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INTRODUCTION

The term "anomalous" jurisdiction[1] evokes amorphous notions which even the well-schooled legal mind would not easily grasp. Yet the term has been applied to incidents in which federal courts, without statutory authority, have provided a forum to entertain independent actions for the return of property wrongfully held by federal officers. Normally, a Motion for the Return of Property is made pursuant to the Federal Rules of Criminal Procedure, Rule 41(e).[2] When federal officers or agencies hold property, and no indictment or information has been filed, the Federal Rules of Criminal Procedure do not apply.[3] The aggrieved individual is left without statutory recourse, compelling the creation of a judicially-devised jurisdiction, coined "anomalous" jurisdiction to entertain such independent actions for the return of property.[4] The anomalous character of such suits is evinced by their characterization as a hybrid civil-criminal procedural vehicle.[5] Despite its exercise by the federal courts, the difficulty in pinning down the concept to a particular jurisdictional premise could lead skeptical commen-

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1. Lord v. Kelley, 223 F. Supp. 684, 688-89 (D. Mass. 1963), *cert. denied*, 379 U.S. 961 (1965). The *Lord* opinion coined the term "anomalous" for seeking return of property illegally held by the I.R.S. in the absence of any criminal proceedings which would have triggered the Rule 41(e) Motion for Return of Property. *Lord* appeared to limit this relief to situations involving threatened criminal prosecutions rather than to civil or administrative actions. *Id.* at 689.

2. FED. R. CRIM. P. 41(e) provides:

> Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

3. The Federal Rules of Criminal Procedure govern criminal proceedings. FED. R. CRIM. P. 1 (scope of rules) & 2 (purpose of rules). Prior to the filing of an indictment or information, there are no proceedings. *Contra* Fifth Avenue Peace Parade Comm. v. Hoover, 327 F. Supp. 238, 241 (S.D.N.Y. 1971).

4. Independent actions of this sort are noted in 3 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE 762 n.42 (2d ed. 1982).

5. FED. R. CRIM. P. 41(e) is inapplicable absent indictment, and the exercise of civil jurisdiction typically precludes further criminal proceedings.

tators to question its very existence. It is obvious that anomalous jurisdiction exists merely by virtue of its repeated exercise.

Property can come into the government's hands many ways, but generally possession results from voluntary or involuntary disclosure.[6] When the government holds property for an extremely long period of time,[7] there is a potential conflict with the constitutional guarantee against unreasonable seizures.[8] Parties have thus attempted to invoke the anomalous jurisdiction of the court by alleging violations of the first,[9] fourth,[10] fifth,[11] and sixth[12] amendments of the United States Constitution.

This article will analyze the jurisdictional and practical problems which result from the exercise of anomalous jurisdiction. It is maintained that the recent elimination of the amount-in-controversy requirement in cases involving federal questions[13] does away with the procedural potholes associated with its exercise. Furthermore, it is urged that Congress enunciate a statutory basis for return of property which is held unreasonably in situations where no indictment has been issued. Such legislation would eliminate the drain upon judicial resources caused by repeated attempts to ascertain the source and nature of anomalous jurisdiction.[14]

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6. Voluntary disclosure results from consent. *See, e.g.*, Mason v. Pulliam, 557 F.2d 426, 428-29 (5th Cir. 1977) (action for return of records and accounts voluntarily loaned to I.R.S. agent, successful on ground of subsequently withdrawn consent); Richey v. Smith, 515 F.2d 1239, 1241 (5th Cir. 1975) ("anomalous" jurisdiction exists to hear and determine allegations of invalid consent for permission given to I.R.S. agent to take business records).

Involuntary disclosure results from searches. See, e.g., the search and seizure provisions of FED. R. CRIM. P. 41.

7. *See, e.g.*, Mr. Lucky Messenger Serv., Inc. v. United States, 587 F.2d 15, 17 (7th Cir. 1978) (hearing required, not on legality of search, but constitutionality of holding property for 17 months without charging plaintiff with criminal offense).

8. U.S. CONST. amend. IV.

9. *See* Fifth Ave. Peace Parade Comm. v. Hoover, 327 F. Supp. 238 (S.D.N.Y. 1971) (first and fourth amendment claims arising from F.B.I. surveillance activities).

10. *See* Mason v. Pulliam, 557 F.2d 426, 428-29 (5th Cir. 1977) (anomalous jurisdiction found in action for return of materials voluntarily loaned by taxpayer to I.R.S., analyzing consent cases in fourth amendment context).

11. *See* Linn v. Chivatero, 714 F.2d 1278, 1281 (5th Cir. 1983) (fourth and fifth amendment claims of plaintiff are justiciable under section 1331, the general federal question statute); Richey v. Smith, 515 F.2d 1239, 1241 (5th Cir. 1975) (anomalous jurisdiction existed in case alleging violation of *Miranda* rights).

12. *See* Smith v. Katzenbach, 351 F.2d 810, 813 (D.C. Cir. 1965) (alleged violations of fifth and sixth amendments, but complaint dismissed due to a lack of equity jurisdiction).

13. In 1976, Congress deleted the $10,000.00 minimum-amount-in-controvery requirement of 28 U.S.C. § 1331 for subsequent actions "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (1976).

In 1980, Congress deleted the minimum amount in controversy for subsequent § 1331 federal question suits. Act of Dec. 1, 1980, Pub. L. No. 96-486, 94 Stat. 2369 (1980).

14. The problem of anomalous jurisdiction warrants more commentary than it has received. "Anomalous" jurisdiction is addressed in 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE 762 n.42 (2d ed. 1982). The Motion for Return of Property is also addressed in 8B J. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 41.06[5] (2d ed. 1983). Other commentary now relevant to injunctive relief against federal officers includes Comment, *The Supervisory*

I. SOURCE OF ANOMALOUS JURISDICTION

A. *The Development of Anomalous Jurisdiction*

If it can be said that a legal concept can have an ancestor, then one might trace the roots of anomalous jurisdiction to attempts by the Supreme Court to extend protection to federal litigants under the Court's "supervisory power." This power was first applied to ensure the proper administration of criminal trials in federal courts,[15] and was subsequently extended to govern non-judicial acts of officials in other branches of government.[16] Consequently, when in a pre-indictment context, a party was not "aggrieved" within the meaning of Federal Rule of Criminal Procedure 41(e),[17] the lack of existing criminal proceedings technically foreclosed the possibility of a remedy. Because judicial relief is said to have developed as a means for protecting citizens from procrastinating officers, anomalous jurisdiction could owe its development to the nonstatutory supervisory power to control officers of the court.

Still, the theoretical basis of a pre-indictment jurisdiction to return illegally held property is difficult to ascertain and, therefore, in need of clarification.[18] One major area of confusion is whether to apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure.[19] Some opinions have boldly suggested that the criminal rule allowing a Motion for the Return of Property may be read broadly to encompass pre-indictment relief,[20] but the question remains open.

Power of Federal Courts, 76 HARV. L. REV. 1656, 1660-64 (1963) (Supervision Over Executive) and the law review articles cited in C. WRIGHT, LAW OF FEDERAL COURTS 180 n.25 (4th ed. 1983) (questioning former jurisdictional amount in controversy for injunctive suits against federal officers).

15. McNabb v. United States, 318 U.S. 332, 340 (1943) (supervisory power extends to proper administration of criminal justice in federal courts).

16. *See* Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 GEO. L.J. 1050, 1062 (1965) (Supervision Affecting Out of Court Behavior of Nonjudicial Officers); Comment, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656, 1660-64 (1963) (Supervision Over Executive).

17. *See supra* note 2.

18. In the recent case addressing confusion in the case law, the Chief Judge's concurring opinion referred to anomalous jurisdiction as "a confused body of caselaw in need of clarification." Linn v. Chivatero, 714 F.2d 1278, 1285 (5th Cir. 1983) (Clark, C.J., concurring). The majority responded that the cases cited in the Chief Judge's opinion were consistent with its disposition of the case, noting that he had not shown *why* the doctrine is confusing. *Id.* at 1282 n.4. Cases in other districts, which analyze the confusion regarding the propriety of such a motion, include *In re* Fried, 161 F.2d 453, 458 (2d Cir.) (addressing property rights in context of pre-indictment return motion), *cert. dismissed*, 332 U.S. 807 (1947); Donlon v. United States, 331 F. Supp. 979, 980 n.5 (D. Del. 1971) (cases not uniform); Lord v. Kelley, 223 F. Supp. 684 (D. Mass. 1963) (tracing theoretical difficulties with anomalous jurisdiction), *cert. denied*, 379 U.S. 961 (1965).

