211 (6th Cir. 1974).

75. *United States v. Hall*, 419 U.S. 824 (1974).

76. 419 U.S. 1087 (1974).

seeking further a declaratory judgment that the termination provisions as applied against him were unconstitutional. On September 18, 1972, the Service moved to dismiss the action or, in the alternative, for summary judgment. The motion to dismiss was granted by the district court on September 12, 1972,⁷⁷ and was affirmed by the Second Circuit Court of Appeals.⁷⁸ The Supreme Court granted certiorari.⁷⁹

The *Hall* and *Laing* cases were argued before the Court in February, 1975. However, the Court has ordered that the cases be re-argued in the 1975 Term.⁸⁰ The initial issue raised by *Hall* and *Laing* is whether a taxpayer is entitled to Tax Court review when the termination provisions of section 6851 are employed against him.

VI. TAX COURT REVIEW OF TERMINATION ACTIONS: TWO INTENTIONS IN SEARCH OF A CONGRESS — AND AN EXTINCT ALTERNATIVE

The position of the Service that a section 6851 termination action is not subject to review in the Tax Court does not appear to have been seriously challenged for many years. The expanded use of the termination authority in situations where criminal enforcement may have been at least as important to the Service as tax collection has, however, generated challenges by taxpayers against whom termination actions have been taken. In turn, a number of courts throughout the country have examined the statutory structure of the termination authority anew to determine whether avenues exist for judicial review of a termination action at a time when a taxpayer might be in need of relief against wrongful actions. Some of those courts have concluded that such taxpayers are entitled to petition the Tax Court for relief. The legislative history of section 6851 is sparse and discloses no Congressional intention with respect to the availability of Tax Court review in termination situations. As a result, the analysis by which the courts have concluded that taxpayers are or are not entitled to such review provides an intriguing study in statutory construction.

Termination authority was initially established in section 250(g) of the Revenue Act of 1918.⁸¹ While there have been some modifications of the original text and new provisions have been added to deal with specific aspects of the termination provisions, the basic language establishing the termination power has not been changed

77. *Laing v. United States*, 364 F. Supp. 469 (D. Vt. 1973).

78. *Laing v. United States*, 496 F.2d 853 (2d Cir. 1974).

79. *Laing v. United States*, 419 U.S. 824 (1974).

80. 43 U.S.L.W. 3674 (U.S. June 24, 1975).

81. Act of February 24, 1919, ch. 18, § 250(g), 40 Stat. 1084.

materially. Action is based upon a "finding" that the taxpayer has the invidious "design" described in the initial paragraph of the section. Upon such a finding, a notice and demand is to be made, and the income tax becomes "immediately due and payable."

The terminology used in the termination section seemed to be directed at potential tax evaders.⁸² The skimpy explanations provided by congressional committees and the short discussion of the provision reflected on the Congressional Record suggest, however, that the primary purpose of the new provision was to capture income taxes that might be owed by the thousands of people who were leaving the country during the period following the end of World War I.⁸³ The rationale for such a provision was obvious; since departing taxpayers were going to put themselves and their assets outside of the reach of the United States, the Service should be in a position to act before it was too late to do so.

Despite the emphasis on departing taxpayers, the new termination power was not limited to those who might be leaving the country. The power could also be exercised against a person who might be hiding himself or his assets within the United States or doing "any other act" which might tend to prejudice or render wholly or partially ineffectual proceedings to collect the income tax of the current or preceding taxable year. Although the terms of the statute do not clearly indicate what steps may be taken after the tax is deemed "due and payable," it has been asserted by the Service and apparently assumed by the courts that the termination authority includes the power to act by distraint or to initiate collection proceedings in court.

There was no Tax Court in 1918. The Board of Tax Appeals was not created until 1924. The normal method of paying taxes was to file an annual return. If the Service assessed additional taxes, the only avenue for relief by a taxpayer who disagreed with the assessment action was to pay the taxes assessed and to file a refund action in the federal court. Until the enactment of the termination authority in 1918, the powers of the Service to initiate collection proceedings in court or to exercise its administrative distraint powers were dependent upon a decision as to the amount of tax due for the entire taxable year. No collection power was, therefore, available to the Service during the pendency of a taxable year or during the succeeding months prior to the date when returns were to be filed.⁸⁴

82. "Congress wisely empowered the Commissioner, in cases of intent to evade, to declare all taxes to be due and payable." R. MONTGOMERY, *INCOME TAX PROCEDURE* 241 (1923).

83. See generally 61 CONG. REC. 6112 *et seq.* (1921).

84. See Act of Oct. 3, 1917, ch. 63, § 3, 40 Stat. 301; Act of Sept. 8, 1916, ch. 463,

A new structure for payment of income taxes was prescribed within section 250 of the Code by the 1918 legislation. The termination power in section 250(g) was part of the structure. Section 250(d) established limits on the powers of the Service to determine and assess taxes, and to undertake suits or proceedings for collection. Section 250(d) established, in effect, a five-year statute of limitations from the time that a return was due or made except in the case of false or fraudulent returns. An assessment could only be made after the return was due or made. There was no provision for jeopardy assessment.⁸⁵

The origins of the Tax Court system can be found in the Revenue Act of 1921. Section 250(d) was modified in a number of ways in 1921. One of the amendments established for the taxpayer a right to a hearing "[i]f upon examination of a return made . . . a tax or a deficiency in tax is discovered."⁸⁶ In such a case, the taxpayer was to receive notice thereof and was given a period of not less than 30 days to file an appeal. The appeal was heard by an administrative board within the Internal Revenue Service. No assessment would be made prior to the administrative review, so no lien could be established prior to the implementation of the review procedures.

The creation of this first mode of review of a proposed assessment was accompanied by the establishment of the jeopardy assessment authority. Section 250(d) ended with the following proviso: "[I]n cases where the Commissioner believes that the collection of the amount due will be jeopardized by such delay he may make the assessment without giving such notice or awaiting the conclusion of such hearing."⁸⁷

When the provision for administrative review was added in 1921, no important modification dealing with termination powers was made in section 250(g).⁸⁸ Since the termination power was exercisable prior to the time when a return for a taxable year could be prepared in many instances, and prior to the time when it was due in others, the administrative review procedures were not available to taxpayers against whom termination actions were taken.

§ 9(a), 39 Stat. 263; R. FOSTER & G. ABBOT, A TREATISE ON THE FEDERAL INCOME TAX UNDER THE ACT OF 1894, at 190ff (1895).

85. "Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made." Act of Feb. 24, 1919, ch. 18, § 250(d), 40 Stat. 1083.

86. Revenue Act of 1921, ch. 136, § 250(d), 42 Stat. 266.

87. *Id.*

88. *Id.* § 250(g), 42 Stat. at 267.

The Board of Tax Appeals was established as an independent reviewing body by the Revenue Act of 1924. Section 900(e) of the 1924 Act empowered the Board to hear appeals arising out of proposed deficiencies and claims for abatement of both estate and income taxes.⁸⁹ Section 274 of the Code required the Commissioner to notify the taxpayer of a proposed income tax deficiency. Moreover, the same section prohibited collection actions by distraint as well as court proceedings until 60 days following the provision of such notice and entitled the taxpayer to file a notice of appeal to the Board within the 60-day period.⁹⁰

Section 274(d) of the 1924 Act preserved the jeopardy assessment, in a somewhat modified form, providing for immediate assessment where the Commissioner believed that "assessment or collection of a deficiency will be jeopardized by delay."⁹¹ Unless the jeopardy assessment power was exercised, distraint powers could not be used until the Board had determined a deficiency. However, Board decisions were not binding on the Service, and collection actions could be taken in court during the pendency of Board proceedings or even following a decision by the Board in favor of the taxpayer.⁹²

The 1924 Act established the termination power in a separate section of the Code. The new section 282, dealing with termination powers, made no reference to "deficiencies" or "assessments," except that a penalty equal to 25% "of the total amount of the tax or deficiency in the tax" could be added "if a taxpayer violates or attempts to violate" the section.⁹³ Further, the new termination section contained no reference to the newly created Board of Tax Appeals.

The Revenue Act of 1926 completed the process of creating an independent system of review. The Board of Tax Appeals was given authority to make decisions which were binding upon the Internal Revenue Service.⁹⁴ The 1926 Act further provided that "no assessment of a deficiency . . . and no distraint or proceeding in court for . . . collection shall be made, begun, or prosecuted" until the expiration of the 60 days following the mailing of the deficiency notice or, if a petition to the Board was timely filed, until the Board's decision became final.⁹⁵ As an additional safeguard, section 274(a) specifically authorized the issuance of an injunction against assess-

89. Revenue Act of 1924, ch. 234, § 900(e), 43 Stat. 337.

90. *Id.* § 274, 43 Stat. at 297.

91. *Id.* § 274(d).

92. *Id.* §§ 274(b), 279(b), 43 Stat. at 300.

93. *Id.* § 282(f), 43 Stat. at 303.

94. Revenue Act of 1926, ch. 27, § 274(b), 44 Stat. 55.

95. *Id.* § 274(a).

ments, distrainments, or court proceedings during the period of the prohibition.⁹⁶

The 1926 Act for the first time treated jeopardy assessments in a separate section of the Code. Section 279(a) directed the Commissioner to assess, make notice, and demand payment of a deficiency immediately when he believed that delay would jeopardize assessment or collection of the deficiency.⁹⁷ The period during which jeopardy assessments could be made was not specified in section 279, but section 277(a) provided for assessment within three years after a return had been filed and section 278(a) provided for assessment "at any time" after a failure to file a return.⁹⁸ A jeopardy assessment could not, therefore, precede the date upon which a return was to be filed.

The termination authority in the 1926 Act, basically unchanged from preceding law, was set forth in section 285.⁹⁹ The 1928 Act did not significantly modify these termination powers but merely moved the termination provision to section 147 of the Code and added subsection headings. Section 147(a) was entitled "Tax in Jeopardy."¹⁰⁰ The jeopardy assessment provision became section 273, also substantially unchanged from the 1926 formulation.¹⁰¹

Although there have been many modifications in the terms and structure of the Internal Revenue Code since 1928, the statutory topography with respect to termination powers, jeopardy assessments, and the jurisdiction of the Tax Court has remained largely unchanged.¹⁰² In the Internal Revenue Code of 1954, however, sections 6851 and 6861 are both found in a subchapter entitled "Jeopardy."¹⁰³ The text of the various statutory provisions gives no clear answer to the question of Tax Court jurisdiction in termination situations. Lower courts have, therefore, endeavored to "harmonize" the provisions of the Code to derive Congress' intent. The result of these attempts is a disharmony that the Supreme Court will be required to correct in *Hall and Laing*. That task is enlarged by the possibility that the Congress may never have had any intent with respect to the issue. In a situation where both litigants offer equally persuasive inferences from the text and organizational arrangement

96. *Id.*

97. *Id.* § 279(a), 43 Stat. at 59.

98. *Id.* § 277(a)(1), 43 Stat. at 58; § 278(a), 43 Stat. at 59.

99. *Id.* § 285, 43 Stat. at 68.

