Argument

I. Whether the Circuit Court erred by granting Defendant's Motion for Summary Judgment, denying Plaintiff's contract action for admittedly due earnings and recognizing Defendant's claim of immunity for surrendering amounts to the IRS, where no levy upon property subject to levy was proven, nor any demand; where there was no valid executive branch warrant delegating authority; or notice of seizure that made an "account" of what was seized to establish the levy date; where there was no language necessary for seizure or demand; and where virtually all of the amounts in question were not Plaintiff's property subject to levy on the date the levy was "first made"; and where there was a genuine issue of material fact as to which amounts were and which were not in the possession of Defendant at the time levy was "first made"?

The Circuit Court erred in granting Defendant's Motion for Summary Judgment under MCR 2.116(C)(7), which is based on a claim of immunity, and/or under MCR 2.116(c)(10), which is based on absence of a genuine issue of material fact and being entitled to judgment "as a matter of law." This Court reviews a motion for summary disposition de novo. Stehlik v. Johnson, on rehearing, 206 Mich. App. 83, 85 (1944). Defendant failed to show it was entitled to immunity under 26 U.S.C. Sec. 6332(e), because it failed to prove the existence of a federal tax levy or to establish the date of the levy; failed to prove "demand" by the Secretary and failed to prove that it surrendered property subject to levy only upon demand; and failed to show that as a matter of law Plaintiff's earnings were subject to levy and that Plaintiff's unearned earnings were "property" under Michigan law, and therefore under 26 U.S.C. Sec. 6331. The Order of the Circuit Court granting Defendant's Motion for Summary Judgment must therefore be reversed, and Plaintiff's cause reinstated and remanded for further proceedings.

A. Whether Defendant surrendered property subject to levy upon which levy had been made upon demand of the Secretary, thereby qualifying for immunity under 26 U.S.C. 6332(e)?

In the Circuit Court Defendant had the burden of proving all the elements necessary to its affirmative defense under 26 U.S.C. Sec. 6332(e).[1] This burden was not met. Defendant failed to prove: 1) that a valid levy was "made," including an executive branch warrant to create a custodial relationship with the government, and a notice of seizure to document the government's acceptance of the seizure and establish the date of the levy; 2) that funds levied upon and surrendered to the IRS were the property of Plaintiff subject to levy; 3) that the funds were surrendered upon demand of the Secretary.

Plaintiff showed the Circuit Court that by stealthy encroachment the IRS seeks to erase the federal legislature's mandate, and case law affirmance, that executive branch **warrants,** in the form of **warrants for distraint,** issue before the IRS may seize property under 26 U.S.C. Sec. 6331.[2] Or more particularly, that to avoid this requirement, the IRS relies on private parties to turn over assets on which no levy, including a proper executive branch warrant, notice of seizure, or demand, have been made.[3] That is the case here. *See* I(A)(1)(a-c). In many cases the "property" is not even a ripe property interest under state law, as with the case of future earnings, and no interest of the alleged tax debtor is conveyed to the government. That is also the case here, see I(A)(2). The IRS has no explicit search authority under 26 U.S.C. 6331,[4] and has exceeded its authority in that respect, if the "process" in this case is held to effect a valid levy. Both the search and seizure would violate the 4th Amendment and the 5th Amendment Due Process clause as to pre-judgment search and seizure, *see* I(A)(1)(a)(i) & (ii). Regulations may not exceed statutes and accompanying case law under the non-delegation of lawmaking authority doctrine of the separation of powers,

see I(A)(1)(a)(iii).

1. Whether the required levy was made?

The statutory federal tax levy process is fairly straightforward, *see* 26 U.S.C. Secs. 6331-6335, 6343, 6502.[5] The pre-1954 case law established that an executive branch warrant is required, per the plain language of the 1939 levy statute, to seize and distrain property subject to levy.

> **26 U.S.C. Sec. 3692 (1939) Levy**
> In case of neglect or refusal under section 3690, the collector may levy, or **by warrant** may authorize a deputy collector to levy, upon all property and rights to property. (Emphasis added).

Congress specifically required an executive branch **warrant** under the 1939 Code law, which was continued by the statement of Congressional intent:

> **Sec. 6331. Levy and distraint**
> This section continues in effect the provisions of existing law relating to distraint and levy (see secs. 3690 and 3692 of the present Internal Revenue Code). *U.S. Code Congressional and Administrative News*, Vol. 3 (1954).[6]

Repeal of a section is not to be implied unless there is a positive repugnancy between the provisions of the new law and those of the old, and this is a most appropriate rule of construction as to the interpretation of laws for the collection of revenue. Wood v. United States, 16 Pet. 342, 363 (1842); Graham v. Goodcell, 282 U.S. 409 (1931).[7] A sworn statement demonstrating probable cause[8] for the seizure by competent authority,[9] among other requirements, is necessary for pre-judgment seizure under both the 4th and 5th Amendments, *see* Secs. I(A)(1)(a)(i) & (ii). The levy statutes would therefore be unconstitutional without the executive branch warrant requirement recognized by case law. The controlling precedent in the 6th Circuit, United States v. O'Dell, 160 F.2d 304 (6th Cir. 1947), holds that the warrant is required, *see* Sec. I(A)(1). The Circuit Court's order in this

case, if allowed to stand, overrules O'Dell. The Supreme Court has never decided the matter.[10]

Upon valid seizure, a custodial relationship over property seized is created between the government and the party honoring a levy. National Bank of Commerce, 472 U.S. 713, 720 (1985).[11] In the case of personal property, the government then must send a notice of seizure to the party in possession of the property seized describing the property seized and establishing the date of the levy:

> **(a) Notice of seizure.**
> As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property (**or, in the case of personal property, the possessor thereof**), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded **and shall contain, in the case of personal property, an account of the property seized and**, in the case of real property, a description with reasonable certainty of the property seized. **26 U.S.C. Sec. 6335(a).** (Emphasis added).

(or in the case of federal government employees, where no seizure technically is made, rather than a notice of seizure, the statute provides for a "notice of levy"[12]), to establish the date of the levy[13]:

> **(b) Date when levy is considered made**
> The **date on which a levy on property or rights to property is made shall be the date on which the notice of seizure provided in section 6335(a) is given.**
> **26 U.S.C. Sec. 6502(b).** (Emphasis added.)

and stating what specifically has been seized. A due process violation exists concerning the quasi in rem theory upon which the notice is based. In the instant case, Plaintiff has never seen the actual process alleged to "seize" Plaintiff's special[14] property, Plaintiff's wages, for

over a year. While entrustment is presumed in quasi in rem cases, how valid is this as a basis for presuming notice, where Plaintiff has had to sue Defendant to obtain it, and has never had the original to use to contest the validity of the levy, and where the government has established a fierce penalty to discourage the normal presumption of cooperation with one entrusted with property?

Only after the notice of seizure/notice of levy is "given" is the Secretary entitled to demand the subject seized property.[15] Obviously the Secretary does not send a notice of seizure for items once it is determined they are not "property" of the alleged tax debtor or are not "subject to levy".[16] In the instant case, it is undisputed that Defendant did not receive either the required executive branch warrant to initiate the seizure; or notice of seizure itemizing what was seized, and establishing the levy date; or demand.

Small employers, such as Defendant, seldom see federal tax levies, so have little opportunity to become acquainted with the correct process. They are of course, required to know the law.[17] In the instant case, Defendant cannot claim immunity, because it received only a notice of levy, which cannot possibly apply in the case of Plaintiff, who is obviously not a government employee, see 26 U.S.C. Sec. 6331(a), nor is there any reasonable mistake of fact concerning that fact on the part of either the government or Defendant,[18] since it is well known and obvious from the cases that the Internal Revenue Service, "IRS," practice has been to send only an unsworn notice of levy with none of the required language of "seizure" or "demand" in all cases, whether the delinquent is a government employee or not.

The notice of levy was inadequate as a warrant to delegate authority and initiate the levy, and as a notice of seizure, to itemize property seized. Nor was demand made. The government will not swear that the tax is due and owing because it is not, nor will they actually levy, which would be to commit trespass, since under the circumstances the tax cannot be owed constitutionally. *See* Exhibit H, Rivera letter.

It is deplorable that the IRS has made a practice of evading the required statutory process, relying on fear and the ignorance and/or indifference of banks and employers concerning the proper process. "The Internal Revenue Service, with its expertise, is obliged to know its own governing statutes and to apply them realistically." Bothke v. Fluor Engineers & Constructors, Inc., 713 F.2d 1405, 1414 (9th Cir. 1983). It is obvious that under the statutory scheme, the notice of levy is the intended substitute for the notice of seizure in the narrow case of levy on the accrued wages or salary of government employees and officers,[19] the case law makes clear the necessity of operative words, and the Constitutional standards make clear the necessity of a sworn statement upon probable cause. Whether Defendant was duped by the IRS routine practice of sending only a wholly inadequate notice of levy, or was intimidated by the Service's reputation, is irrelevant, although Plaintiff did advise Defendant that there were problems with the process. Exhibit C. There is only immunity when the statutory requirements are met. The statute requires strict compliance.[20] Not only were the statutory requirements not met, the violations of the statute are egregious. They are egregious and shocking violations of Constitutional rights no matter how many times the IRS has committed them over the last fifty years.

a. Whether the notice of levy properly initiated levy?

"Illegitimate and unconstitutional practices get their first footing…by silent approaches and slight deviations from legal modes of procedure." Boyd v. United States, 116 U.S. 616, 635 (1886).

As demonstrated above, the statutory federal levy process requires a properly executed executive branch warrant; notice of seizure (or notice of levy in the case of accrued salary in the hands of the government); and demand, before one honoring a levy can claim immunity under 26 U.S.C. 6332(e).

The better reasoned and on point case law holds that a notice of levy does not properly initiate levy and does not accomplish the distraint required by 26 U.S.C. Sec. 6331. United States v. O'Dell, 160 F.2d 304 (6th Cir. 1947). While O'Dell and other cases discussed, infra, were decided prior to implementation of the 1954 Code, as shown, legislative intent was to continue the existing law relating to distraint and levy. As to those "provisions of existing law" and whether a notice of levy effects a levy, O'Dell is directly on point. There it was held that a Collector's notice to a trustee in bankruptcy that there were unpaid taxes due from the bankrupt, and that all money and other property in his hands belonging to the bankrupt was seized and levied upon for payment of the taxes, did not constitute a seizure of such property but was only a statement of notice or claim.

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

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

> **As we read the allegations of the petition, it asserts a threat to distrain rather than an actual distraint…** The facts here, insofar as the procedure

> is concerned, appear to be quite similar to those in United States v. O'Dell, 6 Cir., 160 F.2d, 304, 307. There it was held that a Collector's notice to a trustee in bankruptcy that there were unpaid taxes due from the bankrupt, and that all money and other property in his hands belonging to the bankrupt was **seized and levied upon** for payment of the taxes did not constitute a seizure of such property but was only a statement of notice of claim… We think the same is true in our case. So far as the petition shows, there was no seizure, but only a threat of seizure – the petition alleges that the Collector threatens to issue a warrant of distraint. Givans v. Cripe, *supra*, at 228. (Emphasis added).[21]

Givans recognizes that in O'Dell, even the words "seized and levied upon" were inadequate to validate a notice of levy.[22]

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

> The distress authorized by Sec. 3690 is different from anything known to the common law, both because it authorizes a sale of the property seized, and because it extends to other personalty than chattels. By its very nature it requires that the demands of procedural due process of law be rigorously honored. In the case at bar there was no lawful acquisition of possession of the property representing the surplus funds held by defendant, whether those funds were derived from the corporeal or intangible resources of Brokol. The surplus should be returned to the Trustee to be administered under the Bankruptcy Act. Freeman v. Mayer, 152 F. Supp., id., at 387.

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

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

As noted in United States v. Manufacturers National Bank, 198 F. Supp. 157 (N.D.N.Y. 1961), even the Government acknowledged in its supplemental brief in La Salle Music Corp. v. Magarian Rest., Inc., 183 N.Y.S.2d 599 (1959), "that under the 1939 Internal Revenue Code a warrant of distraint was, in most cases, a necessary prerequisite to an effective levy."

The notice of levy here contained neither words of seizure nor of demand, and did not purport to be a levy. Nor is it the required executive branch warrant. It is not sworn and does not exhibit probable cause for search or seizure. It does not contain a delegation of authority. It violates the controlling precedent in the 6th Circuit, O'Dell v. United States. It was ineffective to initiate a federal tax levy under 26 U.S.C. Sec. 6331.[23]

i. Whether the Fourth Amendment permits warrantless prejudgment search and seizure in this non-jeopardy, alleged tax matter?

Searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Federal Constitution's 4th Amendment, subject only to a few specifically established and well-delineated exceptions. Minnesota v. Dickerson, 508 U.S. 366 (1993). In G.M. Leasing, 429 U.S. 338 (1977), a jeopardy case, the Supreme Court specifically rejected the argument that there is an exception to the Fourth Amendment that allows warrantless seizures for tax purposes. G.M. Leasing, id., at 359. "Indeed, one of the primary evils intended to be eliminated by the Fourth Amendment was

the massive intrusion on privacy undertaken in the collection of taxes pursuant to general warrants and writs of assistance." G.M. Leasing, id., at 356.

The Fourth Amendment to the United States Constitution requires:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and **no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.** U.S. CONST. amend. IV (Emphasis added).

> In order to ascertain the nature of the proceedings intended by the fourth amendment to the constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;' since they place 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. Boyd v. United States, 116 U.S. 616, 625-626 (1886).

Plaintiff's accounts receivable on which any levy is deemed "first made" or "made," are her effects, and therefore entitled to 4th Amendment protection.[24]

In Boyd, the Supreme Court described the "forcible entry into a man's house and searching among his papers" as "aggravating incidents of actual search and seizure," but held that a compulsory production of a man's private papers to establish a criminal charge against him, "**or to forfeit his property**, is within the scope of the fourth Amendment to the constitution, in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object and purpose of search and seizure." Boyd v. United States, 116 U.S.,

id., at 623. (Emphasis added).

One may be more embarrassed, damaged, and rendered more insecure, by a rummaging through the records of one's accounts entrusted to others, than by the rummaging through one's drawers in one's home. In the home, at least, one may have the ability to review the papers claimed to authorize search and seizure, and to object to their deficiencies on the spot. When one's property is in the hands of another, one has no such security. The rights to associate and to contract freely are therefore also infringed by the current unreasonable search and seizure under the notice of levy "process."

Reliance on such associations and contracts are today more indispensable than at the time of the Constitution's framing, when people were generally more self-sufficient. In the instant case, Plaintiff has had her employment relationships and prospects with Defendant essentially destroyed by this bogus, unauthorized "process" which does not properly verify that Plaintiff had any tax liability whatsoever, or could have, under the circumstances, constitutionally. How many livelihoods have been destroyed by this abusive, coercive, non-procedure? How much resource waste to businesses large and small is caused by this chicanery, this flagrant disregard of and disrespect for the Constitution of the United States? Governments cannot be allowed to interfere with contractual relationships without proper safeguards. This is why Congress has required **warrants**, based upon probable cause, to initiate a levy under 26 U.S.C. Sec. 6331.

The 4th Amendment speaks to the right of the people to be **secure**, and not just to the right

of privacy. Privacy is a more limited conception than the actual language of the Amendment requires. The Fourth Amendment is directed to the security of their **persons**, and therefore mental and emotional security, as well as physical security, are protected from unreasonable searches, as they should be. Plaintiff has a right to feel **secure** that Plaintiff will not be subjected to a "levy" that places "the liberty of every man in the hands of every petty officer," Boyd, *supra*, at 616, as the current unsworn notice of levy "process," relegated to deputy collectors without proper delegation of authority or warrant demonstrating probable cause does, if petty officers they even be, given the unclear status of the IRS as an agency of the Treasury Department. See Exhibit J.

How is Plaintiff's status as a "taxpayer" for liability purposes[25] to be assured statutorily or constitutionally? Or the validity of the assessment and other procedural requirements as to probable cause verified? If citizens must swear under penalty of perjury to the existence of a tax liability when they "self-assess" (the ultimate petty officers), it does not seem too much to ask that competent governmental authority swear to the regularity of the extreme remedy of prejudgment seizure, especially in cases such as Plaintiff's where there was no self-assessment. Parties required to honor levies deserve no less than a warrant sworn to upon probable cause to assure they are not engaging in trespass or other violations of property or contract rights. Seizure is required for levy. In allowing the warrantless search for Plaintiff's assets among financial institutions and associates without adequate proofs – probable cause – that a tax debt is due and owing, sworn to by competent authority, Plaintiff's security and privacy are surely unreasonably and unfairly infringed, and her reputation unjustly damaged.

The framers were very familiar with the concept of executive branch warrants when they chose the words "no warrants". *See* Murray's Lessee et. al. v. Hoboken Land and Improvement Co., 18 How. 272, 279 (1856), for a partial listing of executive branch warrants in effect at the time the Constitution was written. Murray's Lessee was decided solely on the basis of the judicial power and due process clauses, and therefore involved an inquiry into processes previously in effect,[26] and as to funds due from receivers of the revenues on their bonds.

> The Fourth Amendment would not emerge from colonial precedents; rather, it would repudiate them; or, as Cuddihy states, 'The ideas comprising the Fourth Amendment reversed rather than formalized colonial precedents. Reasonable search and seizure in colonial America closely approximated whatever the searcher thought reasonable.' Levy, Origins of the Bill of Rights (1999).

The Fourth Amendment was written especially to address tax collection abuses. Since the Fourth Amendment standard, especially as elaborated by case law, is the more specific, a seizure that passes muster under the Fourth Amendment should also satisfy the requirements of the due process clause viewed as an independent source of constitutional norms. McKinney v. George, 726 F.2d 1183, 1187 (1984). The 4th Amendment was written especially to address the oppressions caused by the revenue laws, rather than continue historical oppressions as a solely due process analysis may do. If the judicial warrant process intends to protect only privacy interests narrowly defined, the Congressionally mandated executive warrant process must protect security, and be required by the Constitution to do so. Congress is the branch most in touch with the people and their reasonable expectations of *security*. Fortunately the question of a constitutional requirement as to an executive branch warrant need not be decided here, as Congress has ordered an executive warrant, and it too

must comply with the 4th Amendment strictures for "no warrants but upon probable cause.." The notice of levy in this case does not contain a finding of "probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," by authority competent to do so. Plaintiff has a right to be secure in his person, and this security involves the mental and emotional security of knowing that the security of his earnings and future earnings from unreasonable searches and seizures[27] may not be breached. The security of Plaintiff's person – mental, emotional and physical – and not just his privacy, are protected. When Congress specifies "by warrant," one who honors process pursuant to such statute must be permitted to expect the process to comply with the plain language terms of the 4th Amendment for warrants. Plaintiff had a right to expect such process concerning his effects.[28]

In Boyd, supra, the Supreme Court recited the 1762 case of Entick v. Carrington and Three Other King's Messengers, 19 How. St. Tr. 1029, quoting Lord Camden:

> Such is the power, and therefore one would naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant. If it is law, it will be found in our books; if it is not to be found there it is not law… The great end for which men entered into society was to secure their property.

Carrington involved the validity of an executive branch warrant in a seditious libel case. Where is the law that has eliminated the executive branch warrant requirement mandated by Congress, which case law requires, which Congress expressed its intent to continue, which rules of construction presume is continued, and which the model of a reasonable search noted in Gerstein v. Pugh, supra, mandates?

> The case of searching for stolen goods crept into the law by imperceptible practice. No less a person than my Lord Coke denied its legality (4 Inst. 176)

> and therefore, if the two cases resembled each other more than they do, we have no right, without an act of parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity. Observe, too, the caution with which the law proceeds in this singular case. There must be a full charge upon oath of a theft committed. The owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant, to show them to the officer, who must see that they answer the description…
>
> If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief would likewise in this case protect the subject by adding proper checks; would require 'proofs beforehand'; would call up the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy, my answer is that all these precautions would have been long since established by law if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing. Entick v. Carrington, id., cited in Boyd, supra, at 628-629.

Plaintiff cannot improve upon the words of Lord Camden. The 4th Amendment does not permit warrantless prejudgment seizures in federal tax levy cases under 26 U.S.C. Sec. 6331. An executive branch warrant was required to establish the custodial relation. If notice of seizure is such a "vague term" as Defendant stated in its response to Plaintiff's Interrogatories, the 4th Amendment is also violated.

ii. Whether the Fifth Amendment Due Process Clause permits this unsworn form of prejudgment seizure which does not establish probable cause for either the search for, or purported seizure of, Plaintiff's property?

Due process of law "generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings." Murray's Lessee et. al. v. Hoboken Land & Improvement Co., *supra*, at 280 (1855). We should compare and see whether the federal government is applying the same due process standards to itself in the collection of its revenues as those to which it has held creditors in

the states.

In Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), the Supreme Court repeatedly emphasized the requirement of a sworn affidavit and other safeguards before upholding prejudgment seizure of consumer articles under the 14th Amendment Due Process clause.

> The accompanying affidavit of Grant's credit manager **swore** to the truth of the facts alleged in the complaint. Mitchell, id., at 603. (Emphasis added).
>
> The writ, however, will not issue on the **conclusory allegation** of ownership or possessory rights. Article 3501 provides that the writ of sequestration shall issue '**only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts' shown by a verified petition or affidavit**. In the parish where this case arose**, the clear showing required must be made to a judge, and the writ will issue only upon his authorization and only after the creditor seeking the writ has filed a sufficient bond to protect the vendee against all damages in the event the sequestration is shown to have been improvident.** Mitchell, id., at 606-607. (Emphasis added).
>
> The writ is obtainable on the creditor's ex parte application, without notice to the debtor or opportunity for a hearing, **but the statute entitles the debtor immediately to seek dissolution of the writ, which must be ordered unless the creditor "proves the grounds upon which the writ was issued,"** Art. 3506, **the existence of the debt, lien, and delinquency, failing which the court may order return of the property and assess damages in favor of the debtor, including attorney's fees**. Mitchell, id., at 607. (Emphasis added).

These standards sound more like the "proofs beforehand" that Lord Camden said were required in Entick v. Carrington, quoted in Boyd, *supra,* at 629, (or Mr. Springer's not-preserved-for-appeal "indispensable preliminaries"), and which were recognized by the United States Supreme Court in Boyd, at 628-629. The Mitchell standards were resolved under a due process standard, and not a more stringent 4th Amendment standard, by a divided court with strong dissent against upholding even this statute. On the facts, Mitchell required

judicial supervision and local process.

In the instant case, there has been no sworn affidavit. The notice of levy does not purport to be a warrant as required by the pre-1954 case law Congress expressed its intent to continue. There has been no delegation of authority to the person who "signed" the notice of levy. There are only the most conclusory of allegations, suggestions, really, that Plaintiff is even a taxpayer, that there has been a valid assessment, that proper notice has been given, and that all the requirements of the federal tax levy statutes have been complied with, and that this is even intended to be a levy, with seizure and distraint as required. Without a sworn statement of probable cause by competent authority, it all amounts to suggestion, particularly considering the Constitutional problems concerning the "income tax" documented in the Rivera letter. This is neither reasonable nor fair.

Compare this with the Warrant for Distraint, Form 69, Rev'd 3/33, which was in use at some time under the pre-1954 law, Exhibit K,[29] obtained from Distraint Under the Federal Revenue Laws, *supra,* at 144-147. The Warrant for Distraint was under the seal of the Collector of Internal Revenue that the person is liable for the tax under the "Acts of Congress" and that other necessary procedures have been complied with. It runs to the Deputy Collector and authorizes, delegates to him, to distrain and seize, and requires him to "**strictly comply** with **all** requirements of law and for so doing this shall be your **warrant**." (Emphasis added). The warrant for distraint purported to *be* a warrant, required a signature and was under seal. Sec. 26 U.S.C. Sec. 6331 was undoubtedly "clarified," after the cases requiring a warrant, by making clear that the Secretary is responsible for delegating the

authority, or by regulations assigning a non-ministerial officer to issue the warrants, such as the former officer, Solicitor of the Treasury, but the delegation must appear on the warrant's face. No warrant delegation authority has been authorized, and, whose ever the name is that appears on the Defendant's notice of levy, is without authority to issue a warrant, and never purported to do so.

> The 'root requirement' of the Due Process Clause is 'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some **valid** governmental interest is at stake that justifies postponing the hearing until after the event.' Boddie v. Connecticut, 401 U.S. 371, 379 (1971)(emphasis in the original). See, e.g., Bell v. Burson, 402 U.S. 535, 542 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970). The precise timing and attributes of the due process requirement, however, depend upon accommodating the competing interests involved. Goss v. Lopez, 419 U.S. 565, 579 (1975); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).
>
> **Governmental seizures without a prior hearing have been sustained where** (1) the seizure is necessary to protect an important governmental or public interest, (2) there is a '**special need for very prompt action**,' and 'the standards of a narrowly drawn statute' require that an **official** determine that the particular seizure is both necessary and justified. See Fuentes v. Shevin, 407 U.S. 67, 91 (1972). Seizures pursuant to jeopardy assessments are clearly necessary to protect important governmental interests and there is a 'special need for very prompt action'…
>
> In Goss v. Lopez, supra, the Court held that notice and hearing must follow a deprivation 'as soon as practicable.' 419 U.S., at 582-83. The Louisiana statute upheld in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), entitled debtors whose assets had been seized to a hearing immediately following seizure and to invalidation of the seizure unless the creditor could prove the basis for the seizure, id., at 606. In contrast, a Georgia garnishment statute was invalidated for want of any opportunity 'for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment.' North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607 (1975). Thus, the governing due process principle obliges the IRS to provide a prompt hearing at which the IRS must prove 'at least probable cause' for its claim. Mr. Justice Brennan, concurring in Laing v. United States, 423 U.S. 161, 187-188 (1976). (Emphasis added).