19. *See In re* J.W. Schonfeld, Ltd., 460 F. Supp. 332, 334 (E.D. Va. 1978) (Federal Rules of Civil Procedure are fully applicable); Silbert v. United States, 275 F. Supp. 765, 768 (D. Md. 1967) (field of pre-indictment motions should be reviewed and clarified); Lord v. Kelley, 223 F. Supp. 684, 688 (D. Mass. 1963) (action not in all aspects subject to Federal Rules of Civil Procedure), *cert. denied*, 379 U.S. 961 (1965); United States v. Bell, 120 F. Supp. 670, 672 (D.D.C. 1954) (motion incidental or ancillary to pending criminal action, and so closely associated with criminal proceeding, it should be deemed part of it).

20. *In re* Worksite Inspection of Quality Prod. Inc., 592 F.2d 611, 614 (1st Cir. 1979)

One practical aspect of this area of the law is nevertheless clear: when property is held by federal officers, aggrieved individuals must seek its return in a federal court. Although the Supreme Court has not decided whether state courts can enjoin federal officers, it denied certiorari to a Third Circuit case so holding.[21]

Initially, the exercise of anomalous jurisdiction in civil federal question cases presented two problems, yet only one remains. The first problem, now non-existent, was that plaintiffs faced the procedural hurdle of meeting the 10,000 dollar requirement for federal question cases.[22] The problem was exacerbated when a failure to allege federal question jurisdiction transformed the action into a controversy concerning federal taxes,[23] in which case the return of property violated the Anti-Injunction Act.[24] Nevertheless, these problems were remedied by elimination of the 10,000 dollar requirement in federal question cases.

The remaining problem is ascertaining an acceptable basis for the exercise of this judicial power,[25] because the federal question statute does not independently confer subject matter jurisdiction, nor does it provide any insight concerning how the aggrieved individual should proceed. Plaintiffs are, therefore, filing independent actions by way of petition, motion, or complaint.[26] The following section will address the various jurisdictional premises for the exercise of anomalous jurisdiction.

(Rule 41(e) allows for pre-indictment motion for return of property); Smith v. Katzenbach, 351 F.2d 810, 814 (D.C. Cir. 1965) (en banc) (equitable result can be reached by broad reading of Rule 41(e)); Klitzman v. Krut, 591 F. Supp. 258, 266 (D.N.J. 1984) (Rule 41(e) contemplates pre-indictment relief); Fifth Ave. Peace Parade Comm. v. Hoover, 327 F. Supp. 238, 242 (S.D.N.Y. 1971) (Rule 41(e) can be basis for jurisdiction to hear motion for pre-indictment relief from an unconstitutional search and seizure); Lord v. Kelley, 223 F. Supp. 684, 687 (D. Mass. 1963) (supposition that Rule 41(e) applies only after indictment is incorrect), *cert. denied*, 379 U.S. 961 (1965).

21. Pennsylvania Turnpike Comm. v. McGinnes, 278 F.2d 330, 331 (3d Cir.) (per curiam), *cert. denied*, 364 U.S. 820 (1960).

22. *See supra* note 13 regarding amendments to the federal question requirement.

23. *See, e.g.*, Hunsucker v. Phinney, 497 F.2d 29, 36 (5th Cir. 1974) (plaintiff did not contend that § 1331 federal question jurisdiction is applicable, thus avoiding characterization of controversy as one concerning federal taxes rather than case involving solely search and seizure), *cert. denied*, 420 U.S. 927 (1975). Further, a tax audit is not preliminary to or in connection with a judicial proceeding. United States v. Baggot, 463 U.S. 476, 479-80 (1983).

The Anti-Injunction Act is set forth in 28 U.S.C. § 2201 (1982). This Act is analyzed *infra* text accompanying notes 125-32.

24. 28 U.S.C. § 2201 (1982).

25. As stated by Chief Judge Clark of the Fifth Circuit, "[t]he exercise of jurisdiction was 'anomalous' because the federal courts had created their own jurisdiction without any constitutional or statutory basis in the face of inconsistent, if not antithetical, Congressional expression." Linn v. Chivatero, 714 F.2d 1278, 1285 (5th Cir. 1983) (Clark, C.J., concurring).

26. Jurisdiction was granted, even in early pre-indictment suppression cases initiated by motion, petition, or a bill in equity. Goodman v. Lane, 48 F.2d 32, 35 (8th Cir. 1931) (citing authorities). Jurisdiction in modern return of property cases is similarly noted whether initiated by petition, motion, or complaint.

B. *Jurisdictional Premises for Anomalous Jurisdiction*

As stated, there is no statutory or constitutional authority for the exercise of anomalous jurisdiction. The cases expressly[27] or impliedly exercising it have found or suggested that its doctrinal existence is rooted in one of five (arguably six) supporting theories: (1) the inherent power of supervision (within which the sixth category, "reaching forward," arguably exists); (2) a general equity jurisdiction; (3) vitiated consent; (4) constitutional tort; and (5) general federal question jurisdiction.

1. Inherent Power of Supervision

The Supreme Court has not authoritatively defined the constitutional source of its supervisory power over the judicial branch of government.[28] The scope of such a power over executive officers is questionable. Therefore, the inquiry is: how far can this power be stretched? The most sweeping pronouncement came in 1963, in the case of *Lord v. Kelley*:

> [I]t seems to this Court that the Supreme Court has extended or will extend the anomalous jurisdiction as to reach unlawful searches and seizures by a federal agent *connected with* the enforcement of law . . . .
>
> To this Court, the indications are that the Supreme Court intends that where a federal criminal prosecution is probable, a federal trial court shall have non-statutory jurisdiction to enjoin federal enforcement officers from holding or using property they unlawfully seized.[29]

The message of this oft-cited case has been applied to agents of the I.R.S.,[30] O.S.H.A.,[31] Customs Service,[32] E.P.A.,[33] F.B.I.,[34] Bureau of Narcotics,[35] a private attorney,[36] the Postal Service,[37] and the D.E.A.[38]

27. *In re* Grand Jury Proceedings, 724 F.2d 1157, 1159-60 (5th Cir. 1984); Linn v. Chivatero, 714 F.2d 1278 (5th Cir. 1983); Pieper v. United States, 604 F.2d 1131 (8th Cir. 1979); Mason v. Pulliam, 557 F.2d 426 (5th Cir. 1977); Meier v. Keller, 521 F.2d 548 (9th Cir. 1975); Richey v. Smith, 515 F.2d 1239 (5th Cir. 1975); Hunsucker v. Phinney, 497 F.2d 29 (5th Cir. 1974); *In re* Campola, 543 F. Supp. 115, 116 (N.D.N.Y. 1982); Resmondo v. United States, 536 F. Supp. 19, 20 (S.D. Fla. 1981); *In re* J. W. Schonfeld, Ltd., 460 F. Supp. 332 (E.D. Va. 1978); Dolan v. United States, 331 F. Supp. 979 (D. Del. 1971); Lord v. Kelley, 223 F. Supp. 684 (D. Mass. 1963), *cert. denied*, 379 U.S. 961 (1965).

28. *See generally* United States v. Blank, 261 F. Supp. 180 (N.D. Ohio 1966) (motion successful in context of threatened *civil* enforcement proceeding); Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 193-213 (1969) (Supreme Court has actually avoided consideration of the constitutional basis for the judicial supervisory power).

29. Lord v. Kelley, 223 F. Supp. 684, 688-89 (D. Mass. 1963), *cert. denied*, 379 U.S. 961 (1965) (emphasis added).

30. *See, e.g.*, Linn v. Chivatero, 714 F.2d 1278 (5th Cir. 1983).

31. *See, e.g.*, Marshall v. Central Mine Equip. Co., 608 F.2d 719, 721 (8th Cir. 1979).

32. *See In re* Grand Jury Proceedings, 466 F. Supp. 863 (D. Minn. 1979).

33. *See* Pieper v. United States, 604 F.2d 1131, 1133 (8th Cir. 1979) (reversing trial court determination that E.P.A. employee *not* officer of the court).