100. Revenue Act of 1928, ch. 852, § 147(a), 45 Stat. 836.

101. *Id.* § 273, 45 Stat. at 854.

102. S. REP. No. 20, 76th Cong., 1st Sess. (1939); S. REP. No. 1622, 83d Cong., 2d Sess. (1954); H.R. REP. No. 1337, 83d Cong., 2d Sess. (1954).

103. INT. REV. CODE OF 1954, ch. 70, subchapter A.

of the Code, the fact that the Service's longstanding position has only recently been challenged may be determinative. An ironic footnote to the present controversy, however, arises from evidence in the early history of the termination provisions suggesting the possibility that Congress may never have intended to authorize distraint proceedings in termination situations. While the various lower court decisions dealing with the issue have been thoroughly reported and analyzed,¹⁰⁴ a summary of the alternative analyses now before the Court is necessary to a full consideration of the nature and scope of judicial review in jeopardy situations.

VII. THE SCHRECK CASE— TAXPAYER'S FIRST VICTORY

Section 6851 termination powers may be exercised when the "Secretary or his delegate finds" that the taxpayer "designs quickly" to do something. The use of the Internal Revenue collection mechanisms for criminal law enforcement is not new.¹⁰⁵ In recent years the Nixon administration directed that the termination powers in particular be used in the fight against crime; to effect that end, the Narcotics Enforcement Project was initiated.¹⁰⁶ The use of the termination powers in aid of this program required only that the Commissioner have the statutory "belief" about a "design" that would jeopardize tax collection. When a taxpayer was suspected, if not necessarily charged, with participating in illegal drug traffic, the requisite "belief" could be readily justified.

If the Service is correct in its assertion that the termination powers are not subject to prior review in the Tax Court, the only avenue for review lies in a suit in the district court. Such a suit is unlikely to succeed under a literal application of the Anti-Injunction Act.¹⁰⁷

104. See Peale, *Termination of Taxable Year*, 52 TAXES 305 (1974); Saltzman, *The Termination of a Taxable Year*, 28 TAX LAWYER 91 (1974); Silver, *Terminating the Taxpayer's Taxable Year: How IRS Uses it Against Narcotics Suspects*, 1974 J. TAXATION 110; Note, *Jeopardy Terminations Under Section 6851: The Taxpayer's Rights and Remedies*, 60 IOWA L. REV. 644 (1975); Note, *Terminated Tax Years; Coherent Relief for the Taxpayer*; *Willits v. Richardson*, 497 F.2d 240 (5th Cir. 1974), 54 NEB. L. REV. 184 (1975); Note, *Termination of the Taxable Year: The Need for Timely Judicial Review*, 48 S. CAL. L. REV. 184 (1974); Note, *Narcotics Offenders and the Internal Revenue Code: Sheathing the Section 6851 Sword*, 28 VAND. L. REV. 363 (1975); Note, *Termination of the Taxable Years: the Quagmire of Internal Revenue Code Section 6851*, 15 WM. & MARY L. REV. 658 (1974).

105. See, e.g., *James v. United States*, 366 U.S. 213 (1961).

106. On June 17, 1971, President Nixon announced that an expanded effort to combat drug abuse would include "systematic tax investigations." Implementation of the program included the use of termination and jeopardy assessment powers. CCH INT. REV. MAN. SUPP. at 20373 (1972).

107. INT. REV. CODE OF 1954, § 7421. In the government's view, a literal interpre-

As a result, the use of the termination powers against suspected drug offenders can effect substantial degrees of penalty without permitting the taxpayer's recourse to courts and without requiring the government to muster any meaningful evidence against the taxpayer. The availability of eventual review in a refund suit does little to mitigate the immediate impact of the penalty.¹⁰⁸

The use of termination powers for summary criminal punishment was first questioned seriously in *Schreck v. United States*,¹⁰⁹ a 1969 decision by Judge Frank A. Kaufman. In *Schreck*, federal agents had seized assets of the taxpayer on October 23, 1967. On November 8, the Service delivered a notice of termination of the partial year from January 1 to October 25, 1967, and demanded payment of a "tax due" of \$20,730 which had been assessed against the taxpayer. A notice of levy was filed on November 9, but no deficiency notice was ever sent to the taxpayer.

The taxpayer initiated an action in the federal district court requesting that the Service be required to return the cash and personal property it had seized and levied upon at the time the demand had been sent to the taxpayer. The Service sought dismissal of the action on the ground that the Anti-Injunction Act prohibited the taxpayer from obtaining the relief sought. The taxpayer responded that an injunction was specifically contemplated by Congress in this situation under section 6213(a) of the Code¹¹⁰ because the Service had failed to provide the required deficiency notice.

The Service argued that the exception under section 6213(a) which allowed Tax Court consideration was inapplicable because the

tation of section 7421(a) is appropriate when termination action is being tested by court proceedings. See text accompanying notes 142-64 *infra*.

108. For an excellent discussion of practical consequences of deferred hearings in distraint proceedings, see Note, *Jeopardy Assessment: The Sovereign's Stranglehold*, 55 GEO. L.J. 701 (1967).

109. 301 F. Supp. 1265 (D. Md. 1969), *reaff'd on reconsideration*, 375 F. Supp. 742 (D. Md. 1973), *appeal docketed*, No. 74-1566, 4th Cir., May 16, 1974.

110. INT. REV. CODE OF 1954, § 6213:

(a) TIME FOR FILING PETITION AND RESTRICTION ON ASSESSMENT.

Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after notice of deficiency authorized in section 6212 is mailed . . . the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B or Chapter 42 or 43 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

Tax Court had no jurisdiction with respect to termination actions. No petition may be filed in the Tax Court until a deficiency notice is provided. A termination action does not give rise to a deficiency. Therefore, no notice of deficiency could be provided. Since the Service is not required to provide a deficiency notice in such situations, the relief sought would be wholly impermissible.

The taxpayer could, of course, cite no specific authority for his version of the congressional purpose. He asked the court to infer congressional intent from the organizational structure of the Code: since sections 6851 and 6861 are now found in a subchapter of the Code entitled "Jeopardy Authority," all actions taken under either section result in jeopardy assessments and are, therefore, subject to the requirements prescribed for such assessments, including the requirement that a deficiency notice be sent within 60 days of the jeopardy assessment.

The Service responded that jeopardy assessments and termination actions had always been governed by two different sets of criteria. Moreover, the termination powers could not be subject to the jeopardy assessment limitations because the termination power was created in 1918, three years before the term "jeopardy assessment" found its way into the Code.¹¹¹ Since it had preceded the jeopardy assessment authority, the termination assessment power was implicit in section 6851. In effect, the Service asserted the not unfamiliar "rule" of statutory construction: When the Congress wanted to require a notice, it knew how to do it.

Judge Kaufman concluded that there was no direct authority indicating congressional intent. Looking to "the harmony of our carefully structured twentieth century system of tax litigation,"¹¹² he searched for precedent, and found eight cases dealing with terminations.¹¹³ From those cases he concluded that the Government had itself been unsure about the correct interpretation of the statute. He also noted that the "Government takes its present position in the face of its concession, made less than three years ago, that this position [that section 6851 confers implied assessment authority] has no force."¹¹⁴

Finding no clear congressional mandate and a confusing history of interpretation by the Service, Judge Kaufman cited possible constitutional issues and considerations of equity in concluding that sec-

111. See text accompanying note 71 *supra*.

112. 301 F. Supp. at 1268.

113. *Id.* at 1276.

114. *Id.*

tion 6851 actions were subject to the notice requirements of section 6861.¹¹⁵ Since no deficiency notice had been provided, the injunctive relief was granted. To hold otherwise, Judge Kaufman stated, would be

[T]o hold that Congress has constitutionally authorized the IRS to seize and sell all of a person's property and has also provided that the person has no right to institute *any* court proceeding, for perhaps longer than three years, in which to litigate the validity of the underlying assessment and the seizure, while at the same time all jeopardy income taxpayers, other than short-year jeopardy income taxpayers, have the right to begin a judicial proceeding within 60 days of the assessment.¹¹⁶

VIII. IRVING V. GRAY — SCHRECK ANALYSIS REJECTED

The *Schreck* decision has not yet been reviewed by a court of appeals. The first court of appeals decision dealing with the *Schreck* argument resulted, not from the Drug Enforcement Project, but as part of a celebrated series of legal actions arising out of a purported autobiography of Howard Hughes written by Clifford Irving. When the issue was raised by the Irvings, whose position was now supported by the *Schreck* decision, the Service responded with a new explanation of the source of its termination assessment powers.¹¹⁷

In early 1972, after the hoax had been uncovered, Clifford and Edith Irving were residents of Ibiza, Spain. On February 4, 1972, while both federal and state grand juries were still investigating the scandal, the Service sent a letter declaring the 1971 calendar year to be terminated and demanding immediate payment of taxes for 1971 in the amount of \$243,118 from Edith and \$246,993 from Clifford. On the same day, the Service levied against the Irvings' accounts with a brokerage house in New York.

The taxpayers, relying heavily on the reasoning of the *Schreck* court, contended that the levy was improper. This time the Service presented a new response to the taxpayers' claim that the assessment authority for termination actions derived from section 6861. Abandoning the assertion that section 6851 itself constituted the source of termination assessment power, the Service argued that the general assessment authority of section 6201 was in fact the basis for termination assessments. The district court dismissed, declining to follow

115. *Id.* at 1284.

116. *Id.* at 1281.

117. *Irving v. Gray*, 344 F. Supp. 567 (S.D.N.Y. 1972), *aff'd*, 479 F.2d 20 (2d Cir. 1973).

Schreck,¹¹⁸ and was affirmed by the Second Circuit Court of Appeals.¹¹⁹

The Second Circuit concluded that *Schreck* had been based upon two "erroneous premises." The first was that the assessment authority used in section 6851 situations must, in the absence of a specific provision therein, be derived from section 6861. The Service's new position that section 6201 was the applicable assessment provision was accepted.

The Second Circuit also rejected the premise that the Tax Court was the only forum for immediate judicial review. There was no deficiency and, therefore, no avenue to the Tax Court. But there is an avenue for review provided by the suit for refund: "The taxpayers . . . could have had their complaint of an overpayment heard in the district court below if they had filed full-year returns reporting overpayments of tax; they could have commenced plenary refund actions six months after filing the returns."¹²⁰ The court further indicated that the Irvings could not have been afforded equitable relief even if a statutory avenue were available: "[I]t is bearable inequity that those whose 'bold plans' are frustrated may suffer potentially costly inconveniences."¹²¹

The Service argued in both *Schreck* and *Irving* that it would be inappropriate to provide review in the Tax Court for a terminated year because of the possibility of reopening the year. Since the terminated year could be reopened either by the taxpayer or the Service,¹²² the liability determined did not constitute a final calculation which would be appropriate for Tax Court review. The Second Circuit apparently embraced that rationale. It concluded that one of the grounds for affirming the denial of injunctive relief was that "there was no deficiency assessment made." Since there was no "deficiency assessment," there could presumably be no "deficiency notice."¹²³

IX. OTHER CIRCUITS SPLIT

Prior to the decision of the Second Circuit in the *Irving* case, the question of deficiency notices in termination actions had been raised collaterally before the Seventh Circuit in *Williamson v. United States*.¹²⁴ The taxpayer was arrested on October 18, 1967, and two

118. *Id.*

119. 479 F.2d 20 (2d Cir. 1973).