This review by Mr. Justice Brennan calls into question whether pre-judgment seizure in non-jeopardy cases can pass the due process test. Mr. Justice Brennan concluded that "because present law denies an affected taxpayer access to any forum for review of **jeopardy** assessments for up to 60 days" (emphasis added), due process was violated. How "prompt" has Plaintiff's hearing been here, where the process requirements have been so obscured by stealthy encroachment? The Summary Judgment motion under review was not heard for more than a year after Plaintiff first filed the contract action.[30] The Circuit Court and counsel for the Defendant have seemed genuinely perplexed that such an action could even be brought.

In footnote, Mr. Justice Brennan then provides the key to the due process standard concerning prejudgment federal tax levy under 26 U.S.C. Sec. 6331:

> [Footnote*] The dissenting opinion would require no justification for even a six-month delay, apparently on the view that tax seizures are somehow different from other deprivations for due process purposes. I am aware of no precedent drawing that distinction. Phillips v. Commissioner, 283 U.S. 589 (1931), concerned a procedure that offered taxpayers an alternative of seeking a prompt determination before the Board of Tax Appeals, the predecessor to the Tax Court, before payment and without posting any bond. Id., at 598. The bond referred to in the dissenting opinion, post, at 210-211, was required pending review in the court of appeals of the Board of Tax Appeals' decisions. Laing, id., at 189, Mr. Justice Brennan concurring.

There is no lower due process standard, therefore, for tax cases. Phillips only upheld the summary levy process because there were two paths, and the "taxpayer" could go to "Tax Court" and not pay first.[31]

Mitchell, Sniadach and the other Due Process cases make clear that the purported

levy under consideration here would be unconstitutional if held to comport with the statutes and case law concerning its form.

iii. Whether the non-delegation of lawmaking powers was violated by regulations that eliminate a warrant requirement, which confuse the notice of levy with a warrant and with the notice of seizure, and which make unearned earnings "property"?

The separation of powers doctrine prevents executive branch agencies from exceeding statutory authority in their regulations. The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. Morrill v. Jones, 106 U.S. 466 (1882).[32] The non-delegation of powers doctrine was violated by regulations that have ignored the warrant requirement, which confuse the notice of levy with the warrant requirement and with the notice of seizure, and which treat unearned earnings as "property" regardless of state law.

b. Whether Defendant proved there was a valid notice of seizure establishing the date of the levy?

Defendant offered no valid notice of seizure although under a Discovery Order to do so if one existed. See Exhibit E. A notice of seizure, per 26 U.S.C. Sec. 6335(a), provides an account of property that has been seized. The notice of levy in this case certainly did not do this. The date of the levy is the date the notice of seizure is given, per 26 U.S. C. Sec. 6502(b). This levy has not happened. Defendant failed to prove it happened. Defendant is required to prove the levy, its date, and service. Commonwealth of Kentucky v. Laurel County, 805 F. 2d 628, 634 (6th Cir. 1986); Resolution Trust Corp. v. Gill, 960 F.2d 336 (3rd Cir. 1992). Defendant is therefore without immunity. Requirements of this section for serving notice of seizure are mandatory and require literal compliance. Jones v. New Pittsburgh Courier Pub. Co., 364 A.2d 1315, 469 Pa. 157, cert. den. 430 U.S. 984 (1976).

If the term "notice of seizure" is truly as vague as Defendant claimed in its reply to Plaintiff's interrogatories such that it cannot say for certain if it has one, the statute is surely a violation of Due Process.

c. Whether Defendant proved the Secretary made "demand"?

"One who is in possession of property upon which a levy has been made must hold it (except in certain cases not here relevant) subject to the demand of the district director." 26 U.S.C.A. Sec. 6332. Seattle Assoc. of Credit Men v. United States, 240 F.2d 906, 909 (9th Cir. 1957).[33] Defendant never proved the Secretary demanded Plaintiff's property of any kind, earned or unearned. "Demand" is required for immunity under 26 U.S.C. Sec. 6332(e). Defendant was therefore not entitled to immunity, and the holding of the Circuit Court must be reversed.

Serious deficiencies in the levy notices may call into question the legal effectiveness of the levy, and give reasonable cause for failing to honor the levy. United States v. Donahue, 905 F.2d 1335 (9th Cir. 1990).[34]

> Reasonable cause to resist a levy exists when there is "a bona fide dispute over the amount owing to the taxpayer (by the property holder) or over the legal effectiveness of the levy itself * * *." United States v. Sterling National Bank & T. Co. of N.Y., 494 F.2d 919 (2d Cir. 1974). An unsettled question of law concerning the rights and obligations with respect to the property held constitutes reasonable cause. Id.; United States v. Cuti, 395 F.Supp. 1064 (E.D.N.Y. 1975). United States v. Augspurger, 452 F. Supp. 659, 669 (D.W.D.N.Y. 1978).

Defendant had ample grounds to resist the note from someone apparently from the IRS. The note/fundraising appeal from the IRS is no defense to Plaintiff's contract action for earnings long past due him. If a friend of the company's owner sent the owner a note asking for

Plaintiff's wages for the next three years, would that suffice?

2. Whether Defendant proved Plaintiff's unearned earnings at the time of the levy were "property", "subject to levy" under 26 U.S.C. Sec. 6331(a)?

As if the total absence of the required process for levy and demand weren't adequate to reverse the Circuit Court's finding of immunity on the levy issue, Plaintiff's unearned earnings at the time of the levy aren't even a property interest under 26 U.S.C. Sec. 6331. An unsettled question of law concerning the rights and obligations with respect to the property held constitutes reasonable cause to refuse to honor a levy. United States v. Augspurger, *supra,* at 669.

What is a property interest for purposes of 26 U.S.C. Sec. 6331 is a question of state law. Glass City Bank v. United States, 326 U.S. 265 (1945); United States v. Sullivan, 333 F.2d 100 (3rd Cir.1964); Commonwealth of Kentucky v. Laurel County, 805 F. 2d 628, 630 (6th Cir. 1986); Resolution Trust Corp. v. Gill, 960 F.2d 336 (3rd Cir. 1992). "Moreover, it has long been an axiom of our tax collection scheme that, although the definition of underlying property interests is left to state law, the consequences that attach to those interests is a matter left to federal law." United States v. Rodgers, 461 U.S. 677 at 684 (1983). In determining whether the account receivables were subject to levy, state law determines "the nature of the legal interest which the taxpayer had in the property." United States v. General Motors Corp., 929 F.2d 249, 251 (6th Cir. 1991), citing National Bank of Commerce, 472 U.S. at 722.

Pennsylvania law "does not treat 'future earning capacity' as 'property or rights to property,'" Glass City Bank v. United States, 326 U.S., *supra* 269.

> **In the absence of a statute to the contrary, it is the usual rule that a garnishment does not affect future earnings or salary…** United States v. Long Island Drug Co., 115 F.2d 983, 986 (2nd Cir.1940). (Emphasis added.)

Plaintiff can find no statute wherein Congress has expressed its intention to abrogate this common law rule. Statutes in derogation of the common law must be strictly construed. In Sims v.United States, 359 U.S. 108-114 (1959), the Supreme Court mentioned no less than eleven times in a seven page opinion that only **accrued** wages/salary were reached by the levy. Plaintiff's unearned earnings at the time of the purported levy were not a property interest under Michigan law.[35] There is no right of action for unearned earnings.

The time of the levy for this purpose is set forth in 26 U.S.C. Sec. 6331(e)(1): "The effect of a levy on salary or wages **payable to or received by a taxpayer** shall be **continuous** from the date such levy is **first** made until the levy is released under section 6343." (Emphasis added). If the Court finds the notice of levy was valid to seize Plaintiff's property and create a custodial relation, only those earnings accrued at the time the warrant was served were property of Plaintiff. There is a genuine issue of material fact concerning the amount of wages accrued at the time the purported warrant was served. Whether levied funds were still on deposit at the time of Internal Revenue levy was a question of fact precluding summary judgment in dispute between government and holder of checks drawn on the accounts. Resolution Trust Corp. v. Gill, 960 F.2d 336, 341-342 (3rd Cir.1992). As shown previously, in Gill, the validity of the notice of levy was not questioned. However, the date of the levy for purposes of 26 U.S.C. Sec. 6332(e) is still "the date the notice of seizure is given". 26 U.S.C. Sec. 6502(b).

The plain language of Sec. 6331 confirms that Plaintiff's unearned earnings at the time of service of the alleged warrant are not "property." Under Sec. 6331, levy may be made only on "the **accrued** salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia." (Emphasis added). Future earnings are not a property interest under local, District of Columbia law.[36]

Even the Internal Revenue Service argued that unearned earnings are not property, after the "continuing levy" provision as to wages became effective in July 1989. In James v. United States, 970 F.2d 750 (10th Cir. 1992), "taxpayers" brought a quiet title action under 28 U.S.C. Sec. 2410 for return of wages already "seized". The IRS argued that plaintiff did not have title interest to the property in his "unpaid or unearned wages":

> The IRS argues, without benefit of authority, that plaintiffs do not satisfy the jurisdictional requirement of Sec. 2410, because it alleges that they do not have a title interest in the subject of the levied property. The IRS would have us hold that Mr. James has no title interest to his unpaid or unearned wages. It is axiomatic, however, that an IRS levy on wages is a levy on the taxpayer's property. *See* I R. tab 1 es. A ("AS PROVIDED BY SECTION 6331 OF THE INTERNAL REVENUE CODE, YOUR PROPERTY OR RIGHTS TO PROPERTY MAY BE SEIZED. *THIS INCLUDES SALARY OR WAGES*, BANK ACCOUNTS, COMMISSIONS, OR OTHER INCOME.") (Emphasis added). FN 11. James, id., at 756.

Here Plaintiff has cited the authority which, had it been cited, should have caused a different result in James. Unearned earnings are not a property interest under Michigan law, and state law controls the question of what is property under 26 U.S.C. Sec. 6331. Obviously the IRS in James was hoping to have its cake and not say how. Needless to say, regulations cannot expand the statute.

While there is an absence of legislative history, continuing levy under 26 U.S.C. Sec. 6331(e)(1) appears to be intended, in addition to establishing when wages are "property" (when the "levy is **first made**"),[37] to create an exception where "wages **payable to or received by a taxpayer** shall be **continuous** from the date such **levy** is **first made** until such levy is released under section 6343," (emphasis added), to the holding in Thompson v. Whitman, 85 U.S. 457 (1873). There the Supreme Court stated that a **seizure** was not "continuous in character": "A seizure is a single act, and not a continuous fact," Thompson, id., at 472, so that a sloop seized where there was no jurisdiction for the seizure could not be transported to where there was jurisdiction and be deemed seized. This is also not in derogation of the common law rule (which would require a plain statement of legislative intent) that state law controls concerning what is property, but, as by analogy to Thompson, probably has only reference to that which is property at the time of the seizure, where paychecks may be in transit, "payable to," or already "received by," the "taxpayer". The continuing levy section was added at the same time as 26 U.S.C. 6332(c), which also seems to have been rather a red herring, giving the appearance of a 21 day rule to turn over bank deposits subject to levy, but notice of seizure and demand are still required, and the 21 day rule is a minimum.[38]

There being no "statute or rule to the contrary," it is the rule, as stated in United States v. Long Island Drug Co., *supra*, at 986, "that a garnishment does not affect future earnings or salary" and only Plaintiff's earnings on the date the levy was **first made**, if it was, were seized, awaiting notice of seizure and demand, absent which Defendant is necessarily without

immunity.

It has never been clearly established that wages generally are even property "subject to levy":

> Though we shall **assume** that a salary or wages which have been earned may be made subject to distraint and levy, the situation in respect to future earnings is quite different. They are contingent upon performance of a contract of service and represent no existing rights of property… United States v. Long Island Drug Co., 115 F.2d 983, 986 (2nd Cir.1940). (Emphasis added).