34. *See* Fifth Ave. Peace Parade Comm. v. Hoover, 327 F. Supp. 238, 242 (S.D.N.Y. 1971).

35. *See* Smith v. Katzenbach, 351 F.2d 810, 816 (D.C. Cir. 1965) (citing Rea v. United

The supervisory power has been applied in a civil context also;[39] therefore, this basis for the exercise of anomalous jurisdiction would seemingly apply whether an action be deemed civil or criminal in nature. Application of the supervisory power in civil matters, however, may be stretching the judicial canvas too far beyond Justice Frankfurter's prudential concern in *McNabb*:

> [W]e confine ourselves to our limited function as the court of ultimate review of the standards formulated and applied by federal courts in the trial of criminal cases. We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement.[40]

Extending the supervisory power to executive agents, who are not officers of the court, could conflict with the doctrine of separation of powers.[41] In addition, a civil damage remedy may arise directly under the fourth amendment;[42] therefore, injunctive relief protecting the same constitutional guarantees need not arise under the comparatively amorphous supervisory power. Sanctioning a nonstatutory remedy in this context goes beyond the judicial housekeeping function of the supervisory power.[43] Combined with the proposition that "the effect of the Fourth Amendment in civil cases is not totally settled,"[44] to enjoin fed-

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States, 350 U.S. 214 (1956) (enjoining federal narcotics agent from testifying in state proceeding)).

36. *See* Meier v. Keller, 521 F.2d 548, 553 (9th Cir. 1975) (*attempt* to enjoin private attorney from cooperating with government under anomalous jurisdiction).

37. *See* Hitzman v. Krut, 591 F. Supp. 258, 266 (D.N.J. 1984).

38. *See* DeMassia v. Nunez, 747 F.2d 1283, 1285 (9th Cir. 1984).

39. *See* Thiel v. Southern Pac. Co., 328 U.S. 217, 225 (1946). In exercising the supervisory power, the Supreme Court determined that blanket exclusion of a certain socio-economic group from jury services tarnishes administration of civil justice in federal courts. *See also* Boyd v. United States, 116 U.S. 616 (1886) (private books, invoices, and papers constitutionally inadmissible in criminal proceedings, also determined inadmissible in related civil proceedings); United States v. Blank, 261 F. Supp. 180, 184 (N.D. Ohio 1966) (court determined illegally seized property not related to the crime must be returned).

40. McNabb v. United States, 318 U.S. 332, 347 (1943).

41. *See* Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 203 (1969); Morris, *The End of an Experiment in Federalism–A Note on* Mapp v. Ohio, 36 WASH. L. REV. 407, 427 (1961); Comment, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656, 1661 (1963).

42. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (cognizable money damage claim for violation of fourth amendment arises directly under the Constitution itself). After *Bivens*, the Federal Tort Claims Act was amended to provide statutory relief against the United States for the constitutional torts of its federal officers. *See* 28 U.S.C. § 2680(h) (1982). Congress is currently considering limiting the individual liability of federal officers, who are typically judgment-proof, by amending the Act to preclude tort claims against them. *See* Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 HARV. J. ON LEGIS. 1 (1979).

43. *See supra* text accompanying note 40. Further, one might infer a Supreme Court position that the supervisory power of the federal courts does *not* embrace the ability to regulate I.R.S. agents. Eastus v. Bradshaw, 94 F.2d 788, 789 (5th Cir.), *cert. denied*, 304 U.S. 576 (1938).

44. Cleary v. Bolger, 371 U.S. 392, 403 (1963) (Goldberg, J., concurring).

The effect, in terms of a damage remedy, became clearer in *Bivens*, *see supra* note 42, while the effect of an injunctive remedy remained hazy. *See, e.g.*, C. WRIGHT, LAW OF FEDERAL COURTS 180 n.25 (4th ed. 1983) (collected law review articles discussing this issue).

In searches conducted by administrative agencies the supervisory power of the courts

eral officers from retaining illegally held property is better rooted in some ground other than the inherent power of supervision.[45]

It might be contended that the doctrine of reaching forward[46] is an independent ground for the exercise of anomalous jurisdiction, yet it is unlikely such a contention would succeed in light of the doctrine's characterization as an exercise of a court's equitable powers,[47] and as an exercise of the supervisory powers.[48] The cases discussing this theory[49] have accordingly failed to link it to any single jurisdictional basis. One thing does, however, remain clear: the reaching forward concept is not a distinct basis for the exercise of anomalous jurisdiction. Rather, it is better recognized as a means of portraying the factual circumstance triggering the exercise.

2. General Equity Jurisdiction

As early as *Marbury v. Madison*, the Supreme Court alluded to the right of an injured party to claim protection of the laws.[50] Where no "law" exists, the equity side of modern federal courts[51] is alert to grant

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may be even less effective than in criminal searches. This is because "[p]robable cause in the criminal law sense is not required." Marshall v. Barlow's, Inc., 436 U.S. 307, 320 (1978); *accord* United States v. Powell, 379 U.S. 48, 57 (1964) (no requirement of probable cause for search where taxpayer fraud is suspected unless it is shown enforcement of administrative order would be an abuse of judicial discretion).

45. *See, e.g.* Hunsucker v. Phinney, 497 F.2d 29, 33 (5th Cir. 1974), *cert. denied*, 420 U.S. 927 (1975). The *Hunsucker* court exemplifies the uncertainty and split of authority regarding the supervisory powers of the courts. The court observes that the earlier cases suggest a court's power is limited solely to officers of the court, but such power does not extend to non-officers such as I.R.S. agents. The court then states that the more recent trend suggests a court's powers do extend to non-officers such as I.R.S. agents. The court, however, says it will pretermit the issue of the court's power and simply "assume" it has supervisory powers over I.R.S. agents. *Contra In re* Wilton Assoc., Ltd., 49 F.R.D. 170, 172 (S.D.N.Y. 1970). The court, after recognizing that one is not "aggrieved" under Rule 41(e) absent indictment, states that "[o]ur jurisdiction, therefore, *must* rest upon the general supervisory power of federal courts over federal law enforcement officials. . . ." (emphasis added).

46. This particular theory was best stated in Foley v. United States, 64 F.2d 1, 3 (5th Cir.), *cert. denied*, 289 U.S. 762 (1933): "Though no indictment be pending, the court may reach forward to control the improper preparation of evidence which is to be used in a case coming before it, and can always by summary procedure restrain oppressive or unlawful conduct by its officers." *Foley* was relying on the Supreme Court decision in Go-Bart Importing Co. v. United States, 282 U.S. 344, 354-55 (1930) (where complaint for return of property alleged unconstitutional seizure, U.S. Attorney and prohibition agents subject to power of the court).

47. *See, e.g.*, Pieper v. United States, 604 F.2d 1131, 1133 (8th Cir. 1979).

48. *See, e.g.*, Smith v. Katzenbach, 351 F.2d 810, 815 (D.C. Cir. 1965).

49. *See* Pieper v. United States, 604 F.2d 1131, 1133 (8th Cir. 1979); United States v. Rapp, 539 F.2d 1156, 1160-61 (8th Cir. 1976); Hunsucker v. Phinney, 497 F.2d 29, 32 n.3 (5th Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); Smith v. Katzenbach, 351 F.2d 810, 815-16 (D.C. Cir. 1965); Foley v. United States, 643 F.2d 1, 3 (5th Cir. 1933).

50. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (the "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, wherever he receives an injury").

51. The merger of law and equity courts was established by the 1938 Federal Rules of Civil Procedure. In other words, there is only one form of action, regardless of whether relief is at law or in equity.

relief for federally protected rights.[52] In that anomalous jurisdiction is an extension of federal authority to protect individual rights when statutory law is lacking, the doctrine could find a viable theoretical basis in the general equity jurisdiction of the court.