120. *Id.* at 24.

121. *Id.* at 25. This same justification could, of course, be advanced when a court is confronting a suspected drug pusher's arguments.

122. INT. REV. CODE OF 1954, § 6851(b).

123. 479 F.2d at 25.

124. 31 Am. Fed. Tax. R. 2d 73-800 (7th Cir. 1971).

days later the Internal Revenue Service seized the contents of his safe deposit box. After filing his 1967 return, the taxpayer had filed a refund claim and sued for the refund. The district court dismissed his complaint. The Seventh Circuit reversed the dismissal on other grounds, but took the opportunity to reject the argument that the Service was required to send a deficiency notice in a termination situation. The court concluded that there was no "deficiency" and, therefore, a deficiency notice could not be required.

[A deficiency is defined by section 6211 of the Code] as the amount by which the "tax imposed" exceeds the amount shown on the tax return. The assessment in this case was not an imposed tax, but merely an amount which the [Internal Revenue Service] believed justified the termination of the taxable year. Since no return has been filed at the date of the assessment, no deficiency was determinable.¹²⁵

In 1974 the Fifth Circuit, in *Clark v. Campbell*,¹²⁶ reached the same conclusion that Judge Kaufman had reached in *Schreck*. The Bureau of Narcotics and Dangerous Drugs, armed with a warrant, searched two buildings in Dallas on June 11, 1969. Three days later the Internal Revenue Service mailed a termination letter announcing an assessment of \$104,697.20. An action was initiated by the taxpayer in November 1969 seeking to remove clouds on property title and to enjoin levy and seizure of his property because no deficiency notice had been issued. The district court ordered assessment and levy enjoined unless a deficiency notice was issued.¹²⁷ The Service appealed unsuccessfully.¹²⁸

The Fifth Circuit specifically rejected the Service contention that a taking by authority of section 6851 did not constitute the imposition of a tax because of the possibility of reopening the prematurely terminated taxable year: "[T]he *tax* remains immediately payable unless [the] bonding option is exercised and the taxpayer's assets remain immobilized."¹²⁹

125. *Id.* at 73-800.

126. 501 F.2d 108 (5th Cir. 1974).

127. *Clark v. Campbell*, 341 F. Supp. 171 (N.D. Tex. 1972), *aff'd.*, 501 F.2d 108 (5th Cir. 1974).

128. 501 F.2d at 109. The Fifth Circuit was unimpressed with the differences between sections 6851 and 6861. *Id.* at 124 n.52. The court was, however, highly impressed with the powers created by the termination provisions: "A weapon little known and previously not too often employed, having atomic potentialities in the arsenal of the tax gatherer . . ." *Id.* at 110.

129. *Id.* at 118. The court also cited an indication that the Tax Court was "no longer comfortable" with the Service's reading of Ludwig Littauer & Co., 37 B.T.A. 840 (1938). *Littauer* held that because of the possibility of reopening a terminated

The Fifth Circuit was not sure whether a termination action created a "deficiency," but it was certain that the deficiency notice requirements applied where a termination action had been taken:

We agree with *Schreck* that § 6211 and the applicable regulations are broad enough to cover the "thing" created by an assessment following a § 6851 termination What is more, we believe that the liability created under § 6851 is as a matter of fact the same type of "thing" as a § 6211 deficiency. We see no significant distinction, nor any need for one.¹³⁰

The court recognized that the predecessor of section 6851 had been enacted prior to the establishment of jeopardy assessment provisions, but did not regard the chronology of original enactment as determinative of a present congressional intent. The revenue system, the court noted, had developed from an "unintegrated collection of separate revenue acts through two careful codifications." The process "may well create new affiliations between long existent, but formerly disparate provisions."¹³¹ The court perceived two kinds of assessment authority. Normal assessments are authorized by section 6201. Jeopardy actions are governed by section 6861, and termination actions come within the framework of the jeopardy provisions. Any other conclusion would be "a complete derogation of the obvious and carefully considered pattern of the Code."¹³²

The court buttressed its statutory inferences by observing that no governmental interest would be risked by a prior hearing in termination situations. In the wake of these considerations, the court concluded that "Congress meant for the deficiency notice procedures of section 6861 to be equally applicable to a section 6851 quick-termination taxpayer."¹³³

In 1974 the Sixth Circuit Court of Appeals embraced the *Schreck* analysis. In *United States v. Rambo*,¹³⁴ the court emphasized that its interpretation of the legislative structure was based in large mea-

year, the termination powers did not create a deficiency for notice purposes. *Littauer* had been rigorously applied, but the Fifth Circuit sensed a modification of this position in *Nino Sanzogno*, 60 T.C. 321 (1973). In *Sanzogno*, the Tax Court had held that Form 1040C, required of departing aliens by section 6851(d), constituted a return. Such a holding is inconsistent with the proposition that section 6851 concerns interim indices of an eventual tax-liability determination.

130. 501 F.2d at 119-20.

131. *Id.* at 120.

132. *Id.* at 121.

133. *Id.* at 126.

134. 492 F.2d 1060 (6th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3017 (U.S. July 10, 1974) (No. 73-2005).

sure upon a desire to avoid "serious question of a denial to the taxpayer of his property without due process of law."¹³⁵

The issue of Tax Court reviewability has not been determined in the other circuits.¹³⁶ District courts in circuits that have not finally determined the applicability of the *Schreck* analysis have also divided.¹³⁷ A judicial scorecard of views on the issue would substantiate only a single conclusion: It is not possible to determine whether Congress intended to provide Tax Court review of termination actions. Some judges have implored Congress to address itself to the issue.¹³⁸ But Congressional action prior to reargument and a determination of the issue by the Supreme Court in *Hall* and *Laing* is at best unlikely. A judicial coin flip is, therefore, inevitable.

Neither the court of appeals decision in *Hall* nor the *Laing* decision provides any new analysis of the question. The Sixth Circuit's *per curiam* opinion in *Hall* indicated that the issue had already been decided in *Rambo*.¹³⁹ In *Laing* the Second Circuit indicated that the issue had been resolved in *Irving* case.¹⁴⁰

X. THE EXTINCT ALTERNATIVE

There is no indication that any court dealing with the termination-review issue has considered whether a termination was intended to be a basis for the initiation of distraint action. The absence of such consideration is understandable in light of the Service's long-unchallenged use of section 6851 and its predecessors as a justification for distraint actions. There is, however, direct authority for the proposition that the formulation initially used in the 1918 Act and

135. *Id.* at 1064.

136. The issue of using termination in criminal cases has arisen in the Fourth Circuit in *Lewis v. Sandler*, 498 F.2d 395 (4th Cir. 1974). The taxpayer challenged a termination action against him and sought to have his suit treated as a class action on behalf of those against whom collection actions had been taken for criminal-law-enforcement reasons. The suit was dismissed, however, when the Service returned the assets that had been seized and admitted that it had made an assessment for the wrong tax year. The court affirmed the denial of certification as a class action.

137. *See, e.g., Preble v. United States*, 376 F. Supp. 1369 (D. Mass. 1974); *Lisner v. McCannless*, 356 F. Supp. 398 (D. Ariz. 1973).

138. *See, e.g., Preble v. United States*, 376 F. Supp. 1369, 1373 (D. Mass. 1974): "Perhaps Congress, in memory of an overburdened judiciary will someday give us a Code more amenable to clear interpretation. Until then, we will continue to have responsible jurists reaching contrary conclusions on issues such as those involved here, resulting in added confusion to the operation of the tax system." Judge Freidman's sentiments about the task of statutory construction in this instance were not dissimilar from those of the Fifth Circuit in *Clark v. Campbell*: "[T]he intricate structure of the tax act—which we painstakingly, perhaps painfully painstakingly dissect . . ." 501 F.2d 108, 110 (5th Cir. 1974).

139. 493 F.2d 1211, 1212.

140. 496 F.2d 853, 854.

still found in section 6851 authorized the Service only to initiate collection proceedings in court for the purpose of protecting against loss of jeopardized tax revenues.

Although the Service today relies almost wholly upon its statutory distraint powers,¹⁴¹ there was a time when judicial proceedings to collect taxes were not uncommon.¹⁴² Such proceedings were based merely upon the allegation that the Service was a creditor of the taxpayer and, as such, was entitled to sue on the debt. In such suits it would be possible to attach assets of the taxpayer in the manner prescribed by the rules of practice in the particular court. Judicial review of such proceedings was, of course, automatic. The Service was using the judiciary to collect taxes.

The administrative distraint powers have been part of the federal tax laws since at least 1866.¹⁴³ When the Revenue Act of 1918 was passed, the distraint powers were not materially different from those presently in use. Distraint powers could be exercised against assets of the taxpayer that were subject to the federal tax lien.¹⁴⁴ The federal tax lien came into being when an assessment was made.¹⁴⁵ Prior to an assessment, there was no lien; accordingly, no distraint actions were possible. But collection proceedings in court were permissible even though there had been no assessment.¹⁴⁶

The Service has repeatedly asserted that the Congress knew how to prescribe special assessment authority when it wished to do so. One such situation is that presented by the jeopardy assessment power. But the termination provisions, established originally in the 1918 Act just three years prior to the creation of jeopardy assessment au-

141. Since the distraint powers authorized by section 6331 may be exercised without resort to the courts, the process is more rapid and allows collection officers wider latitude in exercising discretion. There are remedies, however, that may only be sought by court action. In *United States v. Shaheen*, 445 F.2d 6 (7th Cir. 1971), for example, the Government initiated a collection action and sought a writ *ne exeat re publica* to prevent the taxpayer-defendant from leaving the country.

142. See R. FOSTER & E. ABBOT, *A TREATISE ON THE FEDERAL INCOME TAX UNDER THE ACT OF 1894*, at 224 (1895): "A suit by the United States to foreclose their lien for taxes, although less expeditious than a statutory sale, may be more prudent when the amount of the tax is large, since a judicial sale under the decree of a court will produce higher bids."

143. Act of July 13, 1866, ch. 184, § 9, 14 Stat. 101.

144. INTERNAL REVENUE § 3187, 1874 Rev. U.S. Stats. 612.

145. *Id.* § 3186.

146. G. HOLMES, *FEDERAL INCOME AND PROFITS TAXES* 583 (1919):

The only qualification upon this right to resort to a plenary suit in the absence of an assessment is that the tax must be ascertainable and determinable, on evidence, by a court, and a tax of fixed percentage in a subject or object which is so definitely described in the statute that its amount or value can be so ascertained or determined may be recovered in an action though it has never been fixed by assessment.

thority, have never by their terms provided for a special assessment power.

The 1918 Act appears to have authorized "proceedings." The Commissioner was authorized to act in effect when "proceedings to collect the tax [should be] brought without delay." The only action to collect income taxes due and payable, but which had not been assessed, was by the initiation of a suit in a court of law. Ordinarily, such suits could not be brought until the end of the year when the tax was due. Section 250(d) contemplated proceedings at once, but provided no power for immediate assessment.

