

# 17-503

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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JOHN M. LARSON,

—against—

*Plaintiff-Appellant,*

UNITED STATES OF AMERICA,

*Defendant-Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**REPLY BRIEF FOR PLAINTIFF-APPELLANT**

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## INTRODUCTION

The government's brief stretches *Flora v. United States*, 357 U.S. 63 (1958) (*Flora I*), *aff'd on reh'g*, 362 U.S. 145 (1960) (*Flora II*), well beyond its actual holding. In so doing, the government is advocating for non-reviewability (in any practical sense) of the gargantuan penalty assessed against John Larson ("Appellant"), while not acknowledging the due process concerns with its position. The government's position contradicts the arguments that it made to the Supreme Court in *Laing v. United States*, 423 U.S. 161 (1976), and this Court's opinion in *Irving v. Gray*, 479 F.2d 20 (2d Cir. 1973), which correctly recognized the limited scope of *Flora*.

Denial of refund jurisdiction would not only be an incorrect application of the full payment rule, but would also violate Appellant's right to procedural due process under the Fifth Amendment. If the Court finds that the full payment rule applies, which it should not, to avoid a due process violation the Court should allow for judicial review under the Administrative Procedure Act ("the APA"), and should allow all of Appellant's claims to go forward, including the claim that the \$160 million penalty violates the excessive fines clause of the Eighth Amendment.

## POINT I

### THE *FLORA* FULL PAYMENT RULE DOES NOT APPLY TO APPELLANT’S REFUND SUIT

#### A. **Contrary to the Government’s Stinting Reading, *Flora* Repeatedly Presumed the Existence of a Deficiency Allowing Tax Court Review**

The government contends that Appellant’s argument that the full-payment rule should not apply to cases where the IRS has not issued a notice of deficiency “depends on reading a single word from *Flora II* out of context . . .” (Brief for Defendant-Appellee (“Gov. Br.”) at 22). This is simply incorrect. The concept of a deficiency, enabling a taxpayer access to the Tax Court, is at the core of both of the Supreme Court’s opinions in *Flora*.

Chief Justice Warren’s first sentence of *Flora I* puts it plainly: “The issue in this case is whether a taxpayer must pay the full amount of an income tax deficiency before he may challenge its correctness by a suit for refund.” *Flora I*, 357 U.S. at 63. The Court notes that “[a] deficiency assessment was levied . . .” against the taxpayer, the Board of Tax Appeals was created to alleviate the “hardship of prelitigation payment,” and that a taxpayer could “contest a deficiency assessment by a petition in the Tax Court” as an alternative to payment and suit for refund. *Id.* at 74-75. The Court further stated that a taxpayer too poor to pay the assessed tax in full “is free to litigate in the Tax Court without any advance payment” – which, of course, can only occur if a notice of deficiency has

been issued. *Id.* at 75. The presumption that the IRS had issued a notice of deficiency underlies the entire *Flora I* opinion, and the government’s claim that Appellant has read “deficiency” out of context is a substantial mischaracterization.

The government’s attempt to minimize *Flora*’s holding that full payment is required in cases in which the IRS has issued a notice of deficiency fares even worse when lined up against *Flora II*. As described in Appellant’s Brief, the *Flora II* court expressed its frustration with the “inconclusive” statutory language and “irrelevant” legislative history. (Brief for Plaintiff-Appellant (“App. Br.”) at 13) (citing *Flora II*, 362 U.S. at 152). It was only after the Court delved into the history and purpose of the Board of Tax Appeals, later the U.S. Tax Court, did a five-member majority determine that Congress’s intent in 28 U.S.C. § 1346 was to prevent taxpayers *who had the option of Tax Court review* from instead making partial payments and suing for a refund in federal district court. (App. Br. at 14-15). As the Court explained, “a decision in petitioner’s favor could be expected to throw a great portion of Tax Court litigation into the District Courts.” *Flora II* at 176. Of course, this concern does not exist for cases such as the one at bar: the federal district court is the *only* judicial forum available to Appellant.

Judicial review is only available to Appellant, in any real and practical sense, if the “full payment rule” is confined to the class of tax cases addressed in

*Flora* – where a deficiency permits Tax Court review. Notably, this is precisely what the government argued to the Supreme Court in *Laing*.

**B. The Government’s Attempts to Distinguish *Laing* and *Irving* Contradict Its Own Arguments in *Laing***

*Laing* and *Irving* concerned whether the IRS was required to issue a notice of deficiency when it makes a jeopardy assessment upon early termination of a tax year. That is not a concern in the present case. However, the parties argued, and those courts considered, if the IRS was *not* required to issue a deficiency after early termination (and thus no Tax Court jurisdiction existed), whether full payment was a precondition to district court jurisdiction.

The *Laing* majority did not address this issue, as it found that the IRS must issue a notice of deficiency. *Laing*, 423 U.S. at 184. The dissent disagreed that a notice of deficiency was required, but explained why the lack of a deficiency notice would not leave the taxpayer without a review remedy. *Id.* at 208-209. The dissent stated,

Where, as here, in these terminated period situations, there is no deficiency and no consequent right of access to the Tax Court, there is and can be no requirement of full payment in order to institute a refund suit. The taxpayer may sue for his refund even if he is unable to pay the full amount demanded upon the termination of his taxable period.

*Id.* at 208-09 (citing *Irving*, 479 F.2d, at 24-25, n. 6). The dissent’s discussion of the limits of *Flora*’s scope is squarely on point here. In *Irving*, this Court also

stated that the taxpayers would have a review remedy, since *Flora* would not apply where no deficiency had been determined. 479 F.2d at 24-25, n. 6.

The dissent in *Laing* addressed *Flora* because it agreed with the government's position that the IRS need not issue a notice of deficiency for a jeopardy assessment. 423 U.S. at 208-10. Since the lack of a notice of deficiency would prevent review in Tax Court (as in the present case), the taxpayers expressed concern that they would be barred from district court review under *Flora* unless they paid in full. *Id.* At oral argument, the government made two points quite clearly: first, the government explained why *Flora*'s holding was limited to tax matters for which Tax Court review was available; and second, that failure to allow district court review in a partial-payment case where no Tax Court review was available would raise significant constitutional concerns.<sup>1</sup>

During oral argument, government's counsel, Stuart A. Smith, was asked whether the Tax Court was the only forum available for someone who could not pay the full amount of a tax assessment. The government's response was completely in agreement with Appellant's current position:

Q: But a good argument can be made, certainly, [the Tax Court is] the only forum for someone who can't pay all the amount of the assessment under the Flora case.

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<sup>1</sup> On September 5, 2017, Appellant filed a motion requesting that the Court take judicial notice of the transcript of the January 21, 1975 argument in *Laing*. A copy of the transcript is contained in the attached Addendum.

Mr. Smith: There is an argument that the Flora case would bar litigation in the district court, at least types of cases with respect to someone in Mrs. Hall's position.<sup>2</sup> We think that argument misreads this Court in Flora's opinion.

What this Court held in Flora was that under general circumstances a taxpayer cannot bring a refund suit until he has paid the full amount of the assessment. In reaching that decision, the Court painstakingly went through the legislative history in connection with the creation of the Board of Tax Appeals, and there were indications going both ways as to what Congress really intended. But I think that **the really operative portion of the Chief Justice'[s] opinion in Flora was the fact that there the taxpayer had another remedy. He could have gone to the Tax Court, and that made all the difference in Flora** because essentially you had a situation where if you were subjected to an assessment of \$100 and you want to pay \$2 and go to the district court, well, then this Court said in Flora you can't do that, you have to pay the whole \$100." And the reason the Court said that in Flora was because, as the Chief Justice said, he could have gone to the Tax Court without paying a single cent. And the fact of the existence of that Tax Court review convinced the Court that if they had held to the contrary in Flora, they would have infringed upon the pre-payment jurisdiction of the Tax Court because essentially you have a situation where you could split the course of action, you could in effect litigate the refund suit for \$2 and perhaps litigate the \$98 case in the Tax Court. This Court held that Congress didn't want to split those causes of action and cause these two different systems, that is refund review and Tax Court review, to infringe upon each other.

Here that rationale has no application because we say that Congress has made a conscious decision not to give the Tax Court jurisdiction over these termination cases. Once that is accepted, as we think the statutory history demonstrates, then Flora is no bar to the bringing of these kinds of suits, whether the whole amount is seized or not, in the district court.