The Supreme Court has, accordingly, condoned the application of a federal court's equitable powers to tailor a remedy for the individual suffering executive abuses involving constitutional questions.[53] Specifically, the Court has suggested that "[o]nce a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the violation.' "[54] This power generates a wide latitude of discretion, because an equitable remedy is only narrowly reviewable under the abuse of discretion standard.[55]

Federal courts have applied this general equity jurisdiction to injunctions concerning the return of property[56] and, in so doing, have defined the scope of its application. A court's equitable powers, like all court powers, should not unduly interfere with the executive function.[57] The Supreme Court has consequently cautioned against equitable injunctions that affect criminal proceedings. Therefore, the propriety of a motion for the return of property brought as an independent action is sometimes conditioned on its connection to a pendent criminal proceeding. Thus, "[o]nly if the motion is for the return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent."[58] This avoids the problem of an equitable extension by a court that may interfere with a criminal prose-

52. Bell v. Hood, 327 U.S. 678, 684 (1946) (the Supreme Court, in dicta, recognizes federal courts may issue injunctions to protect constitutional rights).

53. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392, 394 (1971) (violation of the fourth amendment may give rise to money damages).

54. Hills v. Gautreaux, 425 U.S. 284, 293-94 (1976) (quoting Milliken v. Bradley, 418 U.S. 717, 744 (1974)).

55. Lemon v. Kurtzman, 411 U.S. 192, 200-01 (1973).

56. Pieper v. United States, 604 F.2d 1131, 1133 (8th Cir. 1979); Mr. Lucky Messenger Serv., Inc. v. United States, 587 F.2d 15, 16-17 (7th Cir. 1978); Meier v. Keller, 521 F.2d 548, 554 (9th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); Donlon v. United States, 331 F. Supp. 979, 980 (D. Del. 1971); Chakejian v. Trout, 295 F. Supp. 97, 100 (E.D. Pa. 1969); Lord v. Kelley, 223 F. Supp. 684, 688 (D. Mass. 1963), *cert. denied*, 379 U.S. 961 (1965).

57. Compare the cases collected in the law review articles in note 41 *supra*.

58. DiBella v. United States, 369 U.S. 121, 131-32 (1962) (decision on motion for return of property is independent, and thus final for purposes of appeal, only if not tied to *criminal* prosecution). Further, a mere audit is not considered to be preliminary to, or in connection with, a *judicial* proceeding. *See also* United States v. Baggot, 463 U.S. 476, 479-80 (1983) (I.R.S. may not obtain grand jury materials to aid in the investigation of civil tax liability).

A related problem is whether subsequent events should be considered as a means of determining if there is a prosecution in existence for purposes of appeal. *See In re* Search Warrant, 750 F.2d 664, 668 (8th Cir. 1984) (holding that subsequent events should be considered, citing authorities from other circuits).

The Ninth Circuit Court of Appeals, additionally, has stated: "[s]everal circuits have given this test a strict reading and have required that any criminal action against the movant be beyond the investigatory stage and into an accusatory stage by the filing of charges. Other circuits have been less restrictive and have deemed a criminal action to be *in esse* before arrest or indictment." DeMassa v. Nunez, 747 F.2d 1283, 1286-87 (9th Cir. 1984) (citations omitted). See *infra* note 98 for a discussion of the term "*in esse*."

cution. If an indictment does issue, the appropriate remedy for return of property is the motion provided under Federal Rule of Criminal Procedure 41(e). Rule 41(e) also functions to codify the exclusionary rule since inadmissibility is part of the remedy.[59]

The caveat of caution and restraint accompanies every potential exercise of anomalous jurisdiction, regardless of which underlying theory is applied.[60] This caveat is improperly ignored where Rule 41(e) is read broadly to apply in the absence of an indictment. The courts have readily expanded Rule 41(e) to support the notion that equity jurisdiction exists to cover pre-indictment motions *not* covered by the rule.[61] Yet another concern voiced in the supporting Advisory Committee Note suggests that a broad reading of Rule 41(e) to incorporate pre-indictment relief is desirable as fostering expediency in criminal proceedings: the "purpose [of Rule 41(e)] is to prevent multiplication of proceedings and to bring the matter before the court in the first instance."[62] Fourth amendment violations are effectively adjudicated on the merits prior to criminal proceedings when the rule is so interpreted. Nevertheless, judicial expansion of Rule 41(e)[63] evokes the equally valid criticism that application of the rule to encompass pre-indictment relief amounts to judicial legislation, since the rule expressly applies to criminal matters.

3. Revoked Consent

Constitutional problems are not always triggered by macabre circumstances or fatally defective warrants. Occasionally, such problems arise in the context of conventional I.R.S. investigations when the subsequently aggrieved individual initially cooperates with federal officers. Internal Revenue Service investigations often commence with routine tax interviews with, or audits of, the taxpayer. Problems may occur when the taxpayer initially consents to production of documents and that consent is subsequently revoked by the court or individual because it was obtained in a coercive manner. Cases involving either voluntary or coerced consent[64] present a scenario distinct from exercises of anom-

59. *See supra* note 2.

60. *See* Linn v. Chivatero, 714 F.2d 1278, 1281 (5th Cir. 1983); Pieper v. United States, 604 F.2d 1131, 1133 (8th Cir. 1979); Mr. Lucky Messenger Serv., Inc. v. United States, 587 F.2d 15, 17 (7th Cir. 1978); Meier v. Keller, 521 F.2d 548, 554 (9th Cir.), *cert. denied*, 424 U.S. 943 (1975); Hunsucker v. Phinney, 497 F.2d 29, 34 (5th Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); Fifth Ave. Peace Parade Comm. v. Hoover, 327 F. Supp. 238, 242 (S.D.N.Y. 1971).

61. Meier v. Keller, 521 F.2d 548, 554 (9th Cir.), *cert. denied*, 424 U.S. 983 (1975); Hunsucker v. Phinney, 497 F.2d 29, 34 n.8 (5th Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); Smith v. Katzenbach, 351 F.2d 810, 814 (D.C. Cir. 1965); Pieper v. United States, 460 F. Supp. 94, 96 n.1 (D. Minn. 1978), *aff'd*, 604 F.2d 1131 (8th Cir. 1979).

62. FED. R. CRIM. P. 41(e) Advisory Committee Note.

63. *See* Pieper v. United States, 460 F. Supp. 94, 96 n.1 (D. Minn. 1978), *aff'd*, 604 F.2d 1131 (8th cir. 1979); *see also* Meier v. Keller, 521 F.2d 548, 554 (9th Cir. 1975); Hunsucker v. Phinney, 497 F.2d 29, 34 n.8 (5th Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); Smith v. Katzenbach, 351 F.2d 810, 814 (D.C. Cir. 1965).

64. Mason v. Pulliam, 557 F.2d 426 (5th Cir. 1977); Richey v. Smith, 515 F.2d 1239, (5th Cir. 1975); Smith v. Katzenbach, 351 F.2d 810 (D.C. Cir. 1965); Chakejian v. Trout, 295 F. Supp. 97 (E.D. Pa. 1969).

alous jurisdiction that are attributed to the court's supervisory power or general equity jurisdiction. This distinction is supported in part by the pronouncement that the judicial supervisory power does not extend to I.R.S. agents.[65]

Where voluntary consent is the sole justification for government possession of property, there is no illegal seizure, but the retention may become illegal if that consent is withdrawn. In this fourth amendment context, the Supreme Court has promulgated the standard of assent without coercion, viewed by the totality of the circumstances.[66] A waiver of fourth amendment rights is not governed by the strict standards applied to other waivers.[67] A less exacting standard for fourth amendment waivers, however, does not mean that such waivers are unqualified. An action seeking return of documents voluntarily loaned to the I.R.S. is illustrative. In *Mason v. Pulliam*, the government argued that initial consent forever waived fourth amendment rights, particularly since a subsequent demand for the return of property (records and accounts) would frustrate a clearly legitimate investigation without advancing constitutional concerns.[68] The court, in affirming the return order, noted that federal officers could not go beyond the scope of the consent originally given. Under this interpretation, revocation of the waiver reinstated the taxpayer's fourth amendment rights.[69]

Pre-indictment return of property actions alleging other constitutional violations have proven more difficult for taxpayer plaintiffs. For instance, where consent has been attacked on grounds of self-incrimination,[70] the decisions evince a judicial trend against interference with a criminal prosecution. Some of the rationale applied in the preclusion of pre-indictment relief in this context include decisions that *Miranda* warnings[71] are not necessary in noncustodial I.R.S. investigations,[72] and that adequate civil[73] or criminal[74] remedies eliminate the need to order return of property.