The viability of wage levies is particularly in doubt after the decision in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), that wages are special in the context of pre-judgment seizure under the due process clauses.[39]

The sole notice of levy received by Defendant is dated October 20, 1998. Should this Court recognize the unsworn notice of levy with no delegation of authority as the necessary warrant, adequate to seize Plaintiff's property in the possession of the Defendant, and **if** wages are property "subject to levy," only those earnings accrued when the levy was "first made" were seized, as Plaintiff's unearned earnings were not "property" at that time. Of course, Defendant still was required to produce a notice of seizure documenting and acknowledging government responsibility for what was seized, and a demand, to qualify for immunity. This it did not do.

For the foregoing reasons, Defendant did not prove that there was "no genuine issue of material fact" and that it was entitled to judgment as a matter of law on the levy question.

II. Whether the Circuit Court erred in granting Defendant's Motion for Summary Judgment on the issue of wage withholding, denying Plaintiff's contract action for admittedly due earnings, and recognizing Defendant's affirmative defense

that wage withholding was required, where no valid wage withholding certificate was of record and where there is no statutory or other authorization to withhold wages without a valid wage withholding certificate in effect?

As previously noted, see FN1, the Circuit Court apparently forgot this issue was part of the case. The likelihood of error is therefore substantial.

A. No statute authorizes Defendant to withhold "withholding taxes" from Plaintiff's earnings without a signed wage withholding certificate in effect; there is a genuine issue of material fact as to whether, as alleged by Defendant, and when, the IRS sent an order concerning Plaintiff's wage withholding, so Defendant is not entitled to judgment as a matter of law.

Defendant has now changed its tune and contends that it was not an IRS order that it relies upon to withhold "withholding taxes" from Plaintiff's wages. It was convenient for Defendant to rely upon the purported order to attempt to bring itself within Pascoe v. IRS, 580 F. Supp. 649 (E.D.Mi.1984), in an attempt to defeat Plaintiff's Motion for Preliminary Injunction (the trial court apparently never realized this second issue was part of the case, as it's preliminary injunction order confused Issue 1 and Issue 2). Defendant is under the order of the Circuit Court to turn discovery materials over to Plaintiff, which would include this "order," as well as any notice of seizure, and has not done so. The notice of levy substantively does not comply with the statutory requirements for a notice of seizure, it does not contain an account of what was seized.

Defendant now contends 26 U.S.C. Sec. 3402(a)(1) controls the earnings withholding under consideration.

> Every employer making payment of wages shall deduct and withhold upon wages a tax determined in accordance with tables or computational procedures prescribed by the Secretary.
>
> **26 U.S.C. Sec. 3402(a)(1)**

No part of 3402(a)(1) imposes a tax on anyone or anything. Neither the employer nor the Secretary has the authority to determine who would be subject to a tax. The Secretary does have, however, authority to prescribe tables and computational procedures which would apply to the withholding from one who is subject to a tax, which is the major import of the rest of the section cited by Defendant.

Who would be subject to a tax? Section 3402(a)(1) is found in chapter 24 of the Code. The latter part, under 3402(a)(1)(B), clearly states that the withholding must:

> …reflect the provisions of chapter 1 [of the Code]…
> **26 U.S.C. 3402(a)(1)(B). (Explanation added).**

Chapter 1 of the Code is the part of the Code that involves the so-called "income" tax. The tax is not imposed in chapter 24. It is imposed in section 1 of chapter 1. Withholding from an individual could only reflect the provisions of section 1 of the Code if the individual is subject to a revenue tax, (or voluntarily agreeing in advance to pay part of his state's share of a direct tax prior to federal collection, as suggested by the Pollock case (and even prior to apportionment, as not suggested by the Pollock case)). The employer has no authority to draw this conclusion. If Defendant has, as it claimed, some IRS order that bears on this, it should have been brought forward. Plaintiff has seen these purported orders before. They address withholding for one who has a withholding certificate on file. See Exhibit M. Defendant has no doubt read the "order" with more care, and recognized its error. Plaintiff has revoked all wage withholding certificates, Exhibit C, which of course distinguished this case from Pascoe, *supra*, on which Defendant and the court relied to deny Plaintiff injunctive relief. (O. 12/23). Plaintiff never voluntarily entered into a wage withholding agreement, and

the IRS knows this. Wage withholding seems to be nothing more than a third party beneficiary charitable subscription or debt acknowledgment (recognizance).

Nothing in the Code or regulations requires an employee to furnish a wage withholding certificate. 26 U.S.C. 3402(f)(1)(A-E) says only that an employee must furnish a certificate to claim exemptions. If an employee claims no exemptions, there is no need or requirement to furnish a withholding certificate. A withholding certificate would not apply to one who is not subject to the tax, (or not voluntarily agreeing to pay a direct tax not yet apportioned), see discussion of Economy Plumbing & Heating Co. v. United States, 470 F.2d 585 (1972) to the effect that the Code is a system in regulation of taxpayers and not non-taxpayers, and Exhibit H.

The rest of the Code and regulations sections cited by Defendant in the Circuit Court are the result of similar misconstructions which are the result of failure to carefully read the Code and understand it in light of Pollock and Economy, a*supra*, and the many cases that hold the Code is a system in regulation of taxpayers and not non-taxpayers. 26 U.S.C. Sec. 3402(I)(1), cited by Defendant as to marital status, says that it may be determined by the employer, "For purposes of applying the tables in subsection (a) and (c)…" As outlined above, the tables don't apply if the tax does not apply. The employer has no authority to make that determination if an employee does not, as opposed to **fails**, to submit a wage withholding certificate. The employer is not authorized to determine if the employee has "failed." The IRS "order," if it exists, must be disclosed to reveal what, if any, determination, or calculated disinformation, issued on this point.

Regulations obviously cannot expand the statute, but when read with a careful and practiced eye, they do not authorize the withholding Defendant alleges it is authorized to take (and hold on to, and collect interest on). The employer is the "taxpayer" under these statutes.

> **Sec. 31.3402(f)(2)-1 Withholding exemption certificates.**
> (a) *On commencement of employment.…*
> (b) The employer is required to **request** a withholding exemption certificate from each employee, but it the employee **fails** to furnish such certificate, such employee shall be considered as a single person claiming no withholding exemptions.
> *26 CFR 31.3402(f)(2)-1(a).* (In part. Emphasis added.)

First, the above regulation tells the employer to **request** a certificate. One cannot **fail** to do something if he is not required to do the thing in the first place. Nor does the regulation authorize the employer to make the determination that the employee has "failed" to supply a certificate, or that it is the employer (as opposed to the government) which will issue a determination that there has been a failure to furnish and the employee is to be considered as a single person claiming no exemptions. Additionally, regardless of what a regulation says, it cannot legally go beyond the scope of the statute. The statute (3402(f)(2)(A)) applies only to those who are claiming exemptions or allowances under that law. The employer has no authority to determine who is or who is not subject to a revenue law. Defendant offered no case law to show that it has such authority.

Defendant was not entitled to Summary Judgment on the wage withholding issue because Defendant failed to show wage withholding was required under 26 U.S.C. Sec. 3402 where Plaintiff had no valid wage withholding certificate in effect. Defendant was therefore not entitled to immunity under 26 U.S.C. Sec. 3403 and the standards required for summary

judgment. The Order of the Circuit Court granting Defendant's Motion for Summary Judgment must therefore be reversed, and Plaintiff's cause reinstated and remanded for further proceedings.

Relief Requested

Plaintiff requests that this honorable Court issue an opinion clearly resolving the legal issues as presented by Plaintiff, and reversing the Genessee Circuit Court as follows: that under 26 U.S.C. Sec. 6331 at minimum a proper executive branch warrant is necessary to initiate seizure in a non-jeopardy tax levy case, following United States v. O'Dell, and that Defendant did not prove the existence of same and was therefore not entitled to Summary Judgment; that a proper, prompt notice of seizure accounting for property seized is required for a complete federal tax levy and to establish the date thereof, as well as proper process demanding release of said property to the Secretary, and that Defendant did not prove the existence of same and was not entitled to Summary Judgment under Resolution Trust Corp. v. Gill. Plaintiff requests a holding that wages are special and therefore not subject to pre-judgment federal tax levy, as well as a holding that unearned earnings are not property under Michigan law, and are therefore not "property" under 26 U.S.C. Sec. 6331.

Plaintiff further requests a holding that a valid, voluntary wage withholding certificate is necessary for wage withholding under 26 U.S.C. Sec. 3402. Plaintiff requests a clear holding that without the foregoing, Defendant, and all who follow, are not entitled to immunity under 26 U.S.C. Sec. 6332(e) or 26 U.S.C. 3403. Defendant did not prove the existence of such certificate and therefore was not entitled to Summary Judgment.

Plaintiff requests this honorable Court issue an Order reversing the Orders of the Circuit Court that granted Defendant's Motion for Summary Judgment and dismissed Plaintiff's cause, and that this Court reinstate Plaintiff's cause, and remand for further proceedings consistent with its opinion. Additionally, while this issue was not part of its Order, the Circuit Court stated that it found Plaintiff was a "taxpayer" and liable for the tax. As explained, "taxpayer" is defined variously in the Code. Plaintiff requests this Court state on what basis the trial court is entitled to make a finding that Plaintiff is a "taxpayer" and liable for the funds mentioned in the notice of levy if it finds, as Plaintiff has shown, that there is no valid levy and no valid, current, wage withholding certificate. That is to say, Plaintiff requests this Court include in its Order a finding that, without a valid levy and a valid wage withholding certificate, on this record the trial court has no basis for making a finding that Plaintiff is liable for any taxes.

Plaintiff further requests that for the protection of the citizens of this state, this honorable Court issue a stern statement opposing the obvious practice by functionaries of the United States and the IRS to violate the spirit, intent, and letter of the Constitution of the United States and the statutes of the Congress of the United States in the matters presented herein.

Respectfully submitted,

_____

Plaintiff-Appellant

_____

Date

[1] 26 U.S.C. Sec. 6332(e): Effect of honoring levy: "Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (d)(1)) shall be discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to such property or rights to property arising from such surrender or payment." Courts have generally held that "taxpayer" defenses such as the validity of the assessment and other latent defects may not be argued on the issue of "subject to levy". "Taxpayer's" defenses to levy do not discharge employer's obligation to honor levy. *See*, Purk v. United States, 747 F. Supp. 1243, 1249 (S.D. Ohio 1989). Likewise, without a valid levy, the tax debt may not be deemed established before the Circuit Court. 26 U.S.C. Sec. 6332(d) & (e) require a valid levy to have been made. This is why proper recitations by one competent to make them concerning liability are required in the warrant as an element of probable cause. Here it is undisputed that Defendant gave funds to the IRS without "demand", or even a valid notice of seizure.

[2]Congress has preserved the distinction between distress and distraint warrants since the Supreme Court's decision in Murray's Lessee et. al. v. Hoboken Land & Improvement Co., 18 How. 272 (1956). In Murray's Lessee, the Court held a sworn statement was not necessary where the statute specified a distress warrant to seize property on the bond of an allegedly delinquent collector of Internal Revenue. "The terms 'distress' and 'distraint' are very often used interchangeably. **The Federal statutes which deal with the matter refer to distraint, except in connection with distress against a delinquent collector or other Federal officer."** "….By these processes the landlord could seize the land itself for rent in arrears, and hold it until payment was made. As these remedies fell into disuse, they seem to have been superseded by 'distresses,' whereby, instead of seizing the land, the lord seized all the movables upon it and held them until he received payment. Later, he was authorized to make sale of such movables, and from this process comes our modern distraint." K. Brewster, Distraint Under the Federal Revenue Laws, (1937), pp. 4-5. (Emphasis added). A 'distress warrant' is a power of attorney by which the landlord delegates exercise of his right to his duly authorized agent. It is not process and the form is unimportant. In re Koizim, 52 F. Supp. 357, 358 (D.C.N.J. 1943). "A distress is the taking of a personal chattel **without legal process** from the possession of a wrongdoer into the hands of the party aggrieved, as a pledge for the redress of an injury, the performance of a duty, or the satisfaction of a demand." Hall v. Marshall, 27 P.2d 195 (1933). (Emphasis added).

It is highly questionable that distress is a constitutionally proper remedy in a highly complex tax system: "To authorize a distress there must be a **fixed rent** in money, produce or services; it may be by parol and if not certain it must be capable of being reduced to a certainty." Distraint Under the Federal Revenue Laws, id. at p. 6. "The landlord's remedy of distress for rent has long been regulated by statute in England." (Citations omitted). "It exists to this day in many States of the United States, although it has been abolished in some. It has frequently been stated that distress as a means of collecting taxes was unknown to the common law." Id. at 6. Since publication of Brewster's work in 1937, many more states have abolished distress in landlord-tenant cases, and prejudgment wage levy is virtually unknown in the states.