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<sup>2</sup> The companion case of *Hall v. United States* was consolidated with *Laing* for oral argument.

Addendum at 14-16.

Later, the Court homed in on two essential questions: first, whether a taxpayer without recourse to the Tax Court would have to pay in full prior to filing a refund suit, or if she could instead pay in part and sue for refund; and second, whether answering that question was necessary to the Court's decision or only advisory. The colloquy between the government and the Court is illuminating:

Q: Is it really realistic to suggest that a taxpayer like Mrs. Hall has a remedy which is based on her paying the deficiency, in this case \$52,000, when the Government has made a levy on all of her known assets . . . .?

Mr. Smith: . . . . But the point is that she has brought this suit, Mr. Justice Powell, to enjoin the Commissioner's action. I suppose that she has expended funds in connection with this suit, and we would think that if she had channeled her litigation energies toward the right remedy, she would be well on her way to a disposition in this.

Q: She really didn't have to pay \$52,000 to get into court, though.

Mr. Smith: Exactly. She doesn't have to pay \$52,000 to get into court. In my colloquy with Mr. Justice Rehnquist, I think it was pointed out in our brief, we don't think that the Flora case bars.

...

Q: Was that the declaratory judgment in this context, or was that an essential holding?

Mr. Smith: I think, without attempting to classify it, I think that it would be both essential from the Commissioner's point of view and the Tax Court's.

Q: I meant advisory rather than declaratory.

Mr. Smith: If the Court held here as we urge that the Tax Court has no jurisdiction in these cases, I think it would concomitantly have to reach the question as to the bar of Flora, because the bar of Flora is a significant bar. If you can't get to the district court with respect to if you don't pay the whole thing, then I think that the taxpayers here have a significant problem, because in effect it bars for quite a long time.

Q: It's more than a problem here; it's a significant constitutional question.

Mr. Smith: Indeed. And I don't think that the Code -- I think since we are right on the statutory question and the interpretation of Flora, I think the constitutional question vanishes.

Addendum at 31-33. The majority did not reach the *Flora* bar issue because it decided that the IRS should have issued a notice of deficiency. The dissent contended that a notice of deficiency was not required, and then explained – consistent with the government's argument – why the taxpayer still had the opportunity for judicial review because *Flora* did not require full payment unless there was a notice of deficiency. 423 U.S. at 208-09.

**C. The Second Circuit Cases Cited by the Government Are Not On Point**

The government cites to the decisions in *Forma v. United States*, 42 F.3d 753 (2d Cir. 1994), and *Magnone v. United States*, 902 F.2d 192 (2d Cir. 1990) (per curiam), to support its contention that this Court has not suggested that *Flora*

is limited to situations where Tax Court review is available. (Gov. Br. at 26). However, *Forma* and *Magnone* involved standard income tax deficiencies that could have been contested in Tax Court. *Forma*, 42 F.3d at 761 (Appellants “had failed to pay certain income taxes . . . Accordingly, the IRS made four assessments against [them]. [Appellants] neither contested the assessments in the Tax Court, nor did they opt to pay the assessed taxes in full and then file an administrative refund claim with the IRS or an independent refund suit in the District Court.”); *Magnone*, 902 F.2d at 193 (describing plaintiffs’ claims as “suits for abatement of interest on tax deficiency assessments.”) These cases fall squarely in line with *Flora*, and there was no reason for the Court to have considered whether, if those litigants had no right of Tax Court review, *Flora* would apply.

**D. The Statutory Exceptions to the Full Payment Rule Support Appellant’s Position**

The government argues that express statutory exceptions to the full payment rule, such as in §§ 6694, 6700, and 6703,<sup>3</sup> show that Congress did not intend for refund jurisdiction based on partial payment of § 6707 penalties. (Gov. Br. at 27). This is where the legislative history, described in Appellant’s opening brief, is especially important. (App. Br. at 33-40). When Congress enacted the version of § 6707 at issue, it had no understanding that the IRS would interpret it in such a

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<sup>3</sup> Unless otherwise stated, all references to sections herein are to the Internal Revenue Code of 1986 (as amended), in effect during 1997-2000.

way as to result in the massive penalties that we see in this case. We submit that if Congress had known, it would have provided clearer instructions on computing the penalty, or it would have made the penalty divisible.

## POINT II

### **DUE PROCESS REQUIRES THAT APPELLANT HAVE ACCESS TO JUDICIAL REVIEW OF THE ASSESSMENT OF PENALTIES AGAINST HIM**

#### **A. It is Not Constitutionally Adequate to Demand Payment in Full of an IRS Penalty Originally Exceeding \$160 Million Before Access to Any Judicial Review**

Fifth Amendment due process jurisprudence requires that the core requirement is *meaningful* review – both in time and in manner. “‘Due process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Cafeteria Workers v. McElroy*, 367 U. S. 886, 895 (1961). “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (*citing Morrissey v. Brewer*, 408 U. S. 471, 481 (1972)). The Fifth Amendment calls for “procedural protection as dictated by the particular circumstance.” *Kahn v. United States*, 753 F.2d 1208, 1218 (3d Cir. 1985). As explained in *Phillips v. Comm’r*, 283 U.S. 589, 595 (1931), while the government may engage in summary proceedings to obtain taxes, the taxpayer must have an “adequate opportunity” for “later judicial determination.”

The government and Appellant disagree as to whether Appellant has a constitutionally adequate opportunity to obtain judicial review. This unusual case presents a situation unlike any of the due process cases cited by the government:

1. Appellant cannot obtain judicial review of this penalty in the Tax Court, unlike the cases in which *Flora*'s full payment rule has been invoked, such as *Ardalan v. United States*, 748 F.2d 1411 (10th Cir. 1984), which involved a challenge to a deficiency assessment that could have been brought in Tax Court.
2. This is not a self-reported liability, such as in *Curry v. United States*, 774 F.2d 852 (7th Cir. 1985), and *Rocovich v. United States*, 933 F.2d 991 (Fed. Cir. 1991). The rationale in those cases does not apply to a multi-million dollar penalty imposed by the IRS.
3. Appellant has expressly alleged in his Complaint (taken as true for purposes of the motion to dismiss), that he is unable to pay in full the \$60+ million remaining of the \$160+ million penalty. (Joint Appendix ("JA") 15, ¶ 28). Thus, if the government prevails, Appellant can never obtain any judicial review of this penalty. This is unlike the cases cited by the government, such as *Curry*, where the taxpayer claimed it would be a "hardship" to pay the tax in full, not that it would be impossible. Notably, the *Flora* Court recognized that the full-payment rule would

cause some taxpayers “great hardship” but also stated that the hardship argument “seems to ignore entirely *the right* of the taxpayer to appeal the deficiency to the Tax Court without paying a cent.” *Flora II*, 362 U.S. at 175 (emphasis added). Since no such “right” exists in this case, the “great hardship” analysis is different in Appellant’s case than that in *Flora* and the vast majority of cases applying *Flora*.

4. There is no underlying tax amount owed – only penalties. District court jurisdiction to review the penalty assessment on Appellant’s refund request would not jeopardize the governmental interest in the smooth and uninterrupted functioning of the tax collection process.
5. The IRS calculated the penalties as a percentage of the “aggregate amount invested” in the transactions at issue, and not based on any percentage of Appellant’s income or assets. Thus, the penalties bear no relationship to Appellant’s ability to pay, unlike most penalties that are computed on a percentage of the underlying tax owed.
6. One of Appellant’s core contentions is that the IRS has vastly inflated the “aggregate amount invested” in the transaction, and thus the resulting penalty amount. As explained in Appellant’s principal brief (App. Br. at 4-5), the IRS disregarded as fictitious and fraudulent the loans and loan premiums when it determined they were part of a tax shelter scheme, and

even refers to them as “purportedly borrowed money” (Gov. Br. at 5-6). Yet, the IRS included those loans and loan premiums in its calculation of the “aggregate amount invested” for the 1% penalty, which caused the penalty to increase *twenty times* the amount it would be if those amounts were not included. Even in the face of what may be a grossly overinflated penalty calculation, the IRS insists that no court can review its penalty calculation, even for purposes of jurisdictional analysis to determine whether Appellant has already paid in full the correct amount of the penalty, without him first paying over \$60 million.