After establishing the power of the Commissioner to act even though the normal assessment period had not arrived, the Code indicates that a tax is "due and payable," and describes but one other consequence of the termination:

In any action suit brought to enforce payment of taxes made due and payable by virtue of the provisions of this subdivision the finding of the Commission, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of the taxpayer's design.¹⁴⁷

"Presumptive evidence" would not, of course, be relevant to a distraint action undertaken directly by the Service for there would be no burden of proof for the Service to bear.

The response of the Service to such an analysis would presumably be that the termination power was so pervasive that distraint proceedings were surely contemplated. There was a general assessment authority in 1918 not unlike section 6201 of the present act.¹⁴⁸ One can infer that the Congress intended to apply such general assessment authority in termination situations where, after all, taxpayers were endeavoring to evade their income tax liabilities. Moreover, there is no evidence from the periodic modifications and reenactments of the termination provisions that the Congress meant to restrict the availability of the distraint power.

But those reenactments have never expressly created an assessment power—and the Congress knows how to create a power of assessment when it wishes to do so. Moreover, there is a niggling doubt about the distraint power raised in part by the position of the Service itself during the early part of the 1920's. In 1923 the Service ruled with respect to the relevant portion of section 250 that "proceedings" referred only to judicial proceedings and not to the

147. This provision has also appeared in each incarnation of the termination provision since 1918.

148. INTERNAL REVENUE § 3182, 1874 Rev. U.S. Stats. 611.

distrain powers.¹⁴⁹ If the termination power of 250(g) established only the right to initiate early "proceedings" and if "proceedings" did not include the power to exercise administrative distrain powers, the termination provision could not be used to levy and seize properties and property rights of the taxpayer. In response to this obscure footnote in the history of federal tax administration, the Service could eagerly admit that it was proved wrong in 1923 and that, in any event, the use of the term "proceedings" in the 1923 ruling arose in another context.

The context was indeed different. In its ruling the Service was asserting that only court actions were limited by the statute of limitations set forth in section 250(d); distrain powers were not so limited. As a result of the Service's interpretation, the statute of limitations was made specifically applicable to distrain actions by the Revenue Act of 1924.¹⁵⁰ And the Service was eventually held to have been wrong. In response to a taxpayer's challenge to the Service's interpretation for a taxable year prior to the 1924 amendment, the Supreme Court held that the term "proceedings" is "rightly used as descriptive of steps taken for the distrain and sale of property to enforce payment of taxes."¹⁵¹ The Court found no direct authority for its conclusion, but found that it could "reasonably . . . be inferred from its terms and the circumstances of its enactment."¹⁵² Finally, the Court noted that the 1924 amendment tended to confirm that the limits were meant to apply to "distrains as well as suits."¹⁵³

The opinion also included a gratuitous assumption with respect to the use of the term "proceedings" in the termination section: "In a later part, subdivision (g) of § 250, 'proceedings' is used broadly in reference to steps for the collection of taxes. Obviously its meaning is not there limited to collection by suit."¹⁵⁴ This "obvious" conclusion is, however, supported by no authority.

The Court in that case¹⁵⁵ dealt with a taxpayer who was confronted with an attempt by the Service to extend its powers by avoiding a statute of limitations. A strict interpretation limiting the Service's collection powers was applied. The scope of termination powers was not at issue in the case; it should not, therefore, be regarded as binding with respect to the definition of termination powers. Moreover, the 1924 amendment adding the reference to distrain au-

149. I. T. 1446, I-2 CUM. BULL. 218 (1922).

150. Revenue Act of 1924, ch. 234, § 278(e), 43 Stat. 300.

151. *Bowers v. New York & Albany Lighterage Co.*, 273 U.S. 346, 351 (1927).

152. *Id.* at 350.

153. *Id.* at 351.

154. *Id.* at 352.

155. 273 U.S. 346, 348 (1927).

thority was restricted to the statute-of-limitation provisions. No such amendment was made in the actual termination provisions.¹⁵⁶

The present position of the Service, asserted in *Hall* and *Laing*, is remarkably consistent with the conclusion that no assessment authority was provided in the termination situation. Having abandoned its position in *Schreck*, the Service now contends that termination assessments are authorized by the general assessment power of section 6201(a). But the Service also asserts that a termination amount "due and payable" does not constitute an "imposed tax" because it is a preliminary determination of amounts potentially due; reopening of the year by the Service or the taxpayer may vary the amount of the tax for the year in question. Since section 6212(a) requires deficiency notices only in respect of "any tax imposed," the ticket to the tax Court need not be issued.

But the general assessment authority provided by section 6201(a) applies only in respect of "taxes . . . imposed by this title." Accordingly, the contentions of the Service itself may lead to the conclusion that assessments are permissible under neither section 6201 nor section 6861. In that event there is a tax due and payable, but no assessment is yet authorized. There is no lien until an assessment is made. The distraint powers may only be exercised against property subject to lien.

XI. EFFECT OF DECISION REGARDING TAX COURT REVIEW OF TERMINATION ACTIONS

The Supreme Court is now being asked to choose between two alternative statutory interpretations, neither of which is required or strongly supported by the legislative history. It appears that there is no less authority for a third interpretation of the termination powers that has not been explored in lower court decisions and which, therefore, the Supreme Court is unlikely to address at this time.

If the Court determines that the language and "harmonics" of the Code provide a path to the Tax Court for taxpayers suffering termination actions, broader questions of judicial review need not be addressed in *Hall* and *Laing*. But if the Court affirms the position of the Service that termination powers include distraint and that Tax Court review in such cases is not available, the applicability of the *Williams Packing* doctrine in suits to enjoin termination proceedings will remain. In that event, *Hall* and *Laing* will join the *Shapiro* case to provide a full test of the *Williams Packing* doctrine under both jeopardy sections.

156. Revenue Act of 1924, § 282, 43 Stat. 302.

157. *Enoch v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962).

XII. APPLICATION OF ANTI-INJUNCTION ACT IN JEOPARDY SITUATIONS

If the Supreme Court concludes in *Hall* and *Laing* that taxpayers suffering termination actions are vulnerable to distraint actions without recourse to the Tax Court for prior review, there will still remain the possibility of injunctive relief despite the general prohibitions of section 7421(a). The other case in which certiorari has been granted, *Commissioner v. Shapiro*,¹⁵⁸ questions the role of the district courts in examining the exercise of jeopardy assessment powers in the face of the apparently absolute prohibition of the Anti-Injunction Act.

The *Shapiro* case arises from a jeopardy assessment under section 6861(a) against a citizen of Israel who was being extradited from the United States to Israel, where he had been indicted for securities fraud. On December 6, 1973, three days prior to an extradition date that had been accepted by the taxpayer, jeopardy assessments were entered in respect of 1970 and 1971 in the total amount of \$92,726.41. On that same day tax liens were filed and notices of levy served upon various banks in the State of New York in which the taxpayer maintained accounts or safe deposit boxes.

The taxpayer initiated a suit in the District Court for the District of Columbia seeking to enjoin the extradition as well as the collection actions. A temporary restraining order was requested upon the taxpayer's affidavit that he owed no federal income taxes. This motion was granted after a hearing, and a subsequent hearing was held to determine whether the taxpayer was entitled to a preliminary injunction. On December 21, 1973, the Service mailed a deficiency notice advising the taxpayer that the 1970 assessment was based upon unexplained bank deposits of \$18,000, and that the 1971 assessment was based upon unreported income of \$137,280 deriving from sales of illegal drugs.

A final hearing on December 21, 1973, resulted in dismissal of the suit.¹⁵⁹ The Court of Appeals for the District of Columbia, however, reversed the dismissal and remanded the case for an examination of the facts upon which the jeopardy assessment had been based.¹⁶⁰ The reversal was premised upon the long-standing judicial exception to the Anti-Injunction Act. The Service does not contest the existence of such a judicial exception. It is, however, concerned with the practical enlargement of the exception by the imposition of

158. *Shapiro v. Secretary of State*, 499 F.2d 527 (D.D.C. 1974), cert. granted sub nom. *Commissioner v. Shapiro*, 420 U.S. 923 (1975) (No. 74-744).

159. (Unreported district court order).

160. 499 F.2d 527 (D.C. Cir. 1974).

evidentiary burdens on the Service. The Service, therefore, successfully petitioned for Supreme Court review.

XIII. THE STRICT PROHIBITION OF THE STATUTE

Section 7421(a) provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." There are several exceptions to the general prohibition, including those which obtain where the required deficiency notices have not been sent or where the matter is pending before the Tax Court. None of these statutory exceptions is applicable in *Shapiro* because the Service, using the jeopardy assessment provisions of section 6861, issued the necessary deficiency notice within the required time.

In the past the Service argued that the Anti-Injunction Act constitutes an absolute prohibition against injunctive relief for taxpayers against whom collection actions have been taken: "the Code means what it says." The Supreme Court has not, however, agreed that the prohibition is absolute. After a period of great ambiguity with respect to the possibility of judicially created exceptions to the prohibitory language of the statute, the Court in 1962 indicated that the exceptions would be narrowly construed. That decision was reaffirmed in two cases handed down by the Supreme Court on the day that the Court of Appeals for the District of Columbia rendered its opinion in *Shapiro*.¹⁶¹

The strict prohibition of the Code has been subjected to attack from its inception. It has from time to time been contended that the prohibition against injunctive relief constituted a violation of the due process rights of taxpayers subjected to summary distraint actions. That contention appeared to have been finally rejected in 1931 by the Supreme Court in *Phillips v. Commissioner*.¹⁶² In that case the Court suggested that where "only" property rights were at risk, postponement of judicial inquiry was not a denial of due process if the opportunity for an ultimate judicial determination would be given.¹⁶³ "[T]wo alternative methods of eventual judicial review" were available to the plaintiff: petition the Board of Tax Appeals or institute suit for refund.¹⁶⁴ The Court was clear about the balance between individual property rights and the needs of government:

161. *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974); *Alexander v. "Americans United," Inc.*, 416 U.S. 752 (1974).

162. *Id.* at 589 (1931).

163. *Id.* at 596-97.

164. 283 U.S. at 597.

Delay in the judicial determination of property rights is uncommon where it is essential that governmental needs be immediately satisfied. For the protection of public health, a State may order the summary destruction of property by administrative authorities without antecedent notice or hearing Because of the public necessity, the property of citizens may be summarily seized in war-time And at any time, the United States may acquire property by eminent domain, without paying, or determining the amount of compensation before the taking.¹⁶⁵

The bonding provisions allowing deferral of the distraint actions pending judicial review were not essential to the constitutionality of the taking. The provision for delaying payment by filing a bond "was granted by the sovereign as a matter of grace solely for the convenience of the taxpayer."¹⁶⁶

Despite its resounding affirmation of the Treasury's right to take first and litigate afterwards, the Court appeared somewhat equivocal about the scope of the Anti-Injunction Act, due to the costs and hardships attending the lengthy postponement of inquiry into the legitimacy of a governmental taking. One year after the *Phillips* decision was rendered, the Supreme Court affirmed the issuance of an injunction against an attempt to collect a tax.