The IRS has, by confusing the historical distinction between distress and distraint warrants, *evaded* the requirement of a proper 4th Amendment executive branch warrant. Some courts have also been confused. In First Nat'l. Bank v. Norfolk & West. RR Co., 327 F. Supp. 196 (E.D.Va. 1971), the court likened the case

to United States v. Eiland, 223 F.2d 118 (4th Cir. 1955), and stated that, where the Director serves notice upon the debtor stating that the money owing 'is seized and levied upon' for the payment of the tax and that demand is made upon the debtor for the amount necessary to satisfy the tax, he is serving a **'warrant of distress.**' First Nat'l. Bank, *supra,* at 198. In reality, Eiland, noting cases which held that "a 'warrant of distraint' is necessary" held that, "but where as here, the Director serves notice…stating that the money owing '**is seized and levied upon**' for the payment of the tax and that **demand** is made for the amount necessary…he is serving a **'warrant of distraint'**. No peculiar virtue inheres in the name ascribed to the notice. As said in Raffaele v. Granger, 3 Cir., 196 F.2d 620l, 623: 'Distraint is a summary, extra-judicial remedy having its origin in the common law. There, a form of self-help, it consisted of seizure and holding of personal property by individual action without intervention of legal process for the purpose of compelling payment of debt." Eiland, *supra,* at 121. Distraint under 26 U.S.C. Sec. 6331 is now more like distress, since there is no automatic hearing. *See* United States v. Rodgers, *infra.*

The court in First Nat'l. Bank may have been correct to characterize the notice of levy in Eiland as a distress warrant if it was not sworn and not true process. It would not be a 4th Amendment warrant, which is required under 26 U.S.C. Sec. 6331 per the plain language of the earlier statute, and the controlling precedent in the 6th Circuit. In the instant case, the notice of levy does not claim to "seize" or make "demand", nor, per the decision in United States v. O'Dell, 160 F.2d 304 (6th Cir. 1947), *see* I(A)(1), and the plain language of the 1939 statute, would those words qualify process as a **warrant** for distraint. An executive branch warrant that complies with the 4th Amendment and 5th Amendment as to prejudgment seizure was required for levy under 26 U.S.C. Sec. 6331 in this case.

[3] This scheme was devised following case law requiring warrants, *see* I(a), and dicta indicating that collectors, although ministerial, could be held liable for trespass where "..Congress, under the guise of taxation, has enacted a statute not within the constitutional grant of express or implied powers. In the *Rickert Rice Mills* case (citation omitted), the Court said: 'If the respondent [Collector] should now attempt to collect the tax by distraint, he would be a trespasser.'" Distraint Under the Federal Revenue Laws, *supra,* at 15. *See also,* Poindexter v. Greenhow, 114 U.S. 270 (1884); Virginia Coupon Cases, 114 U.S. 269 (1884). Plaintiff has provided an attorney letter concerning whether one can be the taxpayer as to a tax on her personal income without apportionment with which she generally agrees (although not with its statement that the courts may not decide in which category, direct or indirect, a tax falls.) Exhibit H. Concisely stated, Plaintiff cannot be compelled, without apportionment, to be the "taxpayer" of a tax on her personal income without violating the holding in Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 635 (1895): "The power to tax real and personal property, and the income from both, there being an apportionment, is conceded; that such a tax is a direct tax in the meaning of the constitution has not been, and, in our judgment, cannot be, successfully denied." Pollock has, of course, never been overturned. The Court stated: "We find it impossible to hold that a fundamental requisition deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property and the property itself." Pollock, id. at 629.

[4] **Seizure and sale of property**. The term "levy" as used in this title includes the power of distraint and seizure by any means. 26 U.S.C. Sec. 6331(b)(in part). A few courts tried to interpret this language as expansionary, which could not be justified given the plain statement of Congressional intent to continue the existing law. The Supreme Court repudiated the expansionist argument in G. M. Leasing Corp. v. United States, 429 U.S. 338 (1977). *See,* I(A)(1).

[5] Since the levy in this case, 26 U.S.C. Sec. 6330, the pre-levy "due process" statute has gone into effect. It does not correct the constitutional and statutory violations noted herein. Since the levy in this case, the General Accounting Office has reported IRS enforcement action has dropped 85-98% in the last two years. See Exhibit F.

[6]As noted in United States v. Manufacturers National Bank, 198 F. Supp. 157 (N.D.N.Y. 1961), even the Government acknowledged in its supplemental brief in La Salle Music Corp. v. Magarian Rest., Inc., 183

N.Y.S. 2d 599 (1959), "that under the 1939 Internal Revenue Code a warrant of distraint was, in most cases, a necessary prerequisite to an effective levy." The La Salle court did perhaps the best job of characterizing the distinctions between the 1939 Code Secs. 3690 and 3692 and the 1954 Code Sec. 6331: "Section 3690 of the 1939 Code, 26 U.S.C.A. Sec. 3690 provided for the collection of taxes by *distraint* and sale, and section 3692 thereof provided for a *levy* in case of neglect or refusal under section 3690. Section 6331 of the present Code of 1954 provides for the collection of taxes *by levy*, and further provides that a levy *includes* the power of distraint and seizure by any means. Likewise under section 3710 of the former Code any person in possession of property *subject to distraint*, upon which a levy had been made, had to surrender same on demand. Section 6332 of the present Code provides for the surrender on demand of any property *subject to levy* upon which a levy has been made.

However, regardless of the procedure now deemed sufficient to constitute an effective levy against property of delinquent taxpayers, I cannot consider the enactment of either section 6331 or 6332 to constitute a repeal by implication of the original section 3672, as re-enacted by section 6323, which holds invalid the Government's lien for taxes as against a judgment creditor until notice thereof has been filed. Nor can such enactment be held to override the case of SportCraft, Inc. v. Lasker, supra, wherein a warrant of distraint was actually served by the Government. As a matter of fact both the House and Senate reports in a detailed discussion of the technical provisions of the bill, stated that 'section (6331) continues in effect the provisions of existing law relating to distraint and levy (see secs. 3690 and 3692 of the present Internal Revenue Code'.) 1954 U.S. Code Congressional and Administrative News, pp. 4555 and 5225, respectively.

If the Congress had intended to change in any way the existing law as it pertained to the steps necessarily to be taken by the Government in order for it to secure priority of its lien, over judgment creditors, whether it be under section 6323 by filing of notice thereof, or by an actual levy under section 6331 as construed by case law, it would have specifically so provided." La Salle Music Corp., *supra*, 183 N.Y.S.2d at 601.

[7] In Matter of Carlson, 434 F. Supp. 554 (D.Col. 1977), Judge Richard Matsch, following the Supreme Court opinion in G. M. Leasing, *supra*, that 26 U.S.C. Sec. 6331 does not give carte blanche for warrantless seizures, hinted at the executive branch warrant requirement in a case where the government sought writs of entry into private premises: "I cannot provide that imprimatur if it is beyond the limited authority and jurisdiction of this Court to do so. The Supreme Court in G.M. Leasing, *supra*, **certainly implies that someone has jurisdiction to issue the kind of warrant here sought**, but that opinion nowhere indicates the statutory source of the jurisdictional grant." Matter of Carlson, at 555-556.

[8] Collectors traditionally were liable for money wrongfully collected, but were indemnified by the government if they obtained a certificate of probable cause for their actions from the court. "(T)hat the judgment is to be paid by the United States and the collector is exempted from execution if a certificate is granted by the Court that there was probable cause for his act, Rev. St. 989 (Comp. St. 1635)," Sage v. U.S., 250 U.S. 33 (1919). "(T)o show that the action still is personal, as laid down in Sage v. United States, 250 U.S. 33, 37, 39 S. Sup. Ct. 415, it would seem to be enough to observe that when the suit is begun it cannot be known with certainty that the judgment will be paid out of the Treasury. That depends upon the certificate of the Court in the case. A personal execution is denied only when the certificate is given." Smietanka v. Indiana Steel Co., 257 U.S. 1, 5-6 (1921); George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 381 (1933); United States v. Kales, 314 U.S. 186, 199 (1941); Stuart v. Chinese Chamber of Commerce of Phoenix, 168 F. 2d 709, 713 (9th Cir. 1948); Oil City Nat'l. Bank v. Dudley, 198 F. Supp. 849, 850 (1961).

In Matter of Carlson, *supra*, at 556, Judge Matsch addressed the issue of what constitutes probable cause in the area of federal tax seizures, citing United States v. First Nat'l City Bank, Civil Nos. 75-6007, 6008 (2d Cir., Feb 4, 1977): "[T]he majority sustains the broad order below on the curious ground that 'probable cause' was shown. But they do not tell us 'probable cause' to believe what." Obviously there can be no probable cause without a sworn statement that includes a finding by competent authority that Plaintiff can be liable for the tax constitutionally. Plaintiff submits that this requirement, and potential liability for its breach, is the reason the IRS has gone to such lengths to avoid the warrant requirement, relying on banks

and employers to misconstrue the process; and the length to which some courts have gone to evade the plain meaning of probable cause under the 4th Amendment, such as the 10th Circuit did in reversing Judge Matsch, and holding dubiously that a lower degree of probable cause was necessary in tax cases than in criminal matters! Matter of Carlson, 580 F.2d 1365, 1376-77 (10th Cir. 1978). Perhaps resort to the former certificate of probable cause process would be helpful to the courts in rediscovering probable cause in the tax context, if the process can be uncovered, given the willful destruction of America's tax history, *see* related footnote, *infra*.

The 4th Amendment was, of course, written especially to address tax collection oppression, *see*, I(A)(1)(a)(i), and it is ludicrous to suggest that "probable cause" has degrees not suggested by the plain language of the 4th, and that tax cases require a **lower degree** of proof. The 10th Circuit, had it read its own opinion with more care, might have discovered the answer, when it cited United States v. Blanchard, 495 F.2d 1329 (1st Cir. 1974), where the court discussed a challenge to a "search warrant" obtained by the Federal Bureau of Alcohol, Tobacco and Firearms to inspect a tavern to determine the presence of any liquor bottled for sale which contained distilled spirits other than those contained in the bottles at the time of stamping, and the owners contended that the search warrant had been issued without sufficient facts to establish probable cause, which contention the Blanchard court rejected:

> "However, in pressing this contention, defendants misconceive the **true nature** of the warrant at issue. In seeking to inspect defendants' premises, the agents were not attempting to make what might be called a 'traditional' fourth amendment search. *See, e.g.*, Berger v. New York, 388 U.S 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967). Rather, pursuant to existing statutory authority, *see*, 26 U.S.C. Secs. 5146(b), 7606(a), (1970), and related administrative regulations, the agents were simply seeking a warrant to enable them to complete a valid and permissible regulatory inspection. Colonnade Catering Corp. v. United States, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970); See v. Seattle, 387 U.S. 72, 87 S.Ct. 1737, 18 L.Ed.2d 930 (1967). While the fourth amendment's requirement of reasonableness clearly extends to the application for such inspection warrants, Camara v. Municipal Court, *supra*, 387 U.S. at 528-534, [87 S.Ct. 1727], it is settled law that **such warrants** may issue despite the absence of probable cause to believe that a specific violation has occurred. *Id.* at 534, [87 S.Ct. 1727]. Rather, where 'reasonable legislative or administrative standards' have been satisfied, the limitations upon inspection searches imposed by the fourth amendment will be deemed to have been complied with. *Id.* at 538, [87 S.Ct. 1727.] In the instant case, the application for the warrant indicated that, upon personal examination of the agent, it appeared that the defendant tavern was serving liquor despite the absence of the required Retail Liquor Dealer's Special Tax Stamp. *See* 26 U.S.C. Sec. 6806 (1970). Moreover, the application additionally asserted that no inspection of the defendants' premises had previously been made within the past twelve months. We think that in an industry so heavily and historically regulated as the liquor trade, *see* Colonnade Catering Corp. v. United States, *supra*, 397 U.S. at 75, 77, [90 S.Ct. 774], a warrant issuing upon either of these two operative facts would easily comport with existing administrative and legislative inspection criteria, and would thus be reasonable under the fourth amendment." 495 F.2d, at 1331. Matter of Carlson, 580 F.2d 1380-81, quoting United States v. Blanchard, (emphasis added).

The 10th Circuit continued, "Thus, while the contours are yet somewhat loosely defined, the 'probable cause' requirements of the Fourth Amendment in relation to issuance of search warrants in conjunction with administrative proceedings cannot be equated with the 'probable cause' requirement of the 'traditional' Fourth Amendment search in the criminal law setting." Matter of Carlson, *supra*, at 1381. In Matter of Carlson, the 10th Circuit ignored the plain statement of the Blanchard court that the **nature** of the warrant in these inspection searches was not that of a traditional 4th Amendment warrant, and equated tax search and seizure warrants with inspection warrants, which the Blanchard court denied were traditional 4th Amendment warrants. Congress has established "reasonable standards" here; they have just not been complied with.

There can be no more traditional 4th Amendment warrant than warrants in tax cases. See Sec. I(A)1(a)(i) herein.