In these unusual circumstances, due process will not be satisfied if the Court applies the full payment rule to bar Appellant’s refund suit.

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews*, 424 U.S. at 335.

The private interest affected is that Appellant is faced with a massive penalty that he is, and likely forever will be, unable to pay, and which bears no relationship to money ever earned by him. The risk of erroneous deprivation is enormous,

since the IRS unilaterally imposed the penalty. Finally, while undoubtedly the government has an essential interest in collecting tax revenues, this is a penalty designed to motivate compliance with tax shelter reporting, not a revenue-driven tax. The government cannot credibly claim that all judicial review must be barred until it obtains payment in full of a penalty designed to deter non-compliance, on the grounds that collection of the penalty somehow is essential to the public fisc.

The government's discussion of *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974), omits key language that sheds a different light on the Supreme Court's due process requirements. In that case, the taxpayer contended that it was a violation of due process for the trial court to dismiss its complaint seeking an injunction preventing the IRS from revoking plaintiff's tax-exempt status. Explaining why the due process argument lacked merit, the Court opened with a clear statement: "This is not a case in which an aggrieved party has no access at all to judicial review. Were that true, our conclusion might well be different." *Id.* at 746.

The Court went on to explain that if the taxpayer had taxable income as a result of the revocation of its tax-exempt status, "it may in accordance with prescribed procedures petition the Tax Court . . . Alternatively, petitioner may pay income taxes . . . exhaust the Service's internal review procedures, and then bring suit for a refund. These review procedures offer petitioner a full, albeit delayed, opportunity to litigate the legality of the Service's revocation of tax-exempt status.

..” *Id.* The Court’s statement that “the problems presented do not rise to the level of constitutional infirmities” was made *after* recognizing that both Tax Court review and a practical opportunity to litigate in district court were available to the plaintiff, but that a *lack of access to judicial review* “might well” lead to a due process clause challenge. *Id.*

Consider the practical reality that Appellant faces: if no court can review this penalty until he pays it in full, he will almost certainly never have access to judicial review. The IRS would be permitted to regularly seize from him, with its various powers of collection, all of his assets for as long as the law permits. At no point would he be allowed to challenge the penalty, since the government would insist that he had not yet “paid in full.” Simply put, this penalty would financially destroy Appellant for the remainder of his life, with no prospect for judicial review. This cannot reasonably pass the procedural due process test stated in *Mathews v. Eldridge*.

**B. IRS Appeals Review Alone Does Not Provide Due Process for Appellant**

The government seems to be arguing that the Appeals review was sufficient to satisfy due process and that judicial review is not required. (Gov. Br. at 31-32). For support, the government cites the recent line of cases of *Our Country Home Enterprises, Inc., v. Comm’r*, 855 F.3d 773 (7th Cir. 2017); *Keller Tank Serv. Inc.*

*v. Comm’r*, 854 F.3d 1178 (10th Cir. 2017); and *Iames v. Comm’r*, 850 F.3d 160 (4th Cir. 2017).

These cases address the issue of whether taxpayers can raise arguments concerning their tax liability during collection due process (“CDP”) hearings under § 6330. None of these cases considered procedural due process, but focused only on the statutory language of § 6330(c)(2)(B), which allows taxpayers a limited opportunity to raise arguments as to the tax liability during CDP if they had no prior “opportunity to dispute” the liability. These cases address the specific meaning of the phrase “an opportunity to dispute” in § 6330(c)(2)(B), and have no broader application. *See Our Country Home*, 855 F.3d at 784-790; *Keller Tank*, 854 F.3d at 1196-1201; *Iames*, 850 F.3d at 165-66.

Moreover, as is explained in the brief submitted by *amicus curiae*, The Legal Services Center of Harvard Law School Federal Tax Clinic (“*Amicus Br.*”), these CDP cases highlight the importance of access to refund jurisdiction for taxpayers like Appellant who have no opportunity for prepayment judicial review through the CDP process. (*Amicus Br.* at 13).

In any event, whether Appeals review is constitutionally adequate in a particular case depends on the facts and circumstances of that case, and here, the record is not sufficiently developed as to the adequacy of the Appeals review for the Court to make a finding that Appellant is not entitled to judicial review.

### POINT III

#### **THE COURT SHOULD EXERCISE JURISDICTION OVER APPELLANT’S APA CLAIM SO THAT HE IS NOT DEPRIVED OF JUDICIAL REVIEW OF THE PENALTY IMPROPERLY ASSESSED AGAINST HIM**

Appellant alternatively seeks review under the APA if the Court determines that a refund suit is not available to him. The APA establishes a broad presumption of judicial review of final agency action. 5 U.S.C. § 702. In determining whether a suit can be brought under the APA, “[w]e begin with the strong presumption that Congress intends judicial review of administrative action.” *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 670 (1986).

As is explained in his opening brief (App. Br. at 32-40), Appellant has satisfied the three preliminary requirements for APA review: (1) there is a final agency action; (2) such action is not committed to agency discretion; and (3) Congress did not intend to preclude judicial review. *Sharkey v. Quarantillo*, 541 F.3d 75, 87 (2d Cir. 2008).

The government does not dispute that Appellant has established these requirements for APA review. Regarding the third requirement, that Congress did not preclude judicial review, the government contends that there is no evidence of Congress’ intent to allow review without full payment. (Gov. Br. at 40). As discussed in his opening brief (App. Br. at 33-29), the legislative history instead shows that Congress did not intend for the penalties to be imposed at the

astronomically high levels that they are here so as to have effectively precluded judicial review.

In addition, Appellant has shown that “no other adequate remedy” exists to provide him with judicial review. *See id.*; 5 U.S.C. § 704. Because of the IRS’s actions in assessing an unreasonable and impossibly high penalty resulting from its incorrect interpretation of the meaning of “aggregate amount invested” in § 6707, Appellant cannot pay in full before bringing suit. Even though the tax refund suit procedure exists, in the abstract, it is not an adequate remedy for Appellant. Appellant cannot meet the threshold requirement of full payment because the IRS has misinterpreted the law to create an insurmountable barrier.

The government’s primary argument – in connection with the applicability of the APA as well as the Anti-Injunction Act (“AIA”), 28 U.S.C. § 2201(a) – is that APA review is not available because Appellant could file a tax refund suit. (Gov. Br. at 33-41). The Supreme Court’s decision in *South Carolina v. Regan*, 465 U.S. 367, 378 (1984), carves out an exception to the AIA for “actions brought by aggrieved parties for whom it has not provided an alternative remedy.” This exception applies here, as the tax refund suit does not provide an adequate remedy to Appellant. (*See App. Br. at 41-48*).

A decision not to allow APA review (while also finding that the full payment rule applies), would not merely bar Appellant from judicial review, but

would impact other taxpayers. Appellant and *amicus curiae* raised hypotheticals highlighting the need for the Court to maintain flexibility with the APA (or the full payment rule) so that the IRS cannot foreclose taxpayers' right to judicial review in assessable penalty cases. (App. Br. at 46-47; *Amicus Br.* at 8-10). The government did not even attempt to respond to *amicus curiae*, and tried to avoid responding to Appellant. In Appellant's first hypothetical, the IRS miscalculated a penalty for failure to report a gift from a foreign relative, assessing a \$30 million, instead of \$30,000, penalty. Appellant's second hypothetical involved a tax protestor against whom the IRS improperly assessed a frivolous tax return penalty under § 6707(a) well beyond the statutory limit, and the Appeals Officer does not grant relief. Under the government's logic, these taxpayers who cannot pay the improperly assessed penalties because they are beyond their means have no right of judicial review.

The government tried to dodge these hypotheticals by arguing that the court should not presume that "the Appeals Office is not sufficiently effective to catch and correct obvious mistakes or misconduct." (Gov. Br. at 38-39).<sup>4</sup> This transparent attempt to avoid answering these hypotheticals should be rejected.

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<sup>4</sup> The cases that the government cites for this point all relate to claims that an agency official's public statements on policy issues do not create a presumption of bias. *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *United States v. Morgan*, 313 U.S. 409 (1941); *Estate of Landers v. Leavitt*, 545 F.3d 98, 113 (2d Cir. 2008). These cases are not relevant to Appellant's situation or of the taxpayers in the hypotheticals who would be foreclosed from review if the IRS's erroneous action had the effect of cutting off their ability to seek review through a refund suit.