In *Miller v. Standard Nut Margarine Co.*,¹⁶⁷ the taxpayer had sought to restrain collection of a tax on margarine. Prior to these attempted collections, the district court for Rhode Island had decided that the taxpayer's products were not subject to the excise tax in question.¹⁶⁸ The Supreme Court affirmed the injunction order referring to the "special circumstances" present in that case.¹⁶⁹

The somewhat imprecise term, "extraordinary circumstances," employed in *Standard Nut Margarine* served as an invitation to lower courts to look for circumstances that would justify equitable relief for taxpayers despite the Anti-Injunction Act. *Standard Nut Margarine* had involved a situation where it had already been determined, by a federal court, that the tax could not be imposed on the taxpayer. In applying this doctrine, however, lower courts appeared to weigh the potential inequities of the collection action against the probability that the assessment would not stand.¹⁷⁰

A situation in which the consideration of the facts and circumstances in each particular case was possible constituted an invita-

165. *Id.*

166. *Id.* at 599.

167. 284 U.S. 498 (1932).

168. *Higgins Mfg. Co. v. Page*, 297 F. 644 (D.R.I. 1924).

169. 284 U.S. at 511.

170. See Hochman & Tack, *Jeopardy Assessments—A System in Jeopardy*, 45 TAXES 418, 423 (1967).

tion to sue for injunctive relief wherever distraint actions were undertaken. The resultant spate of litigation caused the Supreme Court to address the matter again in 1962 in *Enochs v. Williams Packing & Navigation Co.*¹⁷¹ The taxpayer sued to enjoin collection of social security and employment taxes. Rejecting the application of section 7421(a), the district court issued a permanent injunction against the Service prohibiting the collection of the taxes on the ground that the taxes were not payable and that collection would destroy the taxpayer's business.¹⁷² The order was affirmed by the Fifth Circuit Court of Appeals,¹⁷³ but was reversed by the Supreme Court.

The Court referred to its earlier holding in *Standard Nut Margarine*, and indicated that an injunction might be permissible where "it is clear that under no circumstances could the government ultimately prevail" and where "equity jurisdiction otherwise exists."¹⁷⁴

The traditional criteria for the exercise of equity powers were not substantially disputed. The trial court should look to availability of legal remedies. But the adequacy of the legal remedies was not determinative of the availability of injunctive relief.¹⁷⁵ The Supreme Court described more fully the heavy burden involved in showing that the Service could not win:

We believe that the question of whether the government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained. Otherwise, the District Court is without jurisdiction, and the complaint must be dismissed. To require more than good faith on the part of the Government would unduly interfere with a collateral objective of the Act—protection of the collector from litigation pending a suit for refund. And to permit even the maintenance of a suit in which an injunction could issue only after the taxpayer's nonliability had been conclusively established might "in every practical sense operate to suspend collection of the . . . taxes until the litigation is ended."¹⁷⁶

Since the record indicated that the government's claim "was not

171. 370 U.S. 1 (1962).

172. 176 F. Supp. 168 (S.D. Miss. 1959), *aff'd*, 291 F.2d 402 (5th Cir. 1961), *rev'd*, 370 U.S. 1 (1962).

173. 291 F.2d 402 (5th Cir. 1961), *rev'd*, 370 U.S. 1 (1962).

174. 370 U.S. at 7.

175. *Id.* at 6.

176. 370 U.S. at 7-8, *citing* *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943).

without foundation," the injunction was set aside and the case remanded for dismissal. The Court gave no indication of the "foundation" necessary for the Service's unfettered action, nor did it provide meaningful guidance as to the manner in which district court judges should receive evidence with respect to the existence of such "foundation."

It was widely assumed that the *Williams Packing* decision had firmly closed the door to most taxpayers seeking equitable relief from collection actions.¹⁷⁷ By 1974, however, the Court found itself confronted with several new cases arising out of alleged exceptions to or applications of its decision in *Williams Packing*.

In *Bob Jones University v. Simon*¹⁷⁸ and in *Alexander v. "Americans United", Inc.*,¹⁷⁹ tax-exempt organizations were endeavoring to enjoin the Internal Revenue Service from withdrawing rulings which assured deductibility of gifts to the organizations as charitable contributions. The taxpayer in *Bob Jones* alleged irreparable injury in the form of substantial federal income tax liability and the loss of contributions pending clarification of the University's tax-exempt status. The taxpayer argued further that because racial segregation was a religious tenet of the University, revoking the prior tax-exempt status for private schools maintaining racially discriminatory admissions policies violated free exercise of religion, free association, due process, and equal protection of the laws.

The Court noted the strong reasons for which the taxpayer was seeking a prior determination of the propriety of the Service's action. But it observed that the Anti-Injunction Act had been given "almost literal effect" in *Williams Packing*, and it indicated a firm resolve to avoid reopening the issue to another round of litigation:

But the Court's unanimous opinion in *Williams Packing* indicates that the case was meant to be the capstone to judicial construction of the Act. It spells an end to a cyclical pattern of allegiance to the plain meaning of the Act, followed by periods of uncertainty caused by a judicial departure from that meaning, and followed in turn by the Court's rediscovery of the Act's purpose.¹⁸⁰

The Court interpreted the taxpayer's position as an attempt to establish equity as the sole basis for providing injunctive relief. That position, according to the Court, could not be justified:

177. See Odell, *Assessments: What Are They—Ordinary? Immediate? Jeopardy?*, N.Y.U. 31ST INSTITUTE ON FEDERAL TAXATION 1516 (1973).

178. 416 U.S. 725 (1974).

179. 416 U.S. 752 (1974).

180. 416 U.S. at 742.

Under the language of the Act, the degree of harm is not a factor, and as a matter of judicial construction, it does not provide a meaningful stopping point between *Standard Nut* and *Williams Packing*. Acceptance of petitioner's irreparable injury argument would simply revive the evisceration of the Act inherent in *Standard Nut*.¹⁸¹

The due process argument was also dismissed on the ground that "[t]hese review procedures offer petitioner a full, albeit delayed, opportunity to litigate the legality of the Service's revocation of tax-exempt status and withdrawal of advance assurance of deductibility."¹⁸² If a balancing of interests was appropriate, the Government would prevail:

And although the congressional restriction to postenforcement review may place an organization claiming tax exempt status in a precarious financial position, the problems presented do not rise to the level of constitutional infirmities, in light of the powerful governmental interest in protecting the administration of the tax system from premature judicial interference.¹⁸³

The *Americans United* case was decided on the same grounds. In both cases, the Court rejected arguments that section 7421(a) was inapplicable because the taxpayer did not seek to enjoin the assessment or collection of its own taxes or to disrupt the collection process, but to "avoid the disposition of funds from the corporation."¹⁸⁴ Mr. Justice Blackmun dissented in *Americans United* on grounds that the suit did not appear to be "for the purpose of restraining . . . any tax." He expressed concern with the unrestrained powers of the Internal Revenue Service and the fact that "the path to judicial review is so discouragingly long and expensive."¹⁸⁵

In light of the concerns expressed by Mr. Justice Blackmun in that dissent, it is not surprising that issues of judicial review are before the Supreme Court within two years of its solemn assertion that the "capstone" had been placed on the issue. The fundamental problem with the Court's capstone is confronted directly in *Shapiro* and indirectly in *Laing* and *Hall*. The test established in *Williams Packing* is twofold: the propriety of equitable relief must be established, and it must be shown that the Service could not ultimately prevail.

181. *Id.* at 745-46.

182. *Id.* at 746.

183. *Id.* at 747.

184. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 739 (1974); *Alexander v. "Americans United," Inc.*, 416 U.S. 752, 766 (1974).

185. *Id.* at 763.

The criteria for determining a party's eligibility for equitable relief have evolved over centuries of litigation. The basic question is whether there are adequate legal remedies available to the party. Of course, avenues for eventual judicial review exist in both the termination action and the jeopardy assessment situation. Where a termination has occurred, the Service's position is that the taxpayer is not entitled to Tax Court review. In both situations, however, an eventual refund suit is available to the taxpayer. In both situations, moreover, collection actions can be avoided by the posting of a bond sufficient to protect the interest of the Service in the assets against which collection action could be taken. It is, therefore, possible that the Court could conclude that equitable relief is never required in termination or jeopardy assessment situations. Such a determination by the Court would be quite inconsistent with its analysis of the considerations justifying equitable relief in other cases as well as its recent recognition of the constitutional necessity of providing prior review where property is taken pursuant to judicial proceedings initiated by a private creditor.

XIV. THE AVAILABILITY OF EQUITABLE RELIEF

Shapiro's claim for equitable relief derives primarily from his contention that the monies seized by the Service are required for bail in Israel. If bail could not be posted, Shapiro would be incarcerated when he returns to Israel. He contends that the availability of eventual judicial review, even in the Tax Court, will not provide adequate relief to him.¹⁸⁶

Hall and Laing have thus far been denied access to the Tax Court. Their initial claim for equitable relief is based upon the Service's failure to provide the statutorily required deficiency notice. Even if it is determined that the Service is not required to provide such notice, Hall and Laing could still argue that equitable relief is appropriate. Virtually all of Hall's assets were in risk of being seized. She claims that she is not in a position to post bond or finance her defense. Recovery of the proceeds of a distraint sale at some indefinite future time would not be an adequate remedy.¹⁸⁷ Laing similarly argues that all of his assets in the United States have been wrongfully taken and that he can not conduct an adequate defense without them.¹⁸⁸

186. *Shapiro v. Secretary of State*, 499 F.2d 527, 533 (D.C. Cir. 1974), *cert. granted sub nom. Commissioner v. Shapiro*, 420 U.S. 923 (1975) (No. 74-744).

187. Hall argues further that she could not file a refund suit because of the "full payment rule." See *Flora v. United States*, 362 U.S. 145 (1960).

188. Brief for Appellee at 35, *Laing v. United States*, No. 73-1808 (filed May 31, 1974).

The Supreme Court is unlikely to become involved in the balancing of interests that determines the propriety of particular forms of equitable relief in each particular case. The Court has, however, specifically countenanced the possibility that the destruction of a taxpayer's business by collection action could be a ground for providing equitable relief despite the eventual availability of judicial review.¹⁸⁹ It seems unlikely, therefore, that the Court would be willing to conclude in any of these cases that the provision of equitable relief by a trial court would constitute reversible error.

The usual appeals for equitable relief are further buttressed by the Supreme Court's express recognition of the constitutional infirmities inherent in situations where property is taken without opportunity for prior judicial review. In *Sniadach v. Family Fin. Corp.*¹⁹⁰ the Court struck down a garnishment action in behalf of a private creditor where there had been no notice or opportunity for hearing prior to the levy. The majority opinion of Mr. Justice Douglas concluded that due process requirements were not satisfied despite the opportunity for eventual judicial review.