65. Eastus v. Bradshaw, 94 F.2d 788, 789 (5th Cir.), *cert. denied*, 304 U.S. 576 (1938).

66. Schneckloth v. Bustemorte, 412 U.S. 218, 248 (1973) (state must demonstrate consent was voluntarily given; such a determination is a question of fact to be determined from all the circumstances).

67. *Id.*

68. 557 F.2d 426, 428 (5th Cir. 1977).

69. *Id.* at 428 (citing United States v. Dichiarinte, 445 F.2d 126 (7th Cir. 1971) (defendant in criminal prosecution, initially consenting to search, called off the search, thereby limiting scope of consent) and United States v. Bily, 406 F. Supp. 726 (E.D. Pa. 1975) (after discovery of damaging evidence, consenting defendant revoked consent, thereby immediately limiting scope of search)).

70. Richey v. Smith, 515 F.2d 1239 (5th Cir. 1975); Smith v. Katzenbach, 351 F.2d 810 (D.C. Cir. 1965); Chakejian v. Trout, 295 F. Supp. 97 (E.D. Pa. 1969).

71. Miranda v. Arizona, 384 U.S. 436 (1965).

72. Smith v. Katzenbach, 351 F.2d 810, 812-14 (D.C. Cir. 1965); Chakejian v. Trout, 295 F. Supp. 97, 102 (E.D. Pa. 1969).

73. See, e.g., 26 U.S.C. § 7604(b) (1982) regarding procedure for judicial review of a tax summary. This permits civil actions under the I.R.C. without the necessity of resorting to independent injunctive relief. The adequacy of this remedy at law was upheld in Reisman v. Caplin, 375 U.S. 440 (1964) and Justice v. United States, 274 F. Supp. 283 (E.D. Ky. 1967) (per curiam).

74. As discussed throughout the text, the criminal remedy is FED. R. CRIM. P. 41(e).

Allegations of the unconstitutional deprivation of the right to counsel have been equally unsuccessful. These sixth amendment claims have alleged ineffective assistance of counsel where documents are not provided prior to grand jury testimony[75] or where there is an investigative interview designed to establish criminal liability.[76] In every instance, the sixth amendment has proved an ineffective basis for the exercise of anomalous jurisdiction.[77]

4. Constitutional Tort

In 1971, the Supreme Court, in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, held that a suit for damages may arise directly under the Constitution itself.[78] This established a non-statutory remedy against federal officers for violations of the fourth amendment. Subsequently, the Federal Tort Claims Act (F.T.C.A.) was amended to codify this remedy for suits against the United States.[79] The fourth amendment ameliorates jurisdictional problems by extending the non-statutory supervisory power to federal executive officers.[80] Yet the F.T.C.A. does not permit injunctive relief,[81] even though such relief may present a remedy for constitutionally-barred misconduct by individual officers.[82]

The *Bivens* basis for anomalous jurisdiction has been suggested, but remains undecided.[83] If Congress does not provide for injunctive relief in forthcoming amendments to the F.T.C.A.,[84] and general federal

75. *See supra* note 72 for sixth amendment cases.

76. *In re* Grand Jury Proceedings, 466 F. Supp. 863, 867 (D. Minn. 1979) (witness may have attorney present outside room where grand jury investigation is being conducted); *In re* Groban, 352 U.S. 330, 333 (1957) (no constitutional right to be assisted by counsel in giving testimony at an investigatory proceeding). FED. R. CRIM. P. 6(d) is also applicable. It provides that only a government attorney, not a defendant's attorney is allowed in a grand jury room during an investigation.

77. *In re* Grand Jury Proceedings, 466 F. Supp. 863, 867 (D.Minn. 1979); Chakejian v. Trout, 295 F. Supp. 97, 99 (E.D.Pa. 1969). *See also* Smith v. Katzenbach, 351 F.2d 810, 813 (D.C. Cir. 1965).

78. 403 U.S. 388 (1971) (claim arises directly under fourth amendment). The subsequent cases establishing a similar tort remedy are Davis v. Passman, 442 U.S. 228 (1979) (claim arising directly under fifth amendment) and Carlson v. Green, 446 U.S. 14 (1980) (claim arising directly under the eighth amendment).

79. 28 U.S.C. § 2680(h) (1982) (includes 1974 amendment withdrawing sovereign immunity of government when torts are committed within scope of employment).

80. *See supra* notes 28-48 and accompanying text.

81. *See* Moon v. Takiasaki, 501 F.2d 389, 390 (D.C. Cir. 1974). *But see* Jaffee v. United States, 592 F.2d 712, 718-19 (3d Cir. 1979); Kelley v. United States, 512 F. Supp. 356, 362 (E.D.Pa. 1981). Both *Kelley* and *Jaffee* limit injunctive relief permitted under F.T.C.A. for constitutional violations.

82. *See* Bell, *Proposed Amendments to the Federal Torts Claims Act*, 16 HARV. J. ON LEGIS. 1-17 (1979) (amendments would remove individual liability of federal officers and federal employees) [hereinafter "Proposed Amendments"].

83. *Bivens*, in conjunction with the federal question jurisdiction of § 1331, was argued with a multitude of theories in Pieper v. United States, 460 F. Supp. 94, 96 (D.Minn. 1978), *aff'd on other grounds*, 604 F.2d 1131 (8th Cir. 1979). *Bivens* jurisdiction was also suggested, but deemed inapposite, in Linn v. Chivatero, 714 F.2d 1278, 1286 (5th Cir. 1983) (Clark, C.J., concurring).

84. *See* Proposed Amendments, *supra* note 82; *see also infra* text accompanying notes 152-55 regarding expansion of proposals to include injunctive relief.

question jurisdiction does not independently support anomalous jurisdiction,[85] the need for its exercise will remain intact. The propriety of an extension of *Bivens*, from an implied damage remedy[86] to an implied injunctive remedy, is hampered by the observation that the connection between the two remedies is too tenuous to invoke its application. In addition, using the fourth amendment to justify a court's injunctive powers involving executive agencies might conflict with the separation of powers doctrine.

Because a suit for the return of property is in reality a suit against the United States,[87] additional problems arise. The United States cannot be sued without its consent,[88] and congressional consent to such suits should be narrowly construed,[89] although the Supreme Court has denied sovereign immunity to government agents who act in an unconstitutional manner.[90] In recognition of the absence of any statute conferring general jurisdiction over federal officers and agencies,[91] the apparent lack of a provision for injunctive relief under the F.T.C.A.,[92] and the inapplicability of the Federal Rules of Criminal Procedure to pre-indictment injunctive relief,[93] the judiciary should resort to a less hostile basis for its exercise of anomalous jurisdiction.

5. General Federal Question Jurisdiction

Section 1331 of the Judicial Code for federal courts provides that the "district courts shall have original jurisdiction of all civil actions arising under the constitution, *laws*, or treaties of the United States."[94] Federal judicial decisions create the federal common law in contrast to the statutory law enacted by Congress. For purposes of section 1331, federal common law is arguably included among the laws of the United

85. *See infra* section I(B)(5).

86. *Bivens'* codification, by 1974 amendments to the F.T.C.A., essentially provides a damage remedy implied from violations of the fourth amendment. Its purpose is still viable for other constitutional torts. The subsequent utilization of the *Bivens* implied damage remedy rationale in the cases is cited in note 78 *supra*.

87. When a federal officer exceeds powers granted by the sovereign, actions beyond those limitations are individual rather than sovereign. Larson v. Domestic & Foreign Corp., 337 U.S. 682, 689 (1949). There is, however, qualified immunity for "good faith" violations, which might preclude monetary relief. Butz v. Economou, 438 U.S. 478 (1978). Since federal officers are generally judgment proof or unable to act without authority, the real target is or ought to be the government. *See* Proposed Amendments, *supra* note 82 at 7-10. *See generally* Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435 (1962).

88. Supreme Court case authority for this consent requirement ranges from 1834 to the present. *See, e.g.*, United States v. Mitchell, 445 U.S. 535, 538 (1980) (dicta); United States v. Clarke, 33 U.S. (8 Pet.) 436, 444 (1834) (dicta).

89. United States v. Sherwood, 312 U.S. 584, 587-88 (1940) (dicta); Schillinger v. United States, 155 U.S. 163, 166 (1894).

90. *Cf.* Dugan v. Rank, 372 U.S. 609, 621-23 (1963) (dicta) (suit brought to enjoin United States officials dismissed for want of jurisdiction, because suit was in reality one against the United States, and the United States' consent was lacking).