Indeed, Congress has recognized the IRS's penchant for error by allowing taxpayers to collect attorney fees when the IRS's position is not substantially justified. § 7430. In addition to countless cases in which courts have not sustained the IRS's actions, there are a legion of reported decisions in which the IRS was not even substantially justified in its position, such as when it has unreasonably interpreted the Code,<sup>5</sup> ignored case law or Treasury regulations supporting the taxpayer's position,<sup>6</sup> issued a notice of deficiency for a year which was clearly time-barred,<sup>7</sup> asserted a penalty with no factual basis,<sup>8</sup> failed to consider information in its possession,<sup>9</sup> and treated one taxpayer more harshly than similarly-situated taxpayers.<sup>10</sup> The government's argument that judicial review is not necessary because the IRS does not make mistakes cannot be taken seriously. As with any agency action, there is a potential for error, which is why judicial review is crucial, particularly in a case like this, in which the IRS is applying a

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<sup>5</sup> *Newnham v. United States*, 813 F.2d 1384, 1387 (9th Cir. 1987); *Thompson v. United States*, 523 F. Supp. 2d 1291 (N.D. Ala. 2007).

<sup>6</sup> *Estate of Baird v. Comm'r*, 416 F.3d 442 (5th Cir. 2005); *Holmes v. Director, Dep't of Revenue*, 937 F.2d 481, 485 (9th Cir. 1991); *Minahan v. Comm'r*, 88 T.C. 492 (1987).

<sup>7</sup> *Hanson v. Comm'r*, 975 F.2d 1150 (5th Cir. 1992); *Cassuto v. Comm'r*, 93 T.C. 256, 262–65 (1989), *aff'd in part, rev'd in part on other grounds*, 936 F.2d 736 (2d Cir. 1991).

<sup>8</sup> *Fitzgerald v. United States*, 789 F. Supp. 177, 178–79 (E.D. Pa. 1992); *United States v. Sam Ellis Stores, Inc.*, 768 F. Supp. 286, 289 (S.D. Cal. 1991); *Donelan Phelps & Co v. United States*, 681 F. Supp. 615, 621 (E.D. Mo. 1987); *Owens v. Comm'r*, T.C. Memo. 2002-253.

<sup>9</sup> *Fitzgerald v. United States*, 789 F. Supp. 177, 178–79 (E.D. Pa. 1992); *Prudential-Bache Sec. v. Tranakos*, 593 F. Supp. 783, 786–87 (N.D. Ga 1984); *Chapman v. Comm'r*, T.C. Summ. Op. 2009-155; *Petito v. Comm'r*, T.C. Memo 2002-271.

<sup>10</sup> *Baker v. Comm'r*, 787 F.2d 637, 643–44 (D.C. Cir 1986); *Hubbard v. Comm'r*, 89 T.C. 792, 803 (1987).

novel interpretation of a statute that has never been judicially tested, in such a way as to financially devastate Appellant.<sup>11</sup>

Returning to the hypotheticals: Would these taxpayers, like Appellant, be deprived of judicial review and subject to a lifetime of enforced collection and/or forced into bankruptcy? The answer that the government is afraid to give is “yes,” unless the Court finds that either the full payment rule does not apply or that Appellant is entitled to APA review.

In the opening brief, Appellant references three cases in which courts have permitted alternative remedies in tax cases: *Nat. Rest. Ass’n v. Simon*, 411 F. Supp. 993 (D. D.C. 1976); *Estate of Michael ex. Rel. Michael v. Lullo*, 173 F.3d 502 (4th Cir. 1999); and *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011). (App. Br. at 41-43). The government criticizes these citations as not being factually analogous. (Gov. Br. at 37). This is because there is no precedent for Appellant’s specific situation. But, the lack of precedent does not mean that the Court should deny Appellant’s request relief. Given what is at stake – Appellant’s

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<sup>11</sup> The government also argues that Appeals review itself is an adequate remedy, and that further judicial review is not warranted for Appellant or any other taxpayer. Gov. Br. at 38. In the present case, there is no indication that the Appeals Officer considered the merits of Appellant’s arguments. (See JA 4-6). In any event, the government should be aware that with respect to other taxpayers who may be affected by the Court’s ruling in this case, Appeals review is not a right, *Cataldo v. Comm’r*, 60 T.C. 522, 523 (1973), and a taxpayer may not have a chance for Appeals review for a number of different reasons, including that the IRS decides to coordinate its position on a particular issue and not allow any Appeals review at all, see Internal Revenue Manual, 8.1.1.2.1 (Feb. 10, 2012) (some exceptions to Appeals authority).

only chance for judicial review of the IRS's imposition of permanently devastating penalties based on the IRS's aggressive and never before reviewed interpretation of a statute – the Court should permit APA review to go forward.

We refer the Court to the prior discussion of these three cases, but respond to a few of the government's comments. First, regarding *Nat. Rest. Ass'n*, the court crafted an alternative remedy to avoid forcing the taxpayer to violate the law (and be assessed penalties for which it could pay and sue for a refund), before being able to challenge the law. The government uses this as an opportunity to bring up Appellant's criminal conviction, stating that he "already is a 'lawbreaker.'" (Gov. Br. at 37). Appellant's conviction is not relevant here, as the IRS's penalty determination rests on legal and factual issues not decided in the criminal case. The government knows this, but is merely referring to his conviction in an improper attempt to prejudice Appellant.

Second, the government pulls from the *Cohen* decision the language that "[i]n the tax context, the only APA suits subject to review would be those cases pertaining to final agency action unrelated to tax assessment and collection." 650 F.3d at 733. The government fails to explain the context in which the Court made this statement. The discussion relates to the administrative exhaustion requirement

for refund jurisdiction.<sup>12</sup> In any event, the government ignores the *Cohen* court’s admonition that whether there is jurisdiction under the APA “requires a careful inquiry into the remedy sought, the statutory basis for that remedy, and any implication the remedy may have on assessment and collection.” *Id.* at 726. Moreover, the court rejected the IRS’s view, similar to that expressed in this case, of “a world in which no challenge to its actions is ever outside the closed loop of its taxing authority.” *Id.*

Next, regarding *Estate of Lullo*, the government contends that the case should be distinguished because the taxpayer had certainty of success on the merits, but in Appellant’s case, “any prospect of success on the merits has yet to be demonstrated.” (Gov. Br. at 37). Of course, at this stage in the proceeding, Appellant has not had an opportunity to present his arguments on the merits. If the Court accepts the government’s invitation to consider whether Appellant has a prospect of success, we refer the Court to the prior discussion of the legislative history of § 6707. (App. Br. at 33-39). This history shows that the IRS has incorrectly interpreted “aggregate amount invested” to inflate the penalty from approximately \$7 million to approximately \$160 million. There has been no judicial review of the IRS’s interpretation of § 6707 to date, and unless this Court

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<sup>12</sup> The sentence preceding that cited by the government is: “Allowing Appellants to proceed without first filing a refund claim will not open the courthouse door to those wishing to avoid administrative exhaustion procedures in other cases.” 650 F.3d at 733.

permits Appellant to have his day in court, the IRS will be free to continue to apply its mistaken interpretation creating devastating results for Appellant and other taxpayers.

The government also cites several cases that do not support its opposition to relief under the APA and do not address the issue in this case: whether refund jurisdiction is an adequate remedy where Tax Court review is not available and the IRS has improperly computed the penalty assessment to make full payment impossible. First, the government cites to *Bob Jones University*, 416 U.S. at 747, for its position that a tax refund suit is an adequate remedy here. (Gov. Br. at 35). The Supreme Court, however, distinguished the situation “in which an aggrieved party has no access at all to judicial review.” Here, due to the IRS’s misinterpretation of § 6707, Appellant effectively has no access to judicial review, and thus should be permitted to proceed under the APA.

The government’s citation to *United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 4 (2008), (Gov. Br. at 34), also is unhelpful. In that case, the Supreme Court held that taxpayers must comply with the administrative exhaustion and timeliness requirements for refund suits. These requirements are of a different character than the full payment rule in Appellant’s case because they were fully under the control of the taxpayers, who could have complied with them in order to establish refund jurisdiction. In contrast, through no fault of his own, but due to

the IRS's action in improperly assessing the penalty at a level that made it impossible to ever pay, Appellant cannot make full payment.