In *Fuentes v. Shevin*,¹⁹¹ the Court concluded that state laws providing for seizure of an alleged debtor's property without prior notice and hearing also constituted a denial of due process. The availability of eventual judicial review and the opportunity to recover the seized property by posting a bond did not validate the takings.¹⁹²

Both *Sniadach* and *Fuentes* contained language indicating that all governmental takings of property without prior notice and hearing were not necessarily unconstitutional. In *Sniadach*, Mr. Justice Douglas wrote that "[s]uch summary procedure may well meet the requirements of due process in extraordinary situations" and referred to those "requiring special protection to a state or creditor interest."¹⁹³ In *Fuentes*, the Court undertook an enumeration of such situations:

These situations . . . must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly

189. *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932).

190. 395 U.S. 337 (1969).

191. 407 U.S. 67 (1972).

192. *Id.* at 84.

193. 395 U.S. 337, 339 (1969).

of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States [citing *Phillips*], to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food.¹⁹⁴

There are reasons for the Court to reconsider the proposition that all internal revenue actions must be beyond the constitutional requirements of prior judicial review, particularly in jeopardy situations. There is great ambiguity about the scope of the authority created by the jeopardy and termination provisions. Despite the differences in the language used in sections 6851 and 6861, the Service itself has instructed its employees in using the termination authority that "the criteria and procedure related to jeopardy assessments should be followed."¹⁹⁵ The differences in the conditions for exercising the two vast power sources have apparently been ignored rather than addressed and determined by the agency in which the extraordinary powers are vested.

In *Hall* and *Laing*, the internal revenue mechanism has been used, at least in part, as an internal crime busting mechanism. The Court has never sanctioned summary proceedings against criminal defendants. In fact, the Court in *Fuentes* noted and carefully distinguished a governmental taking authorized for tax collection purposes from a seizure of possessions pursuant to search warrants issued only after a showing of probable cause.¹⁹⁶

Finally, the aged proposition that every individual attempt to gather public revenue constitutes an extraordinary circumstance is itself susceptible to serious question. The ancient origins of this doctrine have been tested and found failing in other cases.¹⁹⁷ Its survival may derive in part from a concern with the allocation of powers among the branches of government. The judiciary should not be placed in a position to undermine the "very existence of the government" by enjoining its tax collectors.¹⁹⁸

But the question posed by these particular cases is not whether courts can stop the government from collecting taxes. The normal

194. 407 U.S. 67, 90 (1972).

195. Internal Revenue Service, Internal Revenue Manual § 5213.3(1) (Nov. 25, 1974).

196. 407 U.S. at 93 n.30. See also *Clark v. Campbell*, 501 F.2d 108 (5th Cir. 1974); *Willits v. Richardson*, 497 F.2d 240 (5th Cir. 1974).

197. *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932).

198. *Cheatham v. United States*, 92 U.S. 85, 89 (1875).

tax collection mechanisms are not here in issue. The question is whether the Service is saved from judicial inquiry where it chooses to exercise special collection powers in a relatively few instances where the consequences of the actions upon the taxpayers affected may be peculiarly harsh. The peculiar circumstances in which the special powers are exercisable could be recognized and the broad jeopardy exemption of revenue collection activities reconsidered without measurably affecting the overall efficiency of the tax collection mechanism.¹⁹⁹

A determination requiring judicial review in all jeopardy and termination cases would constitute a substantial departure from the tenor of past tax collection decisions despite the serious questions raised by the unavailability of judicial review in jeopardy situations and recent recognition by the Court of the shortcomings of seizures and levies without notice and review. However, the *Sniadach* and *Fuentes* analyses might reasonably justify the conclusion that equitable relief is always appropriate where termination or jeopardy assessment powers have been exercised.²⁰⁰

There would still remain the second requirement for injunctive relief established in *Williams Packing*. Even though equitable relief is appropriate, an injunction should not issue unless it is clear that the Service can not ultimately prevail "under the most liberal view of the law and facts."²⁰¹ The simplicity of that formulation conceals substantial ambiguity about the practical application of the doctrine.

XV. THE PROCEDURE FOR DETERMINING THAT THE SERVICE CANNOT PREVAIL

In *Shapiro* the Court of Appeals for the District of Columbia has endeavored to apply the second element of the doctrine established in *Williams Packing*. In remanding the *Shapiro* case, the court of appeals directed the district court to hear evidence with respect to the facts upon which the Service had made its jeopardy assessment. The court of appeals assumed that the taxpayer would deny the facts alleged by the Service and allege that the claim was arbitrary and excessive even though such denial and allegations

199. See *Clark v. Campbell*, 501 F.2d 108, 126 (5th Cir. 1974).

200. Once the district court has granted such equitable relief on the grounds that the Service could not ultimately prevail, the underlying rationale of *Sniadach* and *Fuentes* supports an appellate court's refusal to reexamine this determination. Therefore, if the district court grants injunctive relief, *Sniadach* and *Fuentes* can reasonably be argued to prevent reversal on appeal.

201. 370 U.S. 1, 7 (1962).

could not be found in the pleadings.²⁰² The Service contends that there is no reason for hearing further evidence once the fact of the jeopardy assessment is proved. Section 6861(a) provides for jeopardy assessments where the requisite "belief" is held by the Service employee. There is, accordingly, no basis for looking behind the fact of the existence of that belief.²⁰³ But the taxpayer contends that the Service's belief is erroneous. In *Shapiro*, the Supreme Court is then being asked to allocate the burdens for applying the *Williams Packing* test in jeopardy-assessment situations.

The Service cites many cases in which courts have refrained from inquiring into the process by which administrative discretion has been exercised. The Service contends that, barring such circumstances as fraud, these authorities prohibit judicial review of the grounds upon which a jeopardy assessment is made. The District of Columbia Circuit would permit the trial court to require proof by the Service to substantiate the jeopardy assessment.²⁰⁴ If such proof is not satisfactory, the district court can set aside the jeopardy assessment and, accordingly, enjoin any collection action in respect thereof.²⁰⁵

Lower courts have had great difficulty in applying this portion of the *Williams Packing* standard. The major difficulty lies in responding to a Service assertion that the taxes are due. If the assertion is made in reasonably good faith, the Service will prevail unless the court looks to the factual basis of the assertion. Since the possibility of providing injunctive relief was specifically recognized in *Williams Packing*, that decision might be read as a mandate to a trial court to inquire into the bases for the Service's conclusions. But there is also strong language in the *Williams Packing* decision suggesting that the Commissioner's good faith assertion of liability is enough: "To require more than good faith on the part of the Government would unduly interfere with a collateral objective of the Act—protection of the collector from litigation pending a suit for refund."²⁰⁶ The Service is relying heavily upon that language to

202. 499 F.2d at 533. The denial of dealings in narcotics and allegations that the Internal Revenue Service's claim was arbitrary and excessive were not in the pleadings because Shapiro filed his complaint prior to the Service's revealing the basis and amount of the claim against him.

203. The court of appeals asserted that the mere "protestations of good faith and conclusory statements of plaintiff's tax liability" were inadequate to establish the government's burden of establishing a good faith belief. *Id.* at 535, quoting *Mansky v. Fitzgerald*, 297 F. Supp. 943, 946 (E.D.N.Y. 1965).

204. The district court was directed to obtain some evidence to insure the asserted deficiency was not "an exaction in the guise of a tax." 499 F.2d at 535.

205. *Id.* at 536.

206. *Enoch v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962).

overturn the decision of the court of appeals in *Shapiro*.

Courts of appeals in several circuits have heretofore indicated a willingness to require the Service to provide factual support for its collection activities. In other cases, courts of appeals have upheld the propriety of injunctive relief against collection activities because the facts upon which the Service's actions had purportedly been based did not adequately support the actions in question.

The Court of Appeals for the Second Circuit has at least twice supported injunctive relief against collection activities. In *Bauer v. Foley*,²⁰⁷ a deficiency notice was mailed to the taxpayer after which a notice of lien was filed and her home seized. The district court ruled that injunctive relief was impermissible.²⁰⁸ The court of appeals reversed and directed the trial court to determine whether the taxpayer's signature had been forged by her husband on a joint return as the taxpayer had alleged:

If the trial court on remand finds that the signature of the taxpayer was forged on any of the tax returns in question or that the signature was placed on the return under duress, then such return cannot be treated as a joint return for the purposes of the statutes. Under such circumstances the Government could not under the most liberal view of law and the facts establish its claim that the taxpayer was properly subject to a deficiency assessment based on that return.²⁰⁹

The court of appeals contemplated the submission of evidence to determine at least one element of the validity of the Service's action. It was not enough for the Service to state that it honestly believed that it was the taxpayer's signature and that there was no duress involved in her signing the return.

*Pizzarello v. United States*²¹⁰ arose out of an alleged gambling tax deficiency. The taxpayer had been convicted for illegal gambling activities, but his conviction was reversed on fifth amendment grounds.²¹¹ Just prior to the implementation of a court order requiring the return to the taxpayer of monies that had been confiscated in a raid on his store, the Service sent a "Statement of Tax Due" declaring a jeopardy assessment in the amount of \$282,440.70. The claim was said to be based upon an "audit of Pizzarello's tax return for the period shown."²¹² But no tax return had been filed.

207. 287 F. Supp. 343 (W.D.N.Y.), *rev'd*, 404 F.2d 1215 (2d Cir. 1968).

208. *Id.* at 346.

209. 404 F.2d 1215, 1221 (2d Cir. 1968).

210. 408 F.2d 579 (2d Cir. 1969).

211. *See id.* at 581.

212. *Id.* at 582.

The taxpayer at once brought suit to enjoin the anticipated levy. The district court dismissed the case on the ground that a remedy at law was available.²¹³ The court of appeals concluded, however, that the Service could not ultimately prevail and remanded the case to the district court for a hearing on the propriety of injunctive relief.²¹⁴

The Second Circuit decision in *Pizzarello* constitutes the most energetic effort undertaken by any court of appeals to grapple with the difficult procedural questions arising out of the *Williams Packing* doctrine. After accepting the absolute language of the Supreme Court in *Williams Packing* establishing the "no circumstances rule," the court put that rule into procedural perspective:

We begin with the assumption that a tax assessment is presumptively valid and that the burden is on the taxpayer to prove its invalidity . . . Such a presumption is not evidence itself and disappears upon the introduction of evidence to overcome it.²¹⁵

Although the taxpayer had not kept the required records, the Second Circuit reviewed the facts upon which the Service's assessment had been based and concluded that the assessment was "excessive, arbitrary and without factual foundation."²¹⁶

The principal defect in the Service's position lay in its method of estimating the amount of wagering upon which the tax would be applied. A Service employee applied the average amount of wages from a three-day period in April, 1972, to a five-year period, thus assuming that the same amount of wagering activity had been undertaken during the entire period.²¹⁷ The court noted the absence of evidence in the record that gambling activities had existed during the entire five-year period or that the three-day average was representative of the entire period. It held that "[n]o court could properly make such inferences without some foundation of fact."²¹⁸ Governmental references to decisions sustaining the validity of estimating procedures were rejected because of the inadequacy of the criteria upon which the estimates were based: "Because the District Director made a totally excessive assessment, excessive because based on entirely inadequate information, collection should be en-

213. *Pizzarello v. United States*, 285 F. Supp. 147, 151 (S.D.N.Y.), *rev'd and remanded*, 408 F.2d 579 (2d Cir. 1968).