91. 14 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3655, at 172 (1976) (citing McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971)).

92. *See supra* note 81 and accompanying text.

93. *See supra* notes 17-20 and accompanying text.

94. 28 U.S.C. § 1331 (1982) (emphasis added).

States. The Supreme Court failed to resolve this contention in 1959 when presented with the opportunity to incorporate federal common law into the word "laws."[95] However, in 1972, the Court held that section 1331 jurisdiction existed over claims involving the federal common law of interstate pollution.[96] To date, this opinion stands alone as the only case to suggest such a broad reading of the word "laws," and its effect was subsequently nullified by Congress.[97] Therefore, if anomalous jurisdiction is a part of the federal common law, its exercise cannot be regarded as attributable to the general federal question statute, section 1331.

The federal courts have nevertheless announced a federal common law to provide for the return of property when there are no criminal proceedings pending.[98] These courts have drawn upon Supreme Court directives to fashion relief when federal rights are involved.[99] Yet the very existence of anomalous jurisdiction has been questioned by these courts,[100] thereby suggesting that its exercise presents a federal question cognizable under section 1331. This possibility, however, conflicts with judicial constructs resolving doubts against the existence of jurisdiction,[101] or the concern that the application of federal common law is confined to only a few circumstances.[102]

Another related approach to finding a niche for anomalous jurisdiction within the general federal question statute was facilitated by elimination of the amount in controversy requirement. This approach requires an interpretation of section 1331 as incorporating the federal common law, a proposition of questionable validity.[103] Some have suggested that the elimination of the amount in controversy requirement has entirely eradicated the need for independent recognition of anoma-

95. Romero v. International Terminal Operating Co., 358 U.S. 354, 379 (1959).

96. Illinois v. Milwaukee, 406 U.S. 91, 99 (1972).

97. *See* City of Milwaukee v. Illinois & Mich., 451 U.S. 304, 317 (1981) (subsequent stage of 1972 Illinois v. Milwaukee interstate pollution case, wherein the Court held its earlier common law remedy was pre-empted by 1972 federal pollution legislation).

98. *See supra* notes 15-26 and accompanying text. Also note the distinction between when a criminal proceeding is pending and when it is "*in esse*" for the purpose of a motion or complaint for the return of property. The term "*in esse*" was used in the aforementioned context in DiBella v. United States, 369 U.S. 121, 131-32 (1962) and applies in situations in which there is an outstanding complaint, a release following arrest or arraignment, information, or indictment. Some courts require that for a criminal proceeding to be *in esse*, the proceedings must have gone beyond the investigatory stage and be in the accusatory stage which is signified by the filing of charges. *In re* Grand Jury Proceedings, 716 F.2d 493, 496 (8th Cir. 1983); Sovereign News Co. v. United States, 690 F.2d 569, 571 (6th Cir. 1982); Mr. Lucky Messenger Serv. v. United States, 587 F.2d 15, 16 (7th Cir. 1978). This jurisdictional split regarding the term "*in esse*" is described in DeMassa v. Nunez, 747 F.2d 1283, 1286-87 (9th Cir. 1984).

99. "It is not uncommon for federal courts to fashion federal law where federal rights are concerned." Textile Workers v. Lincoln Mills, 353 U.S. 448, 457 (1957).

100. *See, e.g.*, Linn v. Chivatero, 714 F.2d 1278 (5th Cir. 1983). In his concurrence, Chief Judge Clark stated that "anomalous" jurisdiction–once a necessary evil–has become a superfluous anachronism . . . a dead letter." *Id.* at 1285.

101. Healy v. Ratta, 292 U.S. 263, 270 (1934).

102. *See* City of Milwaukee v. Illinois & Mich., 451 U.S. 304, 313 (1981); Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963).

103. *See supra* notes 94-97 and accompanying text.

lous jurisdiction.[104] No matter what it is labeled, as long as property continues to be wrongfully held by federal officers in the absence of an indictment, the judiciary will find a remedy, the semantics of which will remain the domain of the commentators.

II. A Proposed Test to Determine When the Exercise of Anomalous Jurisdiction is Appropriate

Whether anomalous jurisdiction has an identifiable source or basis in the law of federal jurisdiction is a question obviously susceptible to much debate and confusion, to which the preceding portions of this article attest. That question is then left to the authors of judicial opinions. What remains to be determined is: What are the appropriate circumstances for its exercise? A number of concerns have surfaced.[105] The following proposition assumes that because of its anomalous nature, anomalous jurisdiction is best characterized as an exercise of the equitable powers of a court. A three-tiered test comprising primarily equitable criteria is therefore offered because it incorporates the apparent concerns of courts which have engaged in the exercise of anomalous jurisdiction. The test requires (1) disregard of the plaintiff's constitutional rights, (2) irreparable injury, and (3) unavailability of alternative remedies.

A. *Disregard of Plaintiff's Constitutional Rights*

Reliance upon any particular constitutional provision has not been critical.[106] Violations of the first, fourth, fifth, and sixth amendments have been alleged in anomalous jurisdiction cases seeking the return of property illegally held by federal officers.[107] The unreasonable search and seizure provision of the fourth amendment is the one most frequently relied upon.[108]

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104. *See supra* note 100.

105. *Inter alia*, the concerns are: whether the primary purpose of the suit is to recover property or to restrain a tax collection, Linn v. Chivatero, 714 F.2d 1278, 1282 (5th Cir. 1983); balancing the plaintiff's temporary loss of the property against government's interest in protecting the secrecy of an investigation, Shea v. Gabriel 520 F.2d 879, 882 (1st Cir. 1975); the plaintiff's need for the property, Richey v. Smith, 515 F.2d 1239, 1243 n.9 (5th Cir. 1975); effect of private judgment on public interest in administration of justice, Smith v. Katzenbach, 351 F.2d 810, 813 (D.C. Cir. 1965); procrastination of official holding property, United States v. Bell, 120 F. Supp. 670, 673 (D.D.C. 1953). *Compare* the factors discussed in Hunsucker v. Phinney 497 F.2d 29, 34-35 (5th Cir. 1974), *cert. denied*, 420 U.S. 927 (1975) *with* the three-tiered test proposed herein: (1) disregard of plaintiff's constitutional rights; (2) whether plaintiff will suffer irreparable harm; and (3) whether another adequate remedy is available.

106. *See supra* notes 9-12 for a brief summary of cases alleging constitutionally protected rights and *supra* note 14 for a review of constitutional provisions addressed in several commentaries.

107. *See supra* notes 9-12 and accompanying text.

108. Property may be illegally held when plaintiff's initial consent is subsequently withdrawn. Fourth amendment violations may occur when consent is withdrawn so that the continued holding of the property is illegal. *See supra* Section I(B)(3). In some cases, illegally held property will not be returned if the property was used to further criminal activity or constituted the fruit of such an endeavor. *See In re* Wiltron Assoc., Ltd., 49 F.R.D. 170, 173 (S.D.N.Y. 1970) (quoting authorities).

It is important to recognize the distinction between a pleading which seeks the *return* of property and one concerned with the *suppression* of the use of that property in a criminal proceeding. When both suppression and return are sought, the courts have generally required a showing of a callous disregard of the plaintiff's constitutional rights.[109] When only the return of property is sought, however, it is not established whether the complaint must allege a "clear"[110] or a "callous"[111] disregard of the plaintiff's rights. A violation may be clear, but not necessarily callous. The safest practice is to allege both possibilities.[112]

Adherence to this suppression-versus-return distinction avoids an additional problem: a premature decision on the merits of a criminal prosecution. Some courts might find it necessary to ascertain whether a constitutional violation has occurred before ordering the return of property. The constitutional question is more appropriately decided *after* an indictment has been issued and when the return of property would be governed by Rule 41(e). This view incorporates a concern for judicial expediency by avoiding potentially redundant, time consuming, and costly litigation. In addition, this approach would enhance compliance with an individual's constitutional rights by lessening the burden imposed upon him by the court. Therefore, relief in anomalous jurisdiction cases should more appropriately depend upon satisfaction of the more equitable considerations of lack of an adequate alternative remedy and a showing of irreparable injury.