The government also cites to *Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 408 (4th Cir. 2003), in which an entity sought to enjoin the IRS from initiating an audit after revoking its tax exempt status. The Court found that that the AIA barred the suit because organizations whose exempt status had been denied or revoked can seek declaratory relief, an adequate method of judicial review. *Id.* Here, in contrast, Appellant does not otherwise have access to judicial review.

Last, *Matter of La Salle Rolling Mills, Inc.*, 832 F.2d 390 (7th Cir. 1987), and *In re American Bicycle Ass'n*, 895 F.2d 1277, 1279 (9th Cir. 1990), held that the AIA prevents a bankruptcy court from enjoining the collection of trust fund recovery penalties assessed under § 6672 against the responsible officer of a debtor corporation. Part of the basis of the courts' decisions was that the officer could challenge the penalty by paying and suing for a refund. *American Bicycle*, 895 F.2d at 1279; *La Salle*, 832 F.2d at 393. Notably, the trust fund recovery penalty is divisible, and thus the officer would only have had to pay a nominal amount – the employment tax liability for one employee for one quarter – to satisfy the full payment rule. *La Salle*, 832 F.2d at 393, n.8; *see also American Bicycle*, 895 F.2d 1281, n. 4.

If the Court does not rule in Appellant's favor on the full payment rule, it should grant Appellant's alternative request for review under the APA. Otherwise, the IRS will have unilateral and unreviewable power to determine the size and applicability of any assessable penalty.

#### **POINT IV**

#### **THE COURT SHOULD ALLOW APPELLANT'S EIGHTH AMENDMENT CLAIM TO GO FORWARD**

The Complaint alleged a violation of the Eighth Amendment of the United States Constitution. Specifically, the § 6707 penalty of \$160,232,026 is an excessive fine because it is grossly disproportionate to the gravity of the offense. *See Austin v. United States*, 509 U.S. 602, 622-23 (1993); *United States v. Bajakajian*, 524 U.S. 321, 334 (1988).

The government first argues that to the extent that Appellant's claim is for money damages, it should be dismissed. (Gov. Br. at 43). Appellant, however, has not brought a claim for money damages (App. Br. at 48-50), but is seeking a determination that the penalty was improperly assessed and a refund of the portion of the penalty that he has paid to the government, which the Court can hear under the APA. *See Moore v. United States*, No. C13-2063 RAJ, 2015 WL 1510007 (W.D. Wash. Apr. 1, 2015) (exercising jurisdiction over Eighth Amendment claim in APA action).

Moreover, the Complaint does contain sufficient allegations to “state a claim to relief that is plausible on its face.” *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 556. The Complaint, read as a whole, adequately pleaded a violation of the Eighth Amendment. (App. Br. at 52-54).

The government also argues that Appellant failed to allege how the § 6707 penalty compares to penalties imposed in other cases. (Gov. Br. at 47). This would be an unfair bar to relief, given there have been very few § 6707 cases at all, and none on the merits. The only case that the government cites is *Diversified Group, Inc. v. United States*, 123 Fed. Cl. 442, 445 (2015), which was dismissed without any review of the penalty assessment.

As with other aspects of this case, there is no precedent that readily resolves the issues. Given the extremely high penalties, which Appellant has adequately alleged violate the Eighth Amendment, the Court should allow Appellant’s case, including his Eighth Amendment claim, to be heard.

## **CONCLUSION**

The decision of the district court dismissing the Complaint should be reversed, and the case remanded for further proceedings.

Dated: September 5, 2017  
New York, New York

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## **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,974 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times Roman 14-point font.

Dated: September 5, 2017

Respectfully submitted,

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## **ADDENDUM**

In the

Supreme Court of the United States *C. 2*

JAMES BURNETT McKay LAING,	)	
Petitioner,	)	
v.	)	No. 73-1808
	)	
UNITED STATES, et al.,	)	
----- Respondents.	)	
UNITED STATES, et al.,	)	
Petitioners,	)	
v.	)	No. 74-75
	)	
ELIZABETH JANE HALL,	)	
Respondent.	)	

Washington, D.C.  
January 21, 1975

Pages 1 thru 83

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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES BURNETT MCKAY LAING, :
  
:
  
Petitioner :
  
v. : No. 73-1808
  
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UNITED STATES, ET AL., :
  
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Respondents; :
  
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and :
  
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UNITED STATES, ET AL., :
  
:
  
Petitioners :
  
v. : No. 74-75
  
:
  
ELIZABETH JANE MALL, :
  
:
  
Respondent. :
  
-----X

Washington, D. C.  
Tuesday, January 21, 1975

The above-entitled matters came on for argument at  
10:06 a.m..

BEFORE:

- WILLIAM E. BURGER, Chief Justice of the United States
- WILLIAM O. DOUGLAS, Associate Justice
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- HARRY A. BLACKMUN, Associate Justice
- LEWIS F. POWELL, JR., Associate Justice
- WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

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- - -

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 73-1808, Laing against the United States, and 74-75, United States against Hall, the two cases being consolidated.

Mr. Smith, before you proceed, let me announce that Mr. Justice Thurgood Marshall is unavoidably delayed in getting here due to the weather conditions of the roads and he will participate in the case on the basis of the tapes up to the time that he actually arrives.

You may proceed, Mr. Smith.

ORAL ARGUMENT OF STUART A. SMITH ON  
BEHALF OF THE UNITED STATES ET AL

MR. SMITH: Mr. Chief Justice, and may it please the Court: These two cases which have been consolidated come here on writs of certiorari from the United States Courts of Appeals for the Sixth and Second Circuits. They present a procedural issue under the Internal Revenue Code of 1954. That is, whether the Commission of Internal Revenue is required to issue a notice of deficiency in connection with his termination of a taxpayer's taxable year pursuant to that authority granted him by section 6851 of the Internal Revenue Code.

The Courts of Appeals have divided on this question with the Second Circuit in the Laing case holding that the

Commissioner is not so required to issue a notice and the Sixth Circuit holding that the Commissioner is required to issue such a notice. In our view the Sixth Circuit in imposing such a requirement on the Commissioner has erroneously merged two different statutory provisions of the Code, the termination provision, section 6851, and an early assessment provision which is presently set out in section 6861 of the Code.

The significance of the way these cases arrive and the significance of the issue for purposes of these cases is that if the Commissioner is not so required to issue a notice of deficiency in connection with a termination case, as we submit, the parties are agreed that these suits are barred by the Anti-Injunction Act, a longstanding statute which Congress enacted over a hundred years ago which prohibits suits to enjoin the collection and assessment of taxes by any person in any court.

At the outset I think it important --

QUESTION: I thought it was with explicit exception.

MR. SMITH: With an explicit exception. The scope of that exception is at issue here.

At the outset I think the Court should bear in mind an important historical fact about how our present system of tax litigation has developed. The Tax Court, which was established by Congress as the Board of Tax Appeals only in

1924, and the United States Government has been collecting taxes for more than a hundred years.

Now for perhaps the last 125 years the Treasury has been empowered to assess and collect certain taxes like excise taxes prior to the time they are due to be paid, just the way the termination provision works here with respect to income taxes.

Now, coupled with the Anti-Injunction Act, a taxpayer subject to a termination of excise taxes cannot bring a suit to enjoin the collection of those taxes and, because of Congress' decision that excise taxes are not adjudicable in the Board of Tax Appeals, but only in the District Court, the taxpayers are limited to a refund suit of the amount corrected.

Now, we think that the issue here represents very much the same sort of thing. A congressional decision very much like the congressional decision to limit the jurisdiction of the Tax Court to income, estate, and gift taxes, that there has been a congressional decision here which the statutory history demonstrates not to permit the Tax Court to review assessments made by the Commissioner in connection with a terminated taxable period. In fact, that is still the law today with respect to excise taxes, as section 6862 of the Code so provides.

Now, the facts in the cases are somewhat parallel and they are undisputed and can be stated briefly as follows:

In the Laing case, 73-1808, the taxpayer Laing is a citizen of New Zealand. In May of 1972 he entered the United States from Canada on a temporary visitor's visa. In late June he was traveling with two companions in a rented automobile from northern United States, in Vermont, and attempting to get into Canada. Because the Canadian officials were dissatisfied with the identification proffered by one of the passengers, they were refused entry into Canada.