214. 408 F.2d 579, 587 (2d Cir. 1968).

215. *Id.* at 583.

216. *Id.* at 586.

217. *Id.* at 583.

218. *Id.*

joined, if equity jurisdiction otherwise exists.”²¹⁹ The court also took the occasion to reject the Service’s use of evidence already held to be inadmissible, because it was obtained by illegal search and seizure.²²⁰

The Fifth Circuit has also sustained the propriety of injunctive relief in two cases where it found that the Service could not prevail. *Lucia v. United States*,²²¹ also involved an alleged gambling tax liability. The taxpayer had sought to enjoin collection activities after a jeopardy assessment had been made for failing to file wagering tax returns. The district court dismissed the action on the basis of section 7421,²²² but the court of appeals reversed and remanded for consideration of the taxpayer’s allegation that the assessment was arbitrary, capricious, and without factual foundation. In reaching its decision, the Fifth Circuit, sitting en banc, adopted the analysis of the Second Circuit in *Pizzarello*.²²³ After noting that projection methods for determining wagering income were in wide dispute, the court endeavored to explain its holding in light of the *Williams Packing* criteria:

We do not regard this decision as conflicting with the line of cases holding that injunctive relief will be denied if it appears that the Government can make at least some recovery of the tax assessed. More fundamental considerations concern us here than a mere quarrel over the amount of the tax Only after exploring all relevant considerations on remand will the District Court be able to determine whether the computative basis is so insufficient as to make the assessment an exaction in “the guise of a tax” rather than a legitimate tax on wagers.²²⁴

Again, the simple assertion of good faith on the part of the assessing tax collector was not in itself sufficient to carry the day.

In *Aguilar v. United States*,²²⁵ the Fifth Circuit reversed a district court order dismissing an action to enjoin collection activities pursuant to a termination action. The court noted that the tax of \$12,744.00, imposed against a nonresident alien who had sent a truck from Mexico into the United States with some employees and some cash to pay for truck repairs, was almost exactly equal to the sum of the cash and the value of the truck. Moreover, the court

219. *Id.* at 584.

220. *Id.* at 586.

221. 474 F.2d 565 (5th Cir. 1973).

222. (Unreported district court opinion).

223. 474 F.2d at 573.

224. *Id.* at 575.

225. 501 F.2d 127 (5th Cir. 1974).

concluded that the Service's action was consistent with a pattern of behavior which was part of the national drug enforcement campaign. As a result, the action of the Service was held to be potentially arbitrary and a hearing was ordered.²²⁶ The *Aquilar* court clearly questioned the good faith asserted by the Service:

On the face of the record . . . a non-resident alien who has no income from any sources in the United States whose truck and money are geographically within the United States for the purpose of purchasing legitimate commercial supplies, has money and truck taken preemptorily from him at the instance of drug law enforcers with no more than a vague suggestion that the Government "suspected" that these strangers were trafficking in drugs. Adding to the mystery of the basis for that "suspicion" is the total—the word is total—lack of any basis for computing the quick terminated tax to be \$12,774.00—almost the precise total of the money and the value of the truck—a pattern followed often in the contemporary practice where tax mechanisms are employed "not as tax collection devices but as summary punishment to supplement or complement regular criminal procedures."²²⁷

The good faith asserted by the Service was again not of itself sufficient to avoid an inquiry into the bases for the actions taken.

Denials of injunctive relief have been affirmed or required in a number of court of appeals decisions. In one case the relief was denied because the court declined to certify an act as a class action after the Service admitted that it could not prevail against the plaintiff, having assessed a tax for the wrong taxable year.²²⁸ In another the court reversed a district court order granting injunctive relief based upon a ruling that the district director's action had not been properly authorized.²²⁹ The proof of nonauthorization had been asserted for the first time in post-hearing brief. The court held that the untimely assertion was insufficient evidence upon which to find that the Service could not prevail. In several cases courts of appeals have affirmed denials of injunctive relief where the plaintiff had failed to show that the Service could not prevail.²³⁰ In none of these

226. *Id.* at 130. In addition, the Service was held to be required to provide a deficiency notice even though section 6851 powers were being used in the collection action. See *Clark v. Campbell*, 501 F.2d 108 (5th Cir. 1974). *Campbell* was decided the same day as *Aquilar* and held that a deficiency notice was required in section 6851 proceedings.

227. 501 F.2d at 130-31.

228. *Lewis v. Sandler*, 498 F.2d 395 (4th Cir. 1974).

229. *Thornton v. United States*, 493 F.2d 164 (3d Cir. 1974).

230. *James v. United States*, 510 F.2d 860 (6th Cir. 1975); *Trent v. United States*,

cases, however, was the assertion of good faith by the Service deemed adequate in itself to avoid injunctive relief. Only the Seventh Circuit seems to have accepted the Service's assertion of good faith as an automatic bar to injunctive relief under *Williams Packing*. In *Durovic v. Commissioner*,²³¹ the court noted that:

This Circuit has previously held that this discretionary power [to issue jeopardy assessments] is not subject to judicial review. . . . We have heretofore noted that "jeopardy assessments are of their nature and purpose arbitrary." Thus, while we might think the continuing jeopardy assessment, while perhaps originally reasonable, is presently unfair and unreasonable (and we do), we are without power to act.²³²

The court did not, however, conclude that the unfairness and unreasonability of the Service's actions meant that it could not prevail "under any circumstances."

Although somewhat ambiguous, the Seventh Circuit seems to have adopted the view, at least in jeopardy situations, that the simple assertion by the Service that it is acting in good faith is sufficient to withstand successfully an attempt to enjoin collection activity. Such a view appears to be the opposite of the District of Columbia Circuit which in *Shapiro* ordered the Service to provide substantiation for its jeopardy assessment on the basis of an implied allegation by the taxpayer that the Service was in error. The Supreme Court would seem to have several basic options for dealing with the challenges to the absolute prohibition of injunctions against collections in jeopardy situations. It could adopt the view that an assertion of good faith on the part of the Service will suffice to cause dismissal of a taxpayer's suit for an injunction against jeopardy actions. Although the Service in one case admitted that it has assessed taxes for the wrong year and that, therefore, it could not prevail, it is unlikely that admissions of error, let alone bad faith, are likely to be frequent. The result might be, therefore, that injunctive relief is only available when the Service admits that it is prepared to settle the case. In effect this option would provide no prior review of the jeopardy action.

Alternately, the Court could require a taxpayer to prove that the Service could not ultimately prevail to any extent, no matter what theory the Service might secretly covet for its actions. Such a

442 F.2d 405 (6th Cir. 1971); *Cole v. Cardoza*, 441 F.2d 1337 (6th Cir. 1971); *Hamilton v. United States*, 429 F.2d 427 (2d Cir. 1970).

231. 487 F.2d 36 (7th Cir. 1973).

232. *Id.* at 40.

burden would limit substantially the effective availability of judicial review, but would provide some relief for any who could prove that no taxes were owed.

A third possibility is presented by the court of appeals decision in *Shapiro*. If the taxpayer alleges that the Service has erred, the Service would be required to adduce evidence upon which its jeopardy assessment was based.

It seems unlikely that the Supreme Court would at this time effectively remove jeopardy assessments from the *Williams Packing* doctrine. It also seems unlikely that the Court would either require taxpayers to prove defenses to unstated charges or the Service to prove its position against mere allegations of error. The courts in *Pizzarello*²³³ and *Lucia*²³⁴ appear to have found a method for applying the *Williams Packing* tests which could be employed in respect of jeopardy actions without unduly encumbering the collection process: since the Service knows the facts upon which its actions are based; the Service is required to disclose those facts where taxpayers offer proof that the assessment is erroneous; unless the Service can withstand a challenge in a context similar to that of a motion for summary judgment, the injunctive relief may be granted if grounds justifying equitable relief are demonstrated.²³⁵ If this approach is adopted, the Service would have to show the facts upon which its assessment was based as well as the facts that have created the belief that tax collection would be jeopardized by delay. Since the trial court would ordinarily assume the truth of the Government's evidence and make any reasonable inference in favor of the Government, the Service would be "stopped in its tracks" only in such situations where its activities were clearly unjustifiable.

XVI. SPECIAL PROBLEMS IN APPLYING THE WILLIAMS PACKING DOCTRINE TO TERMINATION ACTIONS

Unless the Supreme Court determines that the Service's expression of good faith is sufficient to defeat a suit to enjoin jeopardy collections, several problems arise which are peculiar to the termination provisions of section 6851. The taxpayers in *Hall* and *Laing* could argue that the *Williams Packing* analysis is inapplicable if the Court determined that Tax Court review is unavailable in respect of termination actions. The *Williams Packing* decision specifically noted that relatively speedy Tax Court review was available.

233. *Pizzarello v. United States*, 408 F.2d 579 (2d Cir. 1969).

234. *Lucia v. United States*, 474 F.2d 565 (5th Cir. 1973).

235. See FED. R. CIV. P. 56.

The Court, however, also went out of its way in *Williams Packing* to indicate that the availability of Tax Court review was a matter of legislative grace rather than a constitutional mandate. There is nothing in the Court's later opinions suggesting that it is prepared at this time to make the constitutionality of distraint powers dependent upon Tax Court reviewability.

The Service in *Laing* and *Hall* could argue that, even if evidence must be shown to support a jeopardy assessment, the language of section 6851(a) specifically prohibits inquiry into the adequacy of the bases for the Commissioner's findings in a termination action. The section provides that "[i]n any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy."²³⁶

There are several reasons why this presumption would not appear to prohibit inquiry into the Commissioner's termination finding. The provision by its terms applies only in a collection suit where the government, as plaintiff, would normally bear the burden of proof. Secondly, the presumption applies only to the "jeopardy." Other aspects of the Commissioner's findings are not included in the statutory presumption. There is, for example, no presumption as to the existence of a "design."

The factual differences in the *Laing* and *Hall* cases demonstrate the ambiguities inherent in the finding of a "design." The *Laing* case falls quite clearly within the framework of cases about which, according to the early legislative history, the Congress was particularly concerned.²³⁷ The taxpayer was about to leave the country. There was evidence that a great deal of money was being taken with him. Although it may be difficult to determine how the Service could reach the conclusion that all three travelers were liable for taxes on the same item of potential income, *Laing* is the classic case of the departing alien.

Hall is completely different. A husband is arrested in Texas, so a wife suffers a termination action in Kentucky. There is no evidence of a "design" on the part of the taxpayer to do anything. The inference of the Service employee is based upon the husband's conviction and the discovery in the wife's home of an unspecified quantity of marijuana, and prompted by directions from Washington to crack down on drug dealers.²³⁸

236. INT. REV. CODE OF 1954, § 6851(a).

237. Note 67 *supra*.

238. Note 89 *supra*.

The government might contend that these factual differences have no legal significance. Laing had designed to leave the country and to remove his assets therefrom. Hall had designed to do "any other act." The Commissioner has "found" that both "designs" are for the prohibited objective. Accordingly, termination powers may be exercised in both cases.