> "British attempts to enforce tax measures by general searches also occasioned deeply felt resentments that damaged relations between England and the American colonies and provoked anxious concerns that later sought expression in the Fourth Amendment." L. Levy, Origins of the Bill of Rights (1999) p. 150. (Pennsylvania Chief Justice Wm.) "Allen replied that he would grant 'particular [not general] writs whenever they are applied for on oath.' The customs agent must swear he knew or had reason to believe that prohibited or uncustomed goods were located in a particular place. Allen's groping toward a concept of probable cause as well as specific warrants became clearer as customs officials vainly persisted to engage his cooperation. In South Carolina a judge, explaining his court's refusal to issue the writ, stated that it 'trenched too severely and unnecessarily upon the safety of the subject secured by Magna Charta.'…In Georgia, where the judges declined to issue the writ, they said they would authorize a search warrant for a specific occasion if supported by an affidavit. Virginia issued writs of assistance in 1769 but undermined the process by annexing a degree of specificity obnoxious to the customs office. Its agent had to swear an oath in support of his suspicion and could obtain a writ only for a special occasion and for a limited time. The Virginia judges alleged that the writ sought by the customs office under the Townshend Acts was 'unconstitutional' because it allowed the officer 'to act under it according to his own arbitrary discretion.'" Id. at 165.

Tax search and seizure warrants **are** 4th Amendment warrants. A 4th Amendment warrant requires probable cause – "no warrants…but upon."

[9]Sec. 3692 of the 1939 Code, *supra,* provided that the collector could "by warrant" authorize the deputy collector to levy. 26 U.S.C. Sec. 6331 provides that the Secretary may collect the tax by levy. The definition of Secretary includes the Secretary's "duly authorized" delegate. The warrant is, of course, the means by which the Secretary "duly authorizes," delegates this authority, subject to the rule of Boyd v. United States, 116 U.S. 616, 626 (1886), that the "liberty of every man" may not be placed "in the hands of every petty officer."

[10]In G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977), a jeopardy case involving seizure of vehicles outside a taxpayer's premises, and the seizure of property inside, the Court specifically stated that certiorari was limited to the Fourth Amendment issue:

> "We granted certiorari in this case…limited to the Fourth Amendment issue arising in the context of seizures of property in partial satisfaction of income tax assessments. G.M. Leasing, id. at 338.
>
> "Our grant of certiorari was limited to the Fourth Amendment issue, and we declined to review petitioner's and Norman's son's claims that the assessments and levies should have been voided and that petitioner was not Norman's alter ego…**We therefore approach this case accepting the Court of Appeals' determinations that the assessments and levies were valid… Those facts necessarily establish probable cause to believe that assets held by petitioner were properly subject to seizure…** G.M. Leasing, id. at 352. (Emphasis added).

The Court states that a valid levy **is** a prerequisite to probable cause, and that probable cause is necessary for the property to be subject to seizure (levy)! The Court does no more than note that forms of levy or notices of levy are "normally" used on tangible property. In holding judicial warrants necessary to seize property inside the taxpayer's premises, the Supreme Court points out that the government offered no legislative history to support its contention that under 26 U.S.C. Sec. 6331 no warrants are required:

> The respondents **offer no legislative history** in support of their reading of 6331, and **to give the statute that reading would call its constitutionality into serious question**. We therefore decline to read it as giving carte blanche for warrantless invasions of privacy. Rather, we give it its natural reading, namely, as an authorization for **all forms of seizure**, but as silent on the subject of intrusions into privacy. G.M. Leasing, id. at 338. (Emphasis added.)

The government offered no legislative history of Section 6331 on the warrant question because, whether the Constitution required one or not, and Plaintiff contends it does, and at minimum an executive branch warrant,

Congress has established a warrant requirement, an executive branch warrant requirement, *see* Sec. 3692, *supra.* The plain language of the 4th Amendment does not distinguish between executive branch and judicial warrants in its mandate that "no warrants" may issue without compliance with express norms, and executive branch warrants were well known to the framers when they chose that language. *See,* I(A)(1)(a)(i). The Court explained what the referenced "forms" of seizure were. The Supreme Court provided the meaning of "distraint and seizure by any means," 26 U.S.C. 6331(b), and it destroys the basis for United States v. Manufacturers Nat'l. Bank, 198 F. Supp. 157 (N.D.N.Y. 1961), and other opinions, such as Schiff v. Simon & Schuster, Inc., 780 F.2d 210 (2nd Cir. 1985) that relied on "by any means" as expansionary in spite of express Congressional intent to continue the existing law:

> "Finally, the respondents argue that warrantless searches are justified by congressional enactment… The statute authorizes 'distraint and seizure by any means.'… Read narrowly, it authorizes the use of every means to deprive the taxpayer of use, enjoyment, or title to property **(e.g. transferring title, asportation, immobilization).** It does not refer to warrantless intrusions into privacy." G.M. Leasing, id. at 357. (Emphasis added).

The Supreme Court held the warrantless entry into premises unconstitutional, but upheld the seizures of automobiles "in a public place" without a **judicial** warrant because it involved only a transfer of title and the state controlled the transfer of the vehicle title process, relying on Murray's Lessee v. Hoboken Land & Improv. Co, 18 How. 272 (1856), where the statute specified a distress warrant. The Court said: "In Murray's Lessee v. Hoboken Land & Improv. Co., 18 How. 272 (1856), this Court held that a **judicial** warrant is not required for the seizure of a debtor's land in satisfaction of a claim of the United States. The seizure in Murray's Lessee was made through a transfer of title which did not involve an invasion of privacy." G.M. Leasing, id. at 353. (Emphasis added). Additionally, it was upon the bond of a collector of the revenue who held government funds, and did not involve an ordinary, alleged taxpayer. The Court did not say that an executive branch warrant was not required by the Constitution, or that one could not be required, as it is required in the instant case, by Congress. Without it, the levy statute would violate the Due Process clause as to prejudgment seizure.

A search for and seizure of Plaintiff's accounts would not fall within this very limited exception to even the judicial warrant requirement, which is all Murray's Lessee considered and which did not inquire into more stringent 4th Amendment standards. *See,* I(A)(1)(a)(i). The 4th Amendment was only raised in Murray's on the question of the requirement of a sworn statement, which would not apply where the statute specified a distress warrant, which, as explained previously, is not process at all. Congress subsequently changed the statutes to specify "by warrant," undoubtedly in response to Murray's and its understanding of the Constitutional necessity for a 4th Amendment executive branch warrant.

[11] National Bank of Commerce, id., is often cited as dispositive on the question of whether a notice of levy effects a levy. However, the issue in National Bank of Commerce, as stated by the Supreme Court, was "whether the Internal Revenue Service (IRS) has a right to levy on those accounts for delinquent federal income taxes owed by only one of the persons in whose names the joint accounts stand in order that the IRS may obtain provisional control over the amount in question." Id. at 715. Whether the notice of levy, and what language, accomplished a levy was never at issue in the case, and the Supreme Court reviewed the procedure in a backhand way: "A federal tax lien, however, is not self-executing. Affirmative action by the IRS is required to enforce collection of the unpaid taxes. The Internal Revenue Code provides two principal tools for that purpose. The first is the lien-foreclosure suit. Section 7403(a) authorizes the institution of a civil action in federal district court to enforce a lien 'to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax.'…The second tool is the collection of unpaid tax by administrative levy. The levy is a provisional remedy and **typically** 'does not require any judicial intervention.'…The governing statute is Sec. 6331(a)…. In the situation where a taxpayer's property is held by another, a notice of levy upon the custodian is **customarily** served pursuant to Sec. 6332(a). This notice gives the IRS the right to all property **levied** upon." United States v. Eiland, 223 F.2d 118, 121 (CA4 1955). National Bank of Commerce, id. at 720. (Emphasis added). "Typically" and "customarily" do not address mandates. Eiland, *supra,* held that the name of the form was not critical, but that the words "seizure" and "demand" were critical. These words were never used in the notice of levy

in the instant case. Nor did the language in the notice of levy, while deceptive and pronoun dependent, ever purport to be a levy. For a glossary of IRS notice of levy forms, see Exhibit H.

In National Bank of Commerce, *supra*, the Supreme Court cites Phelps v. United States, 421 U.S. 330 (1975), but neither Phelps nor National Bank of Commerce reviewed the warrant of distraint/language question, Congressional intent, or the cases reviewing them, or the Constitutional clauses Plaintiff has raised relating to them. Phelps is also distinguishable as a bankruptcy case in which the Court cited the administrative regulations without consulting the legislative intent. Additionally, the Phelps Court relied on United States v. Pittman, 449 F.2d 623 (7th Cir. 1971). But Pittman held that the taxpayer relied on the notice of levy and it should be seen as an estoppel case: "Where the Government serves notice of levy, compels transfer of legal title to itself and exercises the rights of an owner to control property by insuring it, renting it and compelling payment of rent to itself and no one else, so that the taxpayer justly concludes he has no further right to deal with the property, there has been an effective levy and seizure within the meaning of 26 U.S.C. Sec. 6331." In Pittman, the notice of levy stated that the property is "hereby levied upon **and seized**" (emphasis in original), and the court noted its surrender was demanded in the notice of levy. United States v. Pittman, at 627. Pittman was also a title transfer case.

It is significant that the Supreme Court in National Bank of Commerce, when discussing the notice of levy in dictum, was quoting Phillips v. Commissioner: "The underlying principle' justifying the administrative levy is 'the need of the government promptly to secure its revenues…. The constitutionality of the levy procedure, of course, 'has long been settled,'" United States v. National Bank of Commerce, *supra*, at 721, quoting Phillips v. Commissioner, 283 U.S. 589 at 595 (1931). So the Court in National Bank of Commerce, relied on Phillips, a pre-1954 case, for the ultimate constitutionality of the levy process, and could not have comprehended the issue as it has developed in the cases. Phillips relied generally on Springer v. United States, 102 U.S. 586, 594 (1880). But Mr. Springer, an attorney, never argued the "indispensable preliminaries," as he referred to the process considerations which are in question here, in the court below, as he was focused on proving that the income tax was a direct tax, a proposition which he lost. None of these cases answer the question whether a notice of levy must be an executive branch warrant.

[12] "Levy may be made upon the **accrued** salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving **a notice of levy** on the employer (as defined in section 3401(d)) of such officer, employee, or elected official." 26 U.S.C. Sec. 6331 (in part)(emphasis added).

[13] *See* Resolution Trust Corp. v. Gill, 960 F.2d 336, 340-341 (3rd Cir. 1992), where the court held that whether a taxpayer's funds were still on deposit at the time of an Internal Revenue levy was a question of fact precluding summary judgment in a dispute between the government and a holder of checks drawn on the accounts: "The IRS regulations provide that a levy is effective upon the IRS's service of the notice of levy. 26 C.F.R. Sec. 301.6331-1(a)(1991)…There is a serious question, however, on the record before us, as to whether Gill had closed her accounts out before the levy. The party in the best position to know, the Bank, refused to admit to the Government's request for admission that at the time the notice of levy was served on the Bank the funds in Gill's IRS accounts were on deposit. The Bank admitted only that on the day of the levy the funds listed were on deposit and stated that further response would involve it in a question of law for the court to determine." The Bank of course understood that there was a question concerning the effectiveness of the notice of levy and the question of the date of the levy under 26 U.S.C. Sec. 6502(b). The trial court in the instant case relied on Gill and United States v. National Bank of Commerce, 472 U.S. 713 (1985) to uphold the notice of levy, but Plaintiff properly distinguished these cases. Gill states: "An administrative levy pursuant to 28 U.S.C. Sec. 6331 is one of two statutory means by which the Government may collect unpaid taxes. National Bank of Commerce, 472 U.S.713, 720, 105 S.Ct. 2919, 2924, 86 L.Ed. 2d 565 (1985). Where the taxpayer's property is held by another, the Government **customarily** serves a notice of levy upon the custodian. The **notice of levy gives the IRS the right to all property levied upon** and creates a custodial relationship between the third party and the IRS so that the Government gains constructive possession of the property. *Id.* at 720, 105 S.Ct. at 2924."

Resolution Trust Corp. v. Gill, *supra*, at 340. This is dicta, as it was in National Bank of Commerce. Again, "customarily" does not address a mandate, and "the notice of levy gives the IRS the right to all property levied upon" is circular question begging.