They then turned around and returned to the United States and were stopped by United States Customs officials at Derby, Vermont. Upon a search of the vehicle in which they were traveling, the Customs officials found concealed in the engine compartment of their car a suitcase containing more than \$300,000 in United States currency.

Now, once this discovery was made by the Customs officials, they in turn notified the District Director of Internal Revenue in Burlington, Vermont, and upon once having received the information, the District Director terminated the taxable years of all three people in the car pursuant to his authority under section 6851 of the Code, one of the statutes here which was employed in both cases.

Assessments were then made against each individual in an amount of approximately \$195,000 for this terminated period, that is, from January 1, 1972, until June 24, 1972, the day that the discovery of the cash was ascertained by the

Customs officials.

QUESTION: Does the record show how that figure was arrived at?

MR. SMITH: The record does not show how that figure was arrived at, but perhaps I can help the Court with that. Apparently what was done was the taxpayer, that is, Laing and his two companions, were subjected to a net worth plus nondeductible expenditures computation. That is, they were asked -- Laing was asked as to how long he was in the United States. It turned out to be some 20 or 30 days. The District Director then made a computation based on his living expenses for that period; in turn the value of other cash on their persons was also included as part of their net worth, and an income figure was arrived at of some \$315,000 or so. There was also a quantity of hashish found on the person of Laing which was valued at a certain retail value; and once a gross income figure was arrived at, then the Internal Revenue Service gave each taxpayer, each person in the car credit for the standard deduction and a personal exemption and then the resulting taxable income figure was arrived at on which the tax was computed. It turned out to be something like \$195,000.

QUESTION: Mr. Smith, would you assume that I asked the same question when you cover the Hall case?

MR. SMITH: Yes, I shall, and I will be glad to

elaborate on that also, although the record is similarly silent.

Now, the assessments were then made in the amount of \$195,000. Now, Laing and his two companions refused to pay this tax. Once having an assessment, the Commissioner exercised his <sup>ll</sup> correction powers which are also well settled in the Internal Revenue Code. Section 6331 provides for levy and restraint power to the Commissioner of Internal Revenue, and as a result, since the tangible property, that is, the cash, was available, the Internal Revenue Service levied upon this cash that was found hidden in the engine compartment in the suitcase.

Now, three or four months later, then, Laing commenced this action in the United States District Court for the District of Vermont, seeking to enjoin the Commissioner's assessment and collection of these taxes and prohibiting his continued possession of this money. The Government defended this suit on the ground of the Anti-Injunction Act which prohibits these kind of injunctive suits for assessment or collection of taxes.

QUESTION: The relief he sought in the District Court, then, was not simply to require you to issue a deficiency notice but actually return the --

MR. SMITH: No. Yes. The relief he sought was to enjoin the Service's continued possession of this money and to return it to him. There was no attempt to -- although some

of these cases involve that kind of relief, these cases involve simply a question of relief sought by the taxpayers is to prohibit the continued possession by the Internal Revenue Service of the money levied upon.

QUESTION: Because there hadn't been a notice of deficiency.

MR. SMITH: Yes. And the ground that the taxpayers urge is that because the Commissioner has not issued a notice of deficiency in this case, then the Anti-Injunction Act does not apply.

Now, the District Court in Daing dismissed the taxpayer's action and on an appeal to the Second Circuit that court affirms on the authority of its previous decision in the Irving case.

QUESTION: Mr. Smith, would you straighten me out a little bit. Had this been a jeopardy assessment after the conclusion of a taxable year, a deficiency notice would be issued even after assessment, wouldn't it?

MR. SMITH: That's correct.

QUESTION: Does this mean that with a jeopardy assessment, that one may then go to the Tax Court even though the assets have been levied upon?

MR. SMITH: That's correct. That's what section -- once you have a jeopardy assessment with respect to a full taxable year, which we submit involves an entirely different

statutory provision, Section 6861(b) provides that the Commissioner shall issue a notice of deficiency within 60 days of the making of the assessment, if he hasn't already done so.

QUESTION: That being the case, how would the Government be hurt by a ruling that in the event of a termination as distinguished from a jeopardy assessment a notice of deficiency could be issued after the fact enabling the taxpayer to go to the Tax Court?

MR. SMITH: Well, I think the best way to answer that question is to simply say that the Government has taken the position in these cases that Congress has made a decision that the Commissioner of Internal Revenue need not issue a deficiency notice in connection with a termination of a taxable year simply because Congress has made the other decision in allocating the jurisdiction of the various courts which hear tax disputes that the Tax Court is not empowered to hear suits involving terminations of taxable years.

I think the Commissioner has proceeded on that basis since this termination statute was enacted in the Revenue Act of 1918 and, as we point out in our petition in the Hall case, there are some 70 cases now pending in the courts and an additional hundreds of cases now pending administratively which involve this issue where the Commissioner has taken the consistent position that he need not issue a notice of deficiency. And I suppose that the Government would be hurt in

the sense that those assessments, the validity and propriety of those assessments, would be put at issue if the Commissioner was deemed to have to issue a notice of deficiency. All the Commissioner is saying here is that he has followed what he thinks is the congressional decision that he need not issue such notice of deficiency.

I think the point here is that review in the Tax Court of these kinds of termination actions does not particularly disadvantage taxpayers, while some of the courts which have held that the Commissioner must issue a notice of deficiency, I think, were prompted by what they thought were serious questions of unfairness by not providing immediate access to the Tax Court. ✓

QUESTION: Well, the Commissioner's position then, of course, raises the constitutional issue.

MR. SMITH: The Commissioner's position raised the constitutional issue, although I think as we point out in our brief, not only do we think that the statutory history demonstrates the existence of that kind of congressional decision to allocate jurisdiction in a termination case not to the Tax Court but to the District Court, but that in fact that decision, that congressional decision, doesn't pose any serious constitutional problems because of the existence of an adequate remedy in the district court.

Now, so the Second Circuit has held that the Government

is correct in its contention that the Commissioner need not issue a notice of deficiency in connection with these termination cases.

Now, the facts in the Hall case are relatively parallel. What happened to the taxpayer in the Hall case was that she was arrested by the Kentucky State police and charged with a narcotics -- charged with being involved in the sale of illegal narcotics.

QUESTION: Before you leave that, trace out the steps of the remedy in the district court. What must the taxpayer do before he can assert a remedy in the district court?

MR. SMITH: What the taxpayer must do before he can assert a remedy in the district court is to file claim for refund. That's what the Code provides, because presumably the Commissioner should have an opportunity administratively to be able to determine the validity of the claim.

QUESTION: Before he files the claim for refund, there must be something on which the refund can operate.

MR. SMITH: Sure. In this particular case the refund claim can operate on the amount levied upon, in both these cases.

Now, once the Commissioner -- the Code provides that the Commissioner has 6 months to process such a claim. If he doesn't process such a claim in 6 months, you can bring a suit

in the district court. And as we pointed out in our brief, the 6-month period is foreshortened by informal means. For example, Laing, after the close of the taxable year, brought a refund suit which he filed on March 1, 1973. It was denied on March 9, 1973, and indeed --

QUESTION: Not a suit.

MR. SMITH: Yes; he filed a claim. But the refund claim was denied by the District Director on March 9, 1973, only 8 days later.

QUESTION: But that certainly is a most unusual, quick action.

MR. SMITH: Mr. Justice Blackmun, I don't think it's that unusual because I think in connection -- I myself have had experience with filing refund claims on behalf of taxpayers where when it becomes clear in the normal case where you have gone through the audit process and the Service is taking one position and you are taking another -- in fact, in this case, it was obvious even at this juncture that this was going to be an issue that was ultimately going to have to be resolved by this Court since the Courts of Appeals had split on the question, it seemed obvious that the Commissioner was going to deny the claim. And in those circumstances, I on many occasions asked that the claim be denied promptly. In most cases the Service is perfectly happy to do that. There is no reason to keep the claims that it is obviously going to deny

anyway pending for the 6-months period, and if for some reason the 6-months period is consumed, then the taxpayer can bring the suit on the day after the 6-months period is expired.