Hall has an argument that does not apply in the *Laing* situation. Since the enactment of the termination provisions in 1918, certain "designs" have been specifically included in the statute: leaving the country or hiding in it; transporting assets out of the country or hiding assets in it. The catchall phrase "any other act" has also been used since 1918 to identify odious designs that may trigger termination action. It would appear, however, that the term "any other act" cannot be interpreted literally.

A literal interpretation would lead to the conclusion that any taxpayer anywhere at any time could be subjected to termination action as soon as income was received as long as the Service employee "finds" that collection was at risk. If such a literal interpretation obtained, there would be no reason to enumerate specifically any particular type of design; but specific acts have always been cited.

In 1939 another specific act was added. Section 6851(a)(2) was added to provide for termination actions in respect to certain corporations in liquidations.²³⁹ There is nothing in section 6851(a)(2) that could be outside of the term "design . . . to do any other act." The reason for clarification must have been, therefore, to assure that the specified actions were clearly recognized as potential occasions for termination actions. The necessary inference is that not all acts constitute a valid basis for termination.

Congress has not defined generally the "other acts" in respect to which terminations could be made and the "other acts" which would not give rise to such powers. There is no indication in the legislative history of any meaning for that term. Commentators writing just after the termination provisions were initially enacted

239. INT. REV. CODE OF 1954, § 6851(a) (2):

If the Secretary or his delegate finds that the collection of the income tax of a corporation for the current or the preceding taxable year will be jeopardized by the distribution of all or a portion of the assets of such corporation in the liquidation of the whole or any part of its capital stock, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable.

were not sure about its full meaning.²⁴⁰ There appears to have been a belief that it was directed at tax evasion.²⁴¹ If so, the question may be whether a taxpayer not possessing one of the “designs” described in the statute is a potential tax evader. There is nothing in the proceedings to suggest that Hall specifically intended to evade taxes.

The Service might respond that it is not required to find potential evasion before exercising the termination authority. Such a response would be supported by the absence of any reference to “evasion” in section 6851. It might be noted in this respect, however, that neither the Treasury Regulations nor the Internal Revenue Manual makes any attempt to define the “other acts” whose design may lead to the invocation of termination authority.

The Service might assert that evidence of narcotics dealing alone is sufficient to support an inference that the taxpayer intends to do “this act” which justifies termination. There is at least one instance in which the Government sought to rely solely upon its suspicions of participation in narcotics trafficking to justify a termination action. In *Willitts v. Richardson*, the district court had dismissed a suit to enjoin the collection actions, but the Fifth Circuit reversed the dismissal and ordered the district court to grant the injunction.²⁴² Although analyzing in detail the rather scant evidence of the taxpayer’s participation in the narcotics trade, the court discussed the Narcotics Project:

The IRS has been given broad power to take possession of the property of citizens by summary means that ignore many basic tenets of pre-seizure due process in order to prevent the loss of tax revenues. Courts cannot allow these expedients to be turned on citizens suspected of wrongdoing—not as collection devices but as summary punishment to supplement or complement regular criminal procedures. The fact that they are cloaked in the garb of tax

240. In G. HOLMES, *FEDERAL INCOME AND PROFITS TAXES* (1919), the “explanation” of the termination provision consists in its entirety of a presentation of the text of the statute in paragraph form, accompanied by the following explanation:

Under this provision it seems to be within the power of the Commissioner to declare the taxable period of a corporation terminated at the end of the calendar month preceding the month in which it is dissolved and to demand immediate payment of the tax for such taxable period and the tax for the preceding year or to require security for the payment thereof.

In another text of that period, the discussion of collection powers contains no reference to the termination provision. KIXMILLER & BAAR, *1922 UNITED STATES INCOME AND WAR TAX GUIDE* 318 (1921).

241. R. MONTGOMERY, *INCOME TAX PROCEDURE* 241 (1923). Such a belief is also reflected in the justification for the provision offered in the Senate during a 1921 debate. See 61 CONG. REC. 6112 (1921).

242. 497 F.2d 240 (5th Cir. 1974).

collection and applied only by the Narcotics Project to those believed to be engaged in or associated with the narcotics trade must not bootstrap judicial approval of such use.²⁴³

If the *Williams Packing* analysis is to have any impact in termination situations, it should at least be employed to ascertain whether a "design" exists and whether it is directed to the doing of an act which could arguably prejudice the collection process or render it partly or wholly ineffective. The use of the termination powers in Narcotics Enforcement Program raises special problems in this respect. No effort appears to have been made specifically to consider the question of tax evasion beyond the assumption that tax evasion follows drug trafficking. But the program was intended primarily to stop drug traffic, while the Anti-Injunction Act applies to actions to enjoin tax collections. The Service steadfastly resists any attempt to explore its motives. But where extraordinary powers are being exercised and the Service itself has disclosed information inviting suspicion that its motivation lies outside of tax collection, judicial inquiry might not be beyond the real purposes of section 7421.²⁴⁴

XVII. LEGISLATIVE AMENDMENT OF THE JEOPARDY POWERS TO PROVIDE FOR JUDICIAL REVIEW

Whether the Supreme Court determines that termination actions must include an opportunity for the taxpayer to seek Tax Court review and whatever the Court should decide about the manner in which the Anti-Injunction Act applies in termination actions and jeopardy assessments, proposals to modify the jeopardy-collection scheme will be placed before the Congress. If the Court decides that judicial review is very restricted, supporters of legislative amendments to provide review will increase their efforts.

Congressional committees have, during the past several years, received reports of jeopardy and termination "horror stories" in which individuals and businesses were ruined by distraint proceedings.²⁴⁵

243. *Id.* at 246.

244. The opinions in *Bob Jones University* and "*Americans United, Inc.*" suggest, understandably, that the Court does not wish to invite litigation with respect to the motives of the Service or the revenue consequences in every injunction proceeding. Such an inclination derives directly from an assumption that the Internal Revenue Service is the federal tax collection agency, and that section 7421 was adopted to allow the Service to perform that function. When the Service becomes an agency for the summary enforcement of criminal laws, however, the validity of the assumption must be questioned.

245. See generally *Hearings Before the Oversight Subcommittee of the House Committee on Ways and Means*, 94th Cong., 1st Sess. (1975); *Hearings on Internal*

These reports have been accompanied by suggestions that judicial review of jeopardy powers be provided.²⁴⁶ Most of the suggestions would provide some avenue for immediate review by the district court of jeopardy assessments and termination actions to assure that the criteria for their usage have been satisfied.²⁴⁷ Such suggestions are not solely of recent vintage. Proposals for judicial review, citing instances of abuse, were made more than two decades ago.²⁴⁸ The Committee on Taxation of the American Bar Association as far back as 1958 recommended that judicial review be provided in jeopardy situations²⁴⁹ and has continued to campaign for such review until the present time.

Representatives of the Internal Revenue Service have been unenthusiastic about proposals to limit its power or to impose time-consuming levels of review.²⁵⁰ Such a response is not surprising; one must expect an organization to be convinced that its internal mechanisms will prevent abuse. And the Service frequently notes that the number of legitimate complaints are minute compared to the amount of public revenues collected.²⁵¹ Moreover, the Service is always eager to assert the need for power to assure "voluntary compliance." The occasional error, it is argued, is more than justified by the deterrent effect of the existence of the summary powers.

One answer to the foregoing is that voluntary compliance is also fostered by the public's belief in the fairness and equity of the tax structure. The occasional abuse may have a more adverse affect upon voluntary compliance than would result from the opportunity for judicial review.²⁵² Of course, such a proposition is not provable, but neither is the view asserted by the Service.

Revenue Appropriations Before the Senate Committee on Appropriations, 93d Cong., 1st Sess. 570, 571, 630, 642-43 (1974).

246. See, e.g., S. 137, 94th Cong., 1st Sess. (1975).

247. S. 137 would, for example, provide for district court review of jeopardy assessment actions within five days after a request for such hearing is filed by the taxpayer.

248. See, e.g., Gould, *Jeopardy Assessment: When They May Be Levied and What To Do About Them* in N.Y.U. INSTITUTE ON FEDERAL TAXATION 937 (1960); Kaminski, *Administrative Law and Judicial Review of Jeopardy Assessments Under the Internal Revenue Code*, 14 TAX L. REV. 545 (1959).

249. AMERICAN BAR ASSOCIATION, ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION, PROCEEDINGS OF THE HOUSE OF DELEGATES 221 (1958). The Committee on Taxation has continued to support proposals for judicial review.

250. See, e.g., Testimony of Commissioner Alexander, *Hearings on Internal Revenue Service Before the Senate Committee on Appropriations, 93d Cong., 1st Sess. 611 (1974).*

251. 113 CONG. REC., 22497 (1967).

252. See, e.g., Plumb, *Federal Liens and Priorities—Agenda for the Next Decade III*, 77 YALE L.J. 1104, 1131 (1968). See also statement of Commissioner Donald C. Alexander in *Taxes on Parade*, CCH 1974 STAND. FED. TAX REP., no. 40, at 2.

One element of the unfairness of an erroneous or unjustified collection action is the generally acknowledged fact that, despite the language of the Supreme Court in *Williams Packing*, it is not necessarily true that the possibility of an eventual refund suit provides adequate relief. If all of the taxpayer's assets are seized, for example, his ability to secure legal assistance may be impaired. If the taxpayer turns out to have been correct, his assets are returned and statutory interest is paid. Non-cash assets will, however, probably have been sold in a distress sale. In such a case the taxpayer is entitled to recover only the proceeds of the sale, an amount unlikely to equal the real value of the assets to the taxpayer.²⁵³

No damages are available from the Service or from the Service employee in the event that a wrongful collection action has been taken.²⁵⁴ The cost of preserving this element of the tax collection mechanism is, therefore, placed squarely on those unlucky few against whom a wrongful action is directed. Neither the Service nor the Congress has shown any disposition to provide damages to the victims of wrongful actions. There is an overwhelming concern that provision for possible damages would create an expanse of litigation that would seriously impede the tax collection function. As long as this view is maintained, the provision of prior review in jeopardy and termination situations would seem to be an appropriate way to retain the special jeopardy powers while minimizing the cost to those who must bear it.

XVIII. CONCLUSION

Despite the criticism of judges, practitioners and scholars, the Service insists upon the necessity of using the termination and jeopardy assessment powers. The great efficiency of the collection devices, the Service argues, would be impaired by the availability of prior judicial review.

But the Treasury is not defenseless without these collection devices. The government may use civil penalties and criminal sanctions against delinquent taxpayers. It has a superpriority over most other creditors who lay claim to a taxpayer's assets. It may use the courts, like other creditors, to collect debts, or, unlike other creditors, it may wield its mighty powers of distraint.

The lack of discretion in the exercise of discretionary powers has invited litigation and invites legislation. It may be timely for Congress to consider, not only the narrow questions of prior review

253. Note 41 *supra*.

254. 28 U.S.C. § 2680(c) (1970).

for termination actions and jeopardy assessments, but the extent to which such powers should properly exist and the circumstances within which their "atomic potential" can be mustered against a taxpayer.