[14] Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

[15] *See*, United States v. Hemmen, 51 F.3d 883 (9th Cir. 1995), a bankruptcy case: "On September 16, 1987, Revenue agents served a Form 668-C Final Demand, on Hemmen referencing the December 1985 notice of levy." Hemmen, id. at 886. Hemmen, a bankruptcy trustee, had not contested the validity of the notice of levy which preceded the Final Demand: "[O]n December 17, 1985, Revenue agents served a **notice of levy** upon Hemmen **pursuant to 26 U.S.C. Sec. 6332(a)**, **demanding** that he surrender all property or rights to property in his possession necessary to pay the tax liability, which by that time included statutory additions." Hemmen, id. at 886. (Emphasis added). It is not clear that the word "demand" was actually used in the notice of levy in Hemmen. It is also not clear whether the notice of levy under 26 U.S.C. 6332(a) functioned as a distress warrant, and whether a distress warrant might issue under 26 U.S.C. Sec. 6331 in an appropriate jeopardy case (levy "includes" the power of distraint and seizure), or whether the appropriate challenges just were not raised. If distress warrants are permitted in some cases, as previously shown, "is seized" as well as "demand" would have to have been expressed on its face. The language required for a distress/distraint (depending upon how used) warrant as required under First Nat'l Bank/Eiland *supra*, was not used in the instant case. O'Dell denied that the use of that language sufficed, and O'Dell is controlling precedent in the 6th Circuit.

[16] Unfortunately 26 U.S.C. 6343 only requires the Secretary to release a levy when the levy has been made. There is no requirement that the Secretary declare property not seized. This is further proof that Plaintiff must have a cause of action against a Defendant who cannot prove the seizure. This gap in the statutes, together with the vaguery of "as soon as practicable after seizure" for giving notice of seizure creates a due process problem, beyond the validity of the unsworn notice and the "sum certain" problem. In the instant case, notice of seizure has not appeared in more than a year and the practice starts to look more like the perpetuity of the writs of assistance.

[17] Immunity may be invoked only if there has been a **levy** on **property subject to levy**. Because regulations cannot exceed the statute, a recitation by the IRS that Plaintiff's unearned earnings, (or wages if not permitted by the Constitution or beyond the statute's search authority), may be levied, or even a recitation that they are levied, cannot support a claim of immunity, as it presents a question of law concerning what is property, or subject to levy – a question of law of which Defendant is required to know the answer. If the note from the IRS said Defendant should have Plaintiff frisked and his wallet searched for valuables to levy every morning as he enters the office, Defendant would apparently do so. Defendant may reasonably refuse to respond to non-levies, see I(A)(1)(c).

What is a levy is also a question of law. There is only immunity, per the statute, if there was a levy. The Boulder Dam, *supra*, appeals court suggested that a "regular on its face" test might apply, but provided no authority for this proposition. "The process that shall protect an officer must, to use the customary legal expression, be fair on its face. By this is not meant that it shall appear to be perfectly regular, and in all respects in accord with proper practice, and after the most approved form; but what is intended is, that it shall apparently be process lawfully issued, and such as the officer might lawfully serve. More precisely, that process may be said to be fair on its face which proceeds from a court, magistrate, or body having authority of law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority. When such appears to be the process, the officer is protected in making service, and he is not concerned with any illegalities that may exist back of it." Cooley on Torts, 3d ed., vol. 2, p. 883, quoted in Bryan v. Ker, 222 U.S. 107 (1911). Defendant is required to know the law that governs the validity of process. Marks v. Shoup, 181 U.S. 562 (1901). Defendant was bound to know that the law provides that mere notice may not effect a levy, and that an executive branch warrant swearing that there is probable cause is required, signed by competent, and not

purely ministerial, authority.

> There is no statute in terms authorizing them to remit taxes, to pass upon the claims for abatement of taxes or to release any obligation for their payment. Only the Commissioner, with the consent of the Secretary of the Treasury, is authorized to compromise a tax deficiency for a sum less than the amount lawfully due. Royal Indemnity Co. v. United States, 313 U.S. 289 (1941).

The authority to execute the warrant must be delegated on its face. No words of seizure or demand were used. Defendant should have known this was not lawful process, particularly since it did not receive a notice of seizure accounting for the property, as soon as practicable after seizure, a seizure being a single act and not a continuing fact. *See* I(A)(1)(a)(ii) explaining the earlier Warrant for Distraint, Exhibit K and I(B), as to seizure being a single act.

[18] The IRS may have attempted some ruse/bizarre rationalization by employing Form 4427, see Exhibit G, which is filled with legal conclusions, regarding the applicability of the notice of levy. Plaintiff discovered this form after the Circuit Court entered its 3/15/00 order, in a twenty-five volume set of obsolete IRS forms. Whether Defendant ever tendered Form 4427is not known to Plaintiff, nor is, at the time of this Brief's filing, the use the IRS generally made of Form 4427. Plaintiff suspects the IRS position with regard to Form 4427 and its use is "frivolous", whether it was to fictionalize consent to search on the part of banks and employers, or to waive proper service, or to fictionalize a purported "taxpayer's" status as that of a "purported" government employee to not very arguably avoid violating the 4th Amendment as to unreasonable searches, there arguably being no search if the "individual" or "firm" is a governmental employer. Perhaps its use was as dye in the water, or operant conditioning. The use of the notice of levy by the IRS in this case, considering the governing statutes, is certainly "frivolous," as well as evidence of a conspiracy to violate constitutional rights, attempting to avoid the requirement of a sworn statement of probable cause by competent authority.

[19] *See* Smith v. Jackson, 246 U.S. 388 (1917); 26 Comp. Gen. 907, 912 (1947); Sims v. United States, 359 U.S. 108 (1958), requiring that a levy on the salary of a government officer be authorized by statute. None of the foregoing made any finding on the question of the appropriate process. Noting that Smith, *supra*, and the Comptroller General Opinion required specific legislative authority to withhold a federal employee's salary, Sims at 113 states that, "It is evident that Sec. 6331 was enacted to overcome that difficulty and to subject the salaries of federal employees to the same collection procedures as are available against all other taxpayers, including employees of a State." The question of the notice of levy was not raised. However, the process is the same for government employees: there must be a warrant and what amounts to a notice of seizure, except that in the case of a federal government employee's salary or wages it is called a notice of levy because technically there is no seizure. We have been told the name of the form is not critical. It is a matter of substance.

[20] "It would seem to require not much exposition to demonstrate that when the sovereign establishes any priority in his favor, and imposes certain conditions upon the enforcement of that right it is required to comply within the conditions which it has laid down. Since no levy was made upon the funds involved, one of the jurisdictional prerequisite for the application of section 3710 is lacking and the complaint was rightly dismissed. Cf. United States v. Aetna Life Insurance Co. of Hartford Conn., D.C. 46 F. Supp. 30, 37 [Emphasis added.]" United States v. O'Dell, 160 F.2d, 304, at 307 (6th Cir. 1947). "The legitimacy of allowing the government to seize and sell property prior to adjudication, however, has long been recognized to depend on strict compliance by government officials with the procedures prescribed by law." Kulawy v. United States, 917 F.2d 729 (2nd Cir. 1990).

[21] Some state courts have mentioned that the provisions of the immunity statute were "triggered" by the notice of levy. This may have been a reference to the "freeze" language in Givans, which was previously shown by Plaintiff to have been dicta due to the posture of the case, and therefore could have been no part of the law Congress expressed its intent to continue, particularly since Congress subsequently enacted the immunity provisions according to its terms – that there is immunity for surrendering property on which levy has been made, not for honoring an attempt at a levy, or something someone ignorant of the law might

misconstrue as a levy.

[22] Since this question has never been definitively resolved by the Supreme Court and the 6th Circuit opinion in O'Dell and other pre-1954 cases cited, have never been overturned, the question is very much alive, particularly in light of the decision in Commonwealth of Kentucky v. Laurel County Board of Education, 805 F.2d 628 (6th Cir. 1986), wherein the 6th Circuit upheld another portion of the pre-1954 common law of levy and distraint based on Congressional intent. In Laurel County, a surety for a school project brought an action against a county and related parties on a construction contract, seeking to recover from a county certain funds payable to a contractor which were surrendered to the IRS by virtue of a purported levy for unpaid taxes of the contractor. The 6th Circuit stated:

> "(prior) to the enactment of Sec. 6332(d), the IRC was silent as to the consequences of a debtor of a taxpayer honoring an IRS levy. Section 6332(d) provides that any person honoring a federal tax levy by surrendering property subject to levy 'shall be discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property arising from such surrender or payment.' 26 USC Sec. 6332(d)(emphasis added). Section 6332(d) discharges a custodian from liability to the taxpayer but is silent as to third parties. (FN9) We believe that the silence of Sec. 6332(d) strongly suggests congressional intent not to disturb existing case law concerning the potential liability of custodians to third parties.
>
> The case law clearly holds that a payment made by a custodian of property in which the taxpayer has an interest pursuant to an IRS administrative levy is a valid defense to a subsequent action by a third party claiming an interest in the property. The cases cited by the government, although few, do support this proposition." *See* Determan v. Jenkins, 111 F.Supp. 604 (N.D.Ga.1953); Sebel v. Lytton Savings and Loan Association, 65-1 U.S. Tax Case. (CCH) Par. 9343 (S.D. Cal. 1965); remaining citations omitted), Laurel, 805 F.2d at 635.

Imagine what the 6th Circuit might have done had it had the plain statement of Congressional intent to continue existing law, and not just relied on inference. The court relied on the pre-1954 Determan case. Since the pre-1954 common law of levy was upheld as recently as 1986, its continuing viability as to the particular levy question cannot be in doubt, particularly given the good sense that an executive branch warrant must issue to seize and distrain property pre-judgment for federal taxes owed. Additionally, the Laurel County, court held that there must **be** a valid levy for there to be immunity:

> Because, however, we cannot be certain concerning the existence of the IRS levy, we are compelled to remand for a finding on this critical factual issue. The district court made no specific factual finding as to the existence, date, or service of the critical levy. Laurel, 805 F.2d at 634.

Laurel County was a litigation that extended over fifteen years. Twice the lower court ordered the levy placed in evidence, but it never was. Counsel for the surety, unfortunately, never raised the questions concerning the validity of a notice of levy that are raised here. A helpful IRS agent did introduce a blank copy of the Notice of Levy, Laurel County, 805 F.2d at 630, FN2. In the instant case, Defendant failed to prove the existence, date, or service of the levy.

[23] In its amicus brief in the Boulder Dam case, the IRS makes plain that it seeks by stealthy encroachment to eliminate a warrant requirement:

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

The omitted footnote miscited Sec. 3692 of the 1939 Code as Sec. 3690. Sec. 3692 is cited above. It states

in pertinent part: "In case of neglect or refusal under section 3690, the collector may levy, or by warrant may authorize a deputy collector to levy upon all property and right to property…" Because Congress understood that the case law recognized and required executive branch warrants, it knew that the statute did not need to specify them, given the statements of legislative intention. This statement of Congressional intent has almost never been offered in post-1954 cases that Plaintiff has found. Nor did the *Rosenblum,* error in IRS brief, court look at this intent, but followed Eiland. Considering the language of 3692 which gave some appearance of narrowing the warrant requirement to only delegates of the Collector, Congress most probably eliminated the section to avoid the confusion, because it fully understood that a warrant has a definite meaning under the 4th Amendment, requiring an Oath or affirmation supporting probable cause, and that there *are* executive branch warrants. It understood that Collectors are ministerial officials, and received their warrant from higher authority, and that "the liberty of every man cannot be placed in the hands of every petty officer." The IRS knows Plaintiff has no tax liability and will not risk trespass by perfecting a true levy.

The trial court attempted to distinguish the Boulder Dam case because Magistrate Victor Miller found a fiduciary obligation on the part of the Credit Union. Magistrate Miller also based his opinion on the contractual obligation. Boulder Opinion, p. 2. Additionally, it appears that the Boulder court misconstrued the 21 day rule as to banks as a requirement, rather than a minimum, and did not seem to understand that a notice of seizure and demand were still required. "No evidence was presented that the Credit Union did anything to investigate the concerns of its depositors other than waiting twenty-one days to send the money." Boulder Opinion, p. 1. The District Court, in remanding for further findings, seemed to be pointing to a resolution based on these issues. It is not clear why the Circuit Court in the instant case would accept the basic case law as outlined in Boulder, making a distinction only on the basis of a fiduciary relation, and yet rely on Gill and National Bank of Commerce, to uphold the validity of the notice of levy, when both are dicta on that question and Plaintiff has pointed out the National Bank of Commerce dicta ever since the first court date.

[24] 26 U.S.C. Sec. 3187 (1939): "If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the Collector or his Deputy to collect the said taxes, with five per centum additional thereto, and interest as aforesaid, by distraint and sale, in the manner hereinafter provided, of the goods, chattels, **or effects**, including stocks, securities, bank accounts, **and evidences of debt,** of the person delinquent as aforesaid." (Emphasis added). For an account of how "effects" came to be used in the 4th Amendment instead of "possessions," see Origins of the Bill of Rights, *supra,* at 173 - 179.