QUESTION: Though it's of no significance, my experience has been just the opposite, the Government waits despite the --

MR. SMITH: In any event, I think that the 6-months period -- I don't think that the 6-months period poses any significant constitutional problems. I think that the Court in the Phillips case, Justice Brandeis simply said that when you have these summary correction remedies, the important thing is that the taxpayer have an opportunity for post correction review. And if that post correction review here takes place after 6 months, that is an administrative decision made by Congress that the Service should have an adequate opportunity to be able to appraise the validity of a claim. All claims are not easy to handle, and the Service should have a minimum amount of time to handle these claims.

QUESTION: The Hall position is a little bit different from Mr. Laing's in that regard, because as I understand it, the amount assessed against her was considerably more than the value of what was seized.

MR. SMITH: That is true, although again we don't think that that makes any difference in terms of her remedy. She could have still filed a claim for refund, in our view,

and gone to the district court. And, indeed, that is what makes this case somewhat curious because here you have taxpayers who in their brief are strenuously arguing that they have been denied some very important right, and that is to be able to get a notice of deficiency and go to the Tax Court. But the Tax Court is not necessarily a particularly favorable forum for the adjudication of these types of cases if what the taxpayers are concerned with is speed. Because it has been recently estimated that it takes about two years from filing of petition to final decision to litigate a case in the Tax Court. The Tax Court is a busy forum.

QUESTION: But a good argument can be made, certainly, it's the only forum for someone who can't pay all the amount of the assessment under the Flora case.

MR. SMITH: There is an argument that the Flora case would bar litigation in the district court, at least types of cases with respect to someone in Mrs. Hall's position. We think that argument misreads this Court's Flora opinion.

What this Court held in Flora was that under general circumstances a taxpayer cannot bring a refund suit until he has paid the full amount of the assessment. In reaching that decision, the Court painstakingly went through the legislative history in connection with the creation of the Board of Tax Appeals, and there were indications going both ways as to what Congress really intended. But I think that the

really operative portion of the Chief Justice' opinion in Flora was the fact that there the taxpayer had another remedy. He could have gone to the Tax Court, and that made all the difference in Flora because essentially you had a situation where if you were subjected to an assessment of \$100 and you want to pay \$2 and go to the district court, well, then this Court said in Flora you can't do that, you have to pay the whole \$100. And the reason the Court said that in Flora was because, as the Chief Justice said, he could have gone to the Tax Court without paying a single cent. And the fact of the existence of that Tax Court review convinced the Court that if they had held to the contrary in Flora, they would have infringed upon the prepayment jurisdiction of the Tax Court because essentially you have a situation where you could split the cause of action, you could in effect litigate the refund suit for \$2 and perhaps litigate the \$98 case in the Tax Court. This Court held that Congress didn't want to split those causes of action and cause these two different systems, that is refund review and Tax Court review, to infringe upon each other.

Here that rationale has no application because we say that Congress has made a conscious decision not to give the Tax Court jurisdiction over these termination cases. Once that is accepted, as we think the statutory history demonstrates, then Flora is no bar to the bringing of these

kinds of suits, whether the whole amount is seized or not, in the district court.

That brings us to the point that I wanted to make about the Tax Court not being a particularly -- these taxpayers are complaining in effect that they have been frozen out of the Tax Court, blocked to immediate access to the Tax Court. But given the two-year time that it takes to litigate a tax case in the Tax Court, it seems to us that it would be far more favorable to these taxpayers subject to termination to bring a refund suit for the amount seized and bring that suit in the district court.

In most district courts the time for bringing a refund suit is considerably shorter than 2 years. I think that's quite plain with respect to the district courts in Kentucky and certainly it's clear with respect to the district courts in Vermont. In fact, that refund suit in Vermont with respect to the Laing case is now being held up awaiting the decision of this Court. In effect, if this action had never been brought, Laing would have had long ago a disposition with respect to the propriety of his refund claim in the district court in Vermont.

QUESTION: Of course your argument assumes that speed is the only criterion.

MR. SMITH: I think that in this particular case speed is an important criterion to the taxpayers, in the sense

that their assets have been levied upon. If you read the complaints of the taxpayers in the record appendices, Laing complains that money was taken away from him, business opportunities were lost. It seems to me that a prompt adjudication of his claim is really the most important thing that he wants. And having brought this action to enjoin on the basis of so-called exception to the Anti-Injunction Act is in effect delaying what we think is his most meaningful and effective remedy and that is a refund suit in the district court.

QUESTION: Mr. Smith, as I understand your position, you are saying that when the Government proceeds under 6851 the taxpayer should not have the normal option of going either to the district court after he has paid the tax or going immediately to the Tax Court itself. But what reason in policy or otherwise is there for denying that option to taxpayers who have been proceeded against under 6851?

MR. SMITH: Well, it's a congressional decision.

QUESTION: Granted that, but --

MR. SMITH: Well, I suppose the only way to analogize it is to compare it to the congressional decision to exclude excise tax jurisdiction from the Tax Court. It's hard to imagine if we were planning a new kind of procedure we perhaps would say the Tax Court ought to have jurisdiction over excise tax cases. But Congress has quite plainly said that that

court is to only have jurisdiction over income, estate, and gift taxes. Congress could have decided the other way and given the Tax Court jurisdiction over those cases. But once having decided the other way, the Commissioner has more or less felt himself bound by that congressional decision and has refrained consistently from issuing notices of deficiency with respect to these cases.

QUESTION: I return to the question Mr. Justice Blackmun asked, in what way would the Government be prejudiced if the Court of Appeals of the Sixth Circuit blending these two statutes together were construed by the Commissioner to be the correct interpretation?

MR. SMITH: It's hard to imagine how the Government would be prejudiced other than the fact that, because of the Commissioner's consistent policy, perhaps some \$100 million of assessments that we have pointed out in our petition in the Hall case would be endangered. I think that is a significant to prejudice/the Commissioner operating under a fair ruling of the statutes that he was not so required to issue a notice of deficiency.

I suppose the answer also was in what we are talking about here when we are talking about people who are subject to these terminations. These are not normal taxpayers. These are people who are committing some act that the Commissioner believes will tend to defeat the collection of their future tax

liability. I think if you look at the words of section 6851, it says, "If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax."

QUESTION: That's that clear in the Laing case, for example, where money was about to be transported out of the United States. Is it equally clear to you in the Hall case?

MR. SMITH: I think it is in the sense that in the Hall case you have a taxpayer with respect to whom the Commissioner has received information that she is involved in illegal clandestine activities of an income-producing nature. And I think that it's a fair assumption that people who are involved in clandestine income-producing activities which are illegal often do not report the income, do not declare the income on their income tax return. In fact, in this particular case Mrs. Hall filed a full year income tax return reporting a gross income from wages of \$530 for the whole year.

QUESTION: Suppose the Commissioner had read that someone had burglarized, say, a liquor store or grocery store and made off with \$10,000, or a bank. Would that justify an assessment?

MR. SMITH: I think it would. You see, Mr. Justice

Powell, you are concentrating with respect to the Laing case with respect to the statutory language about intending quickly to depart, and that indeed is an important part of this statute. In fact, departing aliens who leave this country every day who are subject to U.S. income tax have their taxable years terminated. That is the normal kind of thing. They have to secure a certificate of compliance, and it's colloquially called a sailing permit. They must -- and the Commissioner terminates their taxable year.

But the statute by its terms is not limited to alien taxpayers. It is also subject to domestic taxpayers as well. For example, in the Irving case, that was a celebrated case in which Irving perpetrated a very notable hoax in which he received some \$755,000 from a publishing company in connection with a false biography. Once that hoax was discovered, the Internal Revenue Service, like your case with the burglar, could easily come to the conclusion that Irving was not going to pay taxes on that amount of money. So in the Irving case Irving's taxable year was terminated and an amount was assessed based on receipt of that money and an amount was levied upon, and the Second Circuit rejected Irving's claim which is the same claim that the taxpayers make in these cases that the Commissioner must issue a notice of deficiency with respect to these cases.

I think that illegal activity raises a connotation

that if people are breaking other laws in a clandestine way, I think it's a fair assumption by the Internal Revenue Service that they are not going to meet their tax liability. Our tax system is based on a voluntary disclosure, and if people are involved in illegal activity, it's a fair assumption that they are not going to meet that voluntary obligation. Under those circumstances, Congress has given the Commissioner power to make this artificial termination of the taxable year, because instead of having to wait until the following April 15, Congress has said to the Commissioner, "You may terminate someone's taxable year and collect taxes on that terminated period."