B. *Irreparable Injury*

This aspect of the test should be considered in conjunction with the availability of alternative adequate remedies (section II(C)) in that the underlying purpose of anomalous jurisdiction is to relieve a plaintiff's intolerable hardship resulting from an unlawful deprivation of property.[113]

The two considerations addressed in the cases are the plaintiff's need for the property,[114] and the alleged stigma caused by a wrongful

109. *See* Hunsucker v. Phinney, 497 F.2d 29, 34 (5th Cir. 1974) *cert. denied*, 420 U.S. 927 (1975); Silbert v. United States, 275 F. Supp. 765, 767-68 (D.Md. 1967). *Cf.* United States v. Harte-Hanks Newspapers, 254 F.2d 366 (5th Cir.), *cert. denied*, 357 U.S. 938 (1958) (requiring a clear and definite showing that constitutional rights have been violated). *But cf.* Mr. Lucky Messenger Serv., Inc. v. United States, 587 F.2d 15, 17 (7th Cir. 1978) (callous disregard standard to be applied only when suppression is sought).

110. *In re* Grand Jury Proceedings, 466 F. Supp. 863, 866 (D.Minn. 1979); Donlon v. United States, 331 F. Supp. 979, 980 (D.Del. 1971).

111. Linn v. Chivatero, 714 F.2d 1278, 1281 (5th Cir. 1983); Hunsucker v. Phinney, 497 F.2d 29, 34-35 n.10 (5th Cir. 1974), *cert. denied*, 420 U.S. 927 (1975).

112. *See, e.g.*, Pieper v. United States, 605 F.2d 1131, 1133 (8th Cir. 1979) (jurisdiction requires "clear showing of a search and seizure in callous disregard of the fourth amendment").

113. *See generally* D. DOBBS, REMEDIES § 2.10 (1976) (discussion of standards for granting or denying injunctive relief).

114. *See* Mr. Lucky Messenger Serv., Inc. v. United States, 587 F.2d 15, 18 (7th Cir. 1978) (plaintiff needed funds seized to satisfy tax liability); Mason v. Pulliam, 402 F. Supp. 978, 981 (N.D.Ga. 1975), *aff'd*, 557 F.2d 426 (5th Cir. 1977) (irreparable injury would result if criminal indictment issues from wrongfully seized materials).

possession which accordingly results in a wrongful indictment.[115] Because the right to have property returned is not synonymous with the right to have illegally-seized evidence suppressed, injunctions seeking the return of property should focus on the plaintiff's need for the property, as the stigma suffered by the plaintiff is more appropriately associated with exclusion of wrongfully retained evidence. Therefore, the irreparable injury factor for determining the exercise of anomalous jurisdiction should be a balancing test to determine whether the plaintiff's prospects for irreparable injury outweigh the state's need for the property as part of a criminal investigation. This would reduce undue interference with the criminal justice system while preserving the individual's right to the property.

C. *Unavailability of an Alternative Remedy*

Traditionally, equitable relief is barred by the availability of an adequate remedy at law. Yet in the context of a criminal proceeding, the rhetoric of equity concerning "an adequate remedy at law" is traditionally inapplicable. Rather, the prospect of equitable relief in this context should be conditioned on the availability of sufficient alternative remedies. This approach would avoid the semantic difficulties of reconciling criminal proceedings involving property with the traditional terminology of equity.

The availability of a *jurisdictional* alternative remedy is no longer a requirement to the invocation of equity jurisdiction.[116] For instance, pre-indictment relief is inappropriate to enjoin enforcement of a tax summons,[117] and exclusion of illegally obtained evidence cannot prematurely bar prosecution for tax evasion because exclusion itself is an adequate remedy.[118]

The adequacy and availability of remedies for fourth amendment violations must be viewed restrictively to effectuate the purposes of the exclusionary rule,[119] but the deterrent function of the exclusionary rule is not as tangible when there is no criminal prosecution pending from which evidence may be excluded. Despite the reduced importance of the exclusionary rule in circumstances where no criminal proceedings exist, the courts should still require a clear showing that no alternative remedies are available.

Accordingly, some of the anomalous jurisdiction cases undertake an

115. Richey v. Smith, 515 F.2d 1239, 1243 n.10 (5th Cir. 1975) (stigma not removed by a judgment of acquittal in criminal proceedings); Hunsucker v. Phinney, 497 F.2d 29, 34 (5th Cir. 1974), (examination of wrongfully seized materials leading to issuance of wrongful indictment would inflict irreparable stigma), *cert. denied*, 420 U.S. 927 (1975). *But see In re* Compola, 543 F. Supp. 115, 117 (N.D.N.Y. 1982) (stigma by itself not irreparable injury).

116. D. DOBBS, REMEDIES § 2.5 (1976).

117. Reisman v. Caplin, 375 U.S. 440, 446-50 (1964).

118. *Cf.* United States v. Blue, 384 U.S. 251, 255 (1966) (implicit assumption that exclusion of evidence does not bar prosecution altogether).

119. United States v. Calandra, 414 U.S. 338, 347-48 (1974).

analysis of the various remedies that might be available,[120] premised on the caution and restraint exercised by the courts in this area.[121] The most significant remedies, which provide alternatives to the non-statutory civil suit for return of property, are administrative actions in tax cases, declaratory relief, mandamus, and other statutory bases for the return of property held by the government.[122]

Administrative remedies in tax cases include the return of property as ancillary relief in a suit for a refund or a summons enforcement proceeding.[123] A refund suit may be an inadequate remedy where the plaintiff seeks recompense for alleged abuses, rather than the return of improperly assessed taxes. Such suits, however, must be read in conjunction with the congressional prohibition against injunctions which effectively restrain assessment or collection of federal taxes.[124] One purpose of the Anti-Injunction Act is to minimize civil pre-enforcement interference, while affording the individual the opportunity to determine his right to the disputed tax in a suit for a refund.[125]

It is nevertheless possible to avoid the Act's prohibition against such injunctions where equity jurisdiction exists and the government could not possibly prevail.[126] The plaintiff must clearly establish the inadequacy of legal remedies.[127]

Sharp division in the application of the Anti-Injunction Act surfaced in the recent case of *Linn v. Chivatero*.[128] A taxpayer and his attorney sued the I.R.S. District Director, seeking injunctions prohibiting the use,

120. *See* Linn v. Chivatero, 714 F.2d 1278 (5th Cir. 1983) (alternative, inadequate remedies discussed were a suit for tax refund or suppression of the evidence in non-existent criminal proceeding); United States v. Rapp, 539 F.2d 1156 (8th Cir. 1976) (replevin or a claim under the Tucker Act for deprivation of property without due process of law); *In re* J.W. Schonfeld, Ltd., 460 F. Supp. 332, 336 (E.D.Va. 1978) (suppression and return in a suit for refund, or in a criminal proceeding the taxpayer may request return); United States v. Bell, 120 F. Supp. 670 (D.D.C. 1954) (administrative relief, trespass against the officer, or assertion of property rights in the district's action in libel proceeding for forfeiture).

121. *See supra* note 60 and accompanying text regarding caution and restraint analysis.

122. *See supra* note 120. Other procedural devices include intervention. Chakejian v. Trout, 295 F. Supp. 97 (E.D. Pa. 1969) (intervention by taxpayer into enforcement proceedings against third party); *In re* Wilton Assoc., Ltd., 49 F.R.D. 170, 173 (S.D.N.Y. 1970) (interpleader).

123. Jurisdiction over taxpayer suits for refunds of federal taxes is provided in 28 U.S.C. § 1346(a)(1) (1982). Jurisdiction over I.R.S. summons enforcement suits, triggered by taxpayer noncompliance, is provided in 26 U.S.C. § 7402(b) (1982).

124. The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. . . ." 26 U.S.C. § 7421(a) (1982).

125. Bob Jones Univ. v. Simon, 416 U.S. 725, 736 (1974).

126. Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962) (the plaintiff must show that "under the most liberal view of the law and the facts, the United States cannot establish its claim . . ."). The Supreme Court previously held that special and extraordinary circumstances could make the Anti-Injunction Act inapplicable. Miller v. Standard Nut Margarine Co., 284 U.S. 498, 509 (1932). *Enochs* limited the *Miller* potential for merely applying equity practice as it existed prior to passage of the Act, thus forming the basis for the more strict interpretation of the Act in Bob Jones Univ. v. Simon, 416 U.S. 725 (1974).

127. Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 6 (1962).

128. 714 F.2d 1278 (5th Cir. 1983).

and ordering the return, of documents accidentally produced in response to an I.R.S. summons.[129] The key issue was the applicability of the Anti-Injunction Act in suits where anomalous jurisdiction is presented. The trial court, although dismissing for lack of jurisdiction,[130] presumed the existence of both federal question jurisdiction and anomalous jurisdiction.[131] The appellate majority "refuse[d] to address the continued validity of anomalous jurisdiction . . . despite a confused body of caselaw in need of clarification."[132] The court held that the Anti-Injunction Act did not bar jurisdiction. It characterized the taxpayer's requested injunctive relief as a controversy arising under the fourth amendment search and seizure provision.[133] The elimination of the amount in controversy requirement in federal question cases avoided the problem of transforming the injunctive suit for the return of property into a controversy concerning federal taxes which would be in violation of the Anti-Injunction Act.[134] The concurring opinion observed that the distinction made by the majority between a search and seizure issue and a tax issue, to determine whether jurisdiction existed, was inconsistent with the purposes of the Anti-Injunction Act.[135]

Linn, therefore, establishes a significant hurdle by inhibiting the exercise of anomalous jurisdiction in tax cases governed by the Anti-Injunction Act. The case must certainly be characterized as one involving the return of property rather than one possibly involving a search and seizure issue.

The Declaratory Relief Act could conceivably present an alternative remedy, but an order for the return of property is simply not a declaratory judgment. In addition, although the plaintiff might perceive a sufficient controversy, the courts have not viewed the circumstance triggering anomalous jurisdiction as a controversy within the meaning of the Act.[136]

One proposed remedy is mandamus.[137] Since proceedings under the mandamus statute are prohibitively intricate,[138] the remedy has been characterized as both potentially available[139] and clearly unavaila-

129. *Id.* at 1279.

130. The trial court's dismissal was reversed and remanded for a determination of the propriety of the government's retention of the accidentally produced documents. *Id.* at 1285.

131. *Id.* at 1281.

132. *Id.* at 1285 (Clark, C.J., concurring).

133. *Id.* at 1281.

134. *Id.* at 1282-84. *See also* Hunsucker v. Phinney 497 F.2d 29, 36 (5th Cir. 1974), *cert. denied*, 420 U.S. 927 (1975).

135. Linn v. Chivatero, 714 F.2d 1278, 1286 (Clark, C.J., concurring).

136. *In re* Shoenfeld, Ltd., 460 F. Supp. 332, 338-39 (E.D.Va. 1978) (injunctive relief seeking return of taxpayer's property not within Declaratory Relief Act).

137. 28 U.S.C. § 1361 (1982); French, *The Frontiers of the Federal Mandamus Statute*, 21 VILL. L. REV. 637 (1976).

138. Estate of Watson v. Blumenthal, 586 F.2d 925, 934 (2d Cir. 1978).

139. Hunsucker v. Phinney, 497 F.2d 29, 36 (5th Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); Mason v. Pulliam, 402 F. Supp. 978, 980 (N.D.Ga. 1975), *aff'd*, 557 F.2d 426 (5th Cir. 1977).

ble.[140] Since the purpose of mandamus is to review ministerial (as opposed to discretionary) acts,[141] the remedy is clearly unavailable.

Another alternative to non-statutory anomalous jurisdiction is a statutory suit for the return of property under section 1356 of the Judicial Code.[142] Yet in *Hunsucker v. Phinney*,[143] the court declined to construe section 1356 in such a manner as to enable it to order the return of the taxpayer's property.[144] Other courts have failed to find section 1356 jurisdiction,[145] and the American Law Institute has proposed its repeal.[146] Finally, state courts are an inappropriate forum under the statute,[147] precluding its application in any manner by a state court.

It would appear from the foregoing that alternative remedies rarely exist, suggesting that in most situations equity lies in favor of the truly aggrieved plaintiff. Yet, to expand federal jurisdiction without authority is a questionable path for the courts to follow. But how else can the wronged individual secure his rights to property? The following conclusion addresses this problem.

CONCLUSION

Federal subject matter jurisdiction in suits against federal officers cannot exist in the absence of a statutory waiver of immunity.[148] Additionally, there is no general statutory jurisdiction for suits against federal agencies and officers.[149] At one time the courts were sharply divided over the applicability of the Administrative Procedure Act provision that a "person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action *within the meaning of a relevant statute*, is entitled to judicial review thereof."[150] But in 1977, in *Califano v. Sanders*,[151] the Supreme Court resolved the controversy, holding that the Administrative Procedure Act did not independently confer

140. Fifth Ave. Peace Parade Comm. v. Hoover, 327 F. Supp. 238, 242-43 (S.D.N.Y. 1971) (mandamus unavailable absent specific statute defining officer's duties).

141. *See, e.g.*, Kirkland Masonry, Inc. v. Commissioner, 614 F.2d 532, 533-34 (5th Cir. 1980); Lee Pharmaceuticals v. Kreps, 577 F.2d 610, 618 (9th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979); Associated Businesses of Franklin, Inc. v. Board of County Comm'rs, 522 F. Supp. 1015, 1020 (S.D.Ohio 1981).

142. 28 U.S.C. § 1356 (1982). The Tucker Act, 28 U.S.C. § 1346(a)(2), provides for suits against the sovereign for any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction. Yet anomalous jurisdiction plaintiffs seek injunctive rather than monetary relief. Hunsucker v. Phinney, 497 F.2d 29, 36 (5th Cir. 1984), *cert. denied*, 420 U.S. 927 (1975).

143. 497 F.2d 29 (5th Cir. 1974), *cert. denied*, 420 U.S. 927 (1975).

144. 497 F.2d at 35.

145. *See* Slocum v. Mayberry, 15 U.S. (2 Wheat.) 1 (1817) (analyzing predecessor of § 1356); Johnston v. Earle, 245 F.2d 793 (9th Cir. 1957).

146. A.L.I., *Study of the Division of Jurisdiction Between State and Federal Courts* § 1311 (1969).

147. Slocum v. Mayberry, 15 U.S. (2 Wheat.) 1, 9-11 (1817).

148. *See supra* notes 88 and 89.

149. *See supra* note 91.

150. 5 U.S.C. § 702 (1982) (emphasis added). The division of authority is covered in 14 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE PROCEDURE § 3655 n.10 (1985).

151. 430 U.S. 99, 107 (1977).

jurisdiction on a court. Once again, the individual seeking the exercise of anomalous jurisdiction was left without an alternative.

This author advances two proposals. The lower federal courts should rely *exclusively* upon the general federal question statute, in spite of underlying jurisdictional problems.[152] This may ultimately force the issue of whether the federal common law of anomalous jurisdiction involves a "law" within the meaning of section 1331 of the Judicial Code.[153]

The preferred proposal is for Congress to include an injunctive relief alternative in the proposed amendments to the Federal Tort Claims Act.[154] This would provide an express equitable remedy which would facilitate the policies underlying the current damage statute.

Nevertheless, the latter proposal has at least two drawbacks. First, it would encourage civil claims for the return of property prior to the completion of criminal investigations. Second, its effect would approach the creation of undesirable statutory jurisdiction over suits against federal agencies and officers, because claims against the latter must allege either specific statutory authorization, or that the suit is against the federal government.[155]

An amendment to the Federal Tort Claims Act would have to be interpreted or drafted in such a way as to strike a balance between the government's interest in expediency in the criminal justice system and the individual's interest in his rights to property. Providing statutory relief would eliminate both the current uncertainty accompanying a non-statutory extension of federal jurisdiction, as well as the drain imposed upon judicial resources in attempting to ascertain a basis for this power. There still exists the less optimistic possibility that congressional inaction and judicial confusion will prohibit the now uncertain remedy contained in the exercise of anomalous jurisdiction.

152. *See supra* section I(B)(5).

153. *See supra* notes 94-102 and accompanying text.

154. *See supra* notes 87-93 and accompanying text for current problems with the F.T.C.A.

155. *See* Boelens v. Redman Howes, Inc., 748 F.2d 1058, 1067 (5th Cir. 1984) (citing cases from various circuits); *see also* McQuary v. Laird, 449 F.2d 608 (10th Cir. 1971).