[25] The Circuit Court made a finding that Plaintiff was a "taxpayer" and that the taxes were owed, citing Carter v. C.I.R., 784 F.2d 1006 (9th Cir. 1986) and Wilcox v. C.I.R., 848 F.2d 1007 (9th Cir. 1988) (T. 1/26, p.19-20). Taxpayer is defined in two ways, *see*, 26 U.S.C. 7701(a)(14) and 26 U.S.C. Sec. 1313(b). The court did not indicate which sort of "taxpayer" it found Plaintiff to be. "Taxpayer" is used only once in the sections immediately under consideration, in 26 U.S.C. Sec. 6331(e) as to continuing levy. It is not clear how the court saw the liability question as being relevant to the immediate proceedings. As the court had no response when Plaintiff asked for a finding on the wage withholding question and appeared to have forgotten it, it is doubtful Judge Ransom was deciding Plaintiff was a "taxpayer" under 26 U.S.C. Sec. 3402. The employer is clearly the "taxpayer" as to that tax. The judge may have been seeking an answer to how or whether the ultimate liability issue may affect any further proceedings. Plaintiff's position is that, without a proper warrant, there is no basis in this proceeding for finding Plaintiff liable for any tax. Be that as it may, neither of the two cases cited, or Judge Ransom's mischaracterization, address Plaintiff's arguments on the liability question. Both cases hold that wages are income under the federal statute. Plaintiff's argument is that she cannot constitutionally be required to be the taxpayer of a tax on her income without apportionment. That a tax is "imposed on the taxable income of every individual" does not specify Plaintiff or anyone as the taxpayer of that tax. Perhaps some individuals pay the tax amounts on behalf of their states prior to federal collection, as suggested by the Pollock case.

[26] "Taking these two objections together, they raise the questions, whether, under the constitution of the United States, a collector of the customs, from whom a balance of account has been found to be due by accounting officers of the treasury, designated for that purpose by law, can be deprived of his liberty, or property, in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by due process of law, within the meaning of those terms in the constitution; and if so, then secondly, whether the warrant in question was such due process of law? Murray's Lessee, 18 How., supra, at 275-276.

> Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a collector of customs, **unless there exists in the constitution some other provision which restrains congress from authorizing such proceedings.** Murray's Lessee, 18 How., supra, at 280. (Emphasis added).

That "other provision" is the Fourth Amendment. The Fourth Amendment is more stringent on unreasonable searches and seizures than the 5th Amendment. The 5th Amendment inquiry in Murray's Lessee was essentially an historical one. It was admitted by the Court that it was "a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenues,…(t)hat they were summary and severe, and had been used for purposes of oppression, is inferable from the fact that one chapter of *Magna Charta* treats of their restraint." Murray's Lessee, 18 How., supra, at 277. Murray's Lessee never addressed whether, under the 4th Amendment, as opposed to the 5th, an alleged tax debt of a revenue collector on a bond, let alone of a regular "taxpayer," and not to mention a "non-taxpayer" who has had no recourse to administrative process and no known process in the courts to contest the appellation "taxpayer," could be seized prejudgment. Naturally, once the Court determined that no judicial warrant was required, and no argument made that at a minimum an executive branch warrant was intended and constitutionally required, the Murray's Lessee Court did not require oath or affirmation. The decision has no application where, as here, those challenges are raised, and where Congress specifically stated "by warrant" and did not merely mention the name of a form. References to the "warrant of distraint" or "warrant for distraint" in cases and forms cannot change the intent of the statute, or the constitutional necessity.

Examining the 5th Amendment, Murray's Lessee only addressed the question of whether an alleged debt of a collector of revenue could be collected prejudgment without a **judicial** warrant. To the extent GM Leasing, which was supposedly limited to 4th Amendment inquiry, held that the warrantless automobile seizures, which occurred in public streets, parking lots, or other open areas, were constitutional solely in reliance on Murray's Lessee, it was error, because Murray's was decided only upon the 5th Amendment, which relies on past practice, and is not as stringent concerning search and seizure. See McKinney v. George, supra. In Murray's Lessee, the statute specified a **distress** warrant. Since the same is not process, the Court understandably held that a sworn statement was not necessary. It is therefore understandable that Congress subsequently specified "by warrant," which is not the name of a form. Congress understood the case law requirement, and eliminated the section that gave the appearance that ministerial employees (collectors) could issue warrants.

[27] The fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one. If the motivation of the search is provided by the government, the intrusion may not be made other than in conformity with the 4th Amendment. Skinner v. Railway Labor Executives Ass'n., 489 U.S. 602 (1989).

[28] Traditionally a warrant, a sworn statement of probable cause, even by an average citizen, was required for a prejudgment seizure:

> A similar procedure at common law, the warrant for recovery of stolen goods, is said to have furnished the model for a "reasonable" search under the Fourth Amendment. The victim was required to appear before a justice of the peace and make an oath of probable cause that his goods

> could be found in a particular place. After the warrant was executed, and the goods seized, the victim and the alleged thief would appear before the justice of the peace for a prompt determination of the cause for seizure of the goods and detention of the thief. Gerstein v. Pugh, 420 U.S. 103 (1975). FN17.

[29]The IRS has denied the Freedom of Information Act request of researchers for Plaintiff to obtain warrants for distraint forms, see Exhibit K. Plaintiff is therefore unable to show any other versions of Form 69 that may have been used, and whether they contained sworn statements after the case law impliedly recognized the warrant requirement, or were issued by other than ministerial collectors. Concerning the continuing battle to preserve the IRS paper trail, *see, e.g.*, Tax Analysts v. IRS, 362 F. Supp. 1298 (D.D.C. 1973); Tax Analysts v. IRS, Nat'l Archives & Records Admin. (NARA), et. al., (97-2 U.S. Tax Cas. (CCH) P50,706) (D.D.C. 1997) (federal court holds request under Federal Records Act for IRS records not ripe for review where "NARA and the IRS are currently working toward resolution of the circumstances which gave rise to the improper handling of agency records"); S. Davis, Unbridled Power: Inside the Secret Culture of the IRS (1997), documenting the struggles of embattled former IRS historian Shelly Davis to preserve America's tax history.

[30] See Statement of Facts for a recitation of the delays.

[31] Where as here, however, Plaintiff is not a "taxpayer," two paths were not open. This may not be immediately relevant to a "facial validity" test, but it demonstrates the importance of a probable cause standard with respect to the levy. If "taxpayer" defenses may not be argued in levy proceedings, the regularity of the liability must be established by a proper sworn statement by competent authority.

[32] In the Boulder Dam case, the IRS claimed that "because these regulations have long been in effect without substantial change, they are 'deemed to have received congressional approval and have the effect of law.' Helvering v. Winmill, 305 U.S. 79, 83 (1938)(footnote omitted)." It is easy to understand why the IRS omitted the cases in the footnote. Even the Winmill case does not suggest that regulations long in effect are deemed to have Congressional approval when Congress clearly expressed its intention to the contrary at the outset. United States v. Dakota-Montana Oil Co., 288 U.S. 459 (1933), one of the cases cited in the omitted footnote, states: "For the issue before us, whether the statute requires the former to be treated as depletion, is resolved by the history of the legislation and the administrative practice under it." Dakota, id. , at 463. The IRS wants to ignore the history part. Certainly the IRS cannot be allowed to benefit from its own wrongdoing because its "administrative practice" has been to mislead courts and ignore the legislative history expressing intent to retain the existing distraint procedures which required warrants. A recent GAO report indicated that the GAO was unable to determine whether the IRS was routinely using lawful enforcement practices or not, so how can Congress be presumed to know? Most attorneys are not aware that the IRS uses unsworn prejudgment "process":

> To determine whether information existed to evaluate IRS' use of collection enforcement authorities, we (1) asked IRS to provide us with available basic statistics on its use, and misuse, of lien, levy and seizure authority from 1993 to 1996; (2) reviewed a small and subjectively selected sample of seizure, revenue officer, appeals, and problem resolution case files to identify the types of information that may be available from those files; and (3) interviewed IRS employees involved in these areas to determine how and when collection enforcement authorities were used, the controls for preventing misuse of those authorities, and the results of taxpayer complaints about the inappropriate use of the authorities.
>
> In summary, while IRS has some limited data about its use, and misuse, of collection enforcement authorities, these data are not sufficient to show (1) the extent of the improper use of lien, levy, or seizure authority; (2) the causes of the improper actions; or (3) the characteristics of taxpayers affected by improper actions. From GAO #97.155, 9/23/97.

Shelely Davis, the Tax Analysts, and Plaintiff aren't the only ones unable to obtain IRS documentation: neither can Congress or the GAO. In the other case cited in the omitted footnote, Old Mission Co. v.

Helvering, 293 U.S. 289 (1934), the Supreme Court held that a regulation had the force of law "in view of subsequent reenactments of the same statutory provision" the regulation continuing unchanged, Old Mission Co., id. at 293. In the instant case, Congress expressed its intent to keep the statutory provisions the same, and the IRS decided to sneak around under them. The regulations the IRS advocates for are not covered by the holdings in the cited cases. The regulations attempt to eliminate a warrant requirement and violate the 4th and 5th Amendments as well as the delegation of legislative powers limitation of the separation of powers doctrine.

[33] In Seattle Assoc.of Credit Men, the court stated that it was unclear whether warrants for distraint were served, and noted that there was a split of authority in the jurisdictions concerning the requirement.

[34] A Senate Report accompanying the Tax Lien Act of 1966 states: "it is intended that a bona fide dispute over the amount owing to the taxpayer (by the property holder) or over the legal effectiveness of the levy itself is to constitute reasonable cause under {Sec. 6332(c)(2)}. S.Rep. No. 1708, 89th Cong., 2d Sess., *reprinted in* 1966 (U.S. Code Cong. & Admin. News 3722, 3740.) See current 26 U.S.C. Sec. 6332(d)(1) & (2).

[35] "Personal property" denotes intangible as well as tangible personal property and includes choses in action. Royal Oak Twp. v. City of Berkley, 16 N.W.2d 83, 309 Mich. 572 (1944). A "chose in action" is a right to personal things of which the owner has not possession but merely a right of action for their possession. City of Holland v. Fillmore Twp., 108 N.W.2d 840, 363 Mich. 38 (1961).

[36]D.C.C.E. Sec. 16-507(b). *See*, Cummings General Tire Co. v. Volpe Construction Co., 230 A.2d 712, 713 (1967).

[37]*See* 26 U.S.C. 6331(b)(in part): "Except as otherwise provided in subsection (e), a levy shall extend only to property possessed and obligations existing at the time thereof."

[38] 26 U.S.C. 6332(c). Special rule for banks: "Any bank (as defined in section 408(n)) shall surrender (subject to an attachment or execution under judicial process) any deposits (including interest thereon) in such bank only after 21 days after service of levy."

[39] If a federal statute does not clearly establish a prejudgment remedy, state law must be followed. *See,* Fed. R. Civ. P. 64. If there is so much uncertainty concerning the proper process for a federal tax levy, or if the process is deemed unconstitutional for any reason, state law will apply. Michigan does not allow prejudgment levy on wages and the Michigan garnishment statute has not been complied with here. MCLA 600.4011(3); MSA 27A.4011(3). Garnishment is an extraordinary remedy that does not permit recovery unless all proper ingredients are present. Burch v. Wargo, Mich. App. 365 (1965) rev'd on other grounds. Garnishment proceedings are statutory and must be strictly followed. Krakowsky v. Margolis, 255 Mich. 3 (1931); Folkerts v. Marysville Land Co., 240 Mich. 129 (1931). Garnishment proceedings are special and statutory, affording a harsh remedy, and one pursuing it must bring himself within the statutory mandates. People's Wayne County Bank v. Stott, 246 Mich. 540 (1929); W.H. Warner Coal Co. v. Nelson, 204 Mich. 317 (1918). Garnishment is a harsh statutory remedy whose application is limited when necessary to protect the rights of the parties by a reasonable construction of the applicable statute and court rule. Berar Enterprises v. Harmon, 93 Mich. App. 1 (1979). Garnishment is regarded as an anomalous and harsh statutory remedy, and the rule of strict construction to protect the rights of the parties prevails. Webber v. Richter, 217 Mich. 561 (1922). There is no such thing as a constructive garnishment under Michigan or federal law. "Almost only counts in horseshoes," not levies, and this is a long way from almost. Unless the Defendant can plainly show that federal law has been followed and that there was a valid levy, it has no defense to Plaintiff's suit. Nor has Defendant immunity under 26 U.S.C. Sec. 6332(e) because under that section, immunity is provided when honoring a federal tax levy on demand. However, in the instant case, FEI, Inc., can establish neither a levy, nor demand. Consequently, the law providing for immunity when releasing sums pursuant to a "levy" is not applicable.