QUESTION: Nobody is questioning that, as I understand it. Aren't the revenues adequately protected by the Commissioner's power to summarily levy and keep in his possession --

MR. SMITH: The protection of the revenue is not at issue here with respect to whether the Commissioner should or should not issue a notice of deficiency. I don't think that's in dispute. What concerns us is the fact that Congress has made a legislative decision which is evidenced in the Revenue Act of 1921 through the Revenue Act and through the creation of a Board of Tax Appeals that the Tax Court is not to have jurisdiction over these termination cases.

I think I can demonstrate that. We have set it forth in great detail in our brief, but I think it can be demonstrated

by the sequence of legislative events that occurred from 1918 through the Revenue Act of 1926.

QUESTION: If what this suit was all about in the district court in the Laing case was to get the money back, I would suppose that if the Government can keep the money whether a notice has to be issued or not pending litigation somewhere, the plaintiff could never win in the district court in such a suit.

MR. SMITH: I am not exactly sure why you say that. Once a refund suit is brought, and if the district court, for example, were to say that the taxpayer is entitled to a refund --

QUESTION: Oh, I understand that, they can get the money back if they win the lawsuit.

MR. SMITH: Yes.

QUESTION: But pending litigation under this kind of an assessment or a jeopardy assessment, the Government can keep the money while litigation is going on.

MR. SMITH: Well, Congress has made that --

QUESTION: Isn't that right?

MR. SMITH: That's right.

QUESTION: Well, then, how could the plaintiff ever have won his case in the district court?

MR. SMITH: In these particular cases?

QUESTION: Yes. He said, "I want the money back

because you didn't issue a notice of deficiency.

MR. SMITH: Well, the whole point is that he is not entitled to win his case by raising --

QUESTION: I know, but that would be true whether he went to the Tax Court or whether he went to the district court.

MR. SMITH: Indeed that's so.

QUESTION: Then I still don't think you have given a glimmer as to how the Government is hurt in this case other than making a legalistic argument which is a fair argument, all right, as to what Congress intended.

MR. SMITH: We think that the Service has fair -- it is a legal argument in the sense that we are construing statutes.

QUESTION: Let's suppose you lose this suit. What will happen in the Laing case? .. the money aren't you, pending litigation in the Tax Court?

MR. SMITH: Well, I'm not so sure we would be able to keep the money.

QUESTION: That's what I want to know.

MR. SMITH: Well, I suppose --

QUESTION: Is it too late for you to issue a notice?

MR. SMITH: Well, for example, the ground upon which the decisions holding that we have to issue a notice are premised on merging section 6861 into 6851. Section 6861(b)

requires the Commissioner to issue a notice within 60 days of the making of the assessment. I suppose the taxpayer could urge that if we didn't issue it within 60 days the whole assessment is invalid.

Now, the Board of Tax Appeals in a case called J. H. Reese, which is not cited in our brief, I think it's in 15 B.T.A., has held when the Commissioner fails to issue a notice of deficiency in connection with a straight jeopardy assessment, not a termination case, the jeopardy assessment is invalid.

Now, I think that in that sense the Government ---

QUESTION: Let me make a new one.

MR. SMITH: I don't know whether this action is still open to make a new one in this case.

QUESTION: But at least prospectively, the collection of the revenue would not be the least bit impaired if you lost this case, if you knew what the rule was in advance.

MR. SMITH: I should think that's right, although -- I suppose that's right, the collection of the revenue prospectively, although again I would like to point out that retroactively there would be a good deal of revenue lost in these cases.

QUESTION: You are afraid that your fail to issue notice may have foreclosed your collecting the tax at all.

MR. SMITH: In these cases because of the operation

of the statutes of limitation and with respect to when we were supposed to issue the notice.

QUESTION: In Laing, a guy going across the border with three hundred grand in the engine compartment, I would think that would justify that sort of an assessment perhaps even two years after he found him doing it.

MR. SMITH: That's true, but when did this occur? This occurred in 1972. The Commissioner normally has two years in which to issue an assessment. I'm not sure after the termination, after the conclusion of this case whether the statute would still be open.

But in any event, I think we are on sound ground statutorily to taking the position that we don't have to issue a notice of deficiency.

QUESTION: The taxable years involved have long since been over, haven't they?

MR. SMITH: I think they are.

QUESTION: Has anybody filed a return?

MR. SMITH: Both of them have filed returns. I can tell the Court --

QUESTION: I suppose then you are in the position if you think it's proper to make a jeopardy assessment after the close of a taxable year.

MR. SMITH: Well, the statute of limitations still operate with respect to jeopardy assessments.

I really don't know the answer as to whether the years would be open in these cases. But there is a significant problem as to if the Service should be subjected to issuing a notice of deficiency, I think there would be a lot of these cases backed up in the courts, the revenue would be endangered with respect to them.

QUESTION: It looks as though these years are open for these taxpayers.

MR. SMITH: It would appear so.

QUESTION: Notice could be issued tomorrow.

MR. SMITH: What?

QUESTION: A notice could be issued tomorrow.

MR. SMITH: A notice could be issued tomorrow, Mr. Justice Blackmun, but, of course, the pendency of this case makes that likelihood impossible, because the Commissioner has taken the position that his statutory construction does not require him to issue a notice of deficiency. In fact, the Tax Court has held --

QUESTION: That's an administrative decision.

MR. SMITH: That's an administrative decision, although, you know, it's a consistent decision which we have made, which the Service has made, since this statute has been enacted in 1918. Because, you see, the notice of deficiency, issuance of the notice of deficiency requirement is tied to the jurisdictional questions as to whether the Tax Court has

jurisdiction in these cases.

We say that Congress decided not to give the Tax Court jurisdiction in these cases and as a result, the notice of deficiency requirement, that is, which has been termed the ticket to the Tax Court, you can't get into the Tax Court without a notice of deficiency, has no application in this case.

The reason we say that is as follows: This termination provision existed in the Revenue Act of 1918 --

QUESTION: I think we all concede this, as you have argued it, but I gather there is a little concern up here why, if the Government is so disturbed about the possibility of these revenues slipping away, they don't issue a deficiency tomorrow as a matter of preservation of the revenues.

MR. SMITH: Well, I think it's more complicated than that. I'm not sure in respect to these two cases the Commissioner can -- whether these years are open any more. But even more important, the Tax Court has held that it doesn't have jurisdiction in these cases. It held that in the Ludwig Littauer case in 37 B.T.A. and has consistently held that today.

Now, I'm not sure that even if the Commissioner issued a notice of deficiency in these cases the taxpayer would be able to get into the Tax Court, because the Tax Court itself has construed the statute in accordance with our

position that it doesn't have jurisdiction in these termination cases.

QUESTION: What could you lose by it?

MR. SMITH: Well, there is nothing to lose by it other than the fact that our posture has been in these cases and we think it's soundly grounded on the reading of the statutory history, that we need not issue a notice of deficiency, and I think the reason we need not is evidenced in the statutory history. This termination provision came in in the Revenue Act of 1918.

QUESTION: Let me interrupt you for one more question. Is it your position that you need not or that you are not even authorized?

MR. SMITH: That we are not even authorized, in the sense that because we are only authorized to do that in a case where the Tax Court has jurisdiction. I suppose it would be a meaningless act in the sense that the Tax Court has consistently held that it would not take jurisdiction of a case involving a short period year so that the issuance of a notice of deficiency in these cases would not give the taxpayers in termination cases any added advantage. They wouldn't be able to go to the Tax Court, and in our view, they should pursue the remedy that Congress provided for them, a rapid remedy and one that does not pose, in our view, any constitutional problems.

QUESTION: Is it reasonable to assume that if your

opponents on the other side of the table felt that you could reach this money by this other process that we wouldn't have any more than an academic controversy here?

MR. SMITH: That's what makes this controversy a strange one in the sense that we have the Tax Court here, Mr. Chief Justice, whereby you could get this paper which permits them entrance to the Tax Court which in our view is not a particularly favorable mode of obtaining redress in these cases. Access generally involves a long and lengthy proceeding. They want to get their money back, and it seems to us that the way to get it back is to pursue the remedy that Congress has provided. That is, district court refunds.

QUESTION: Assume for a moment hypothetically that these intimations are correct, that you could issue the deficiency notice now and that they could go into the Tax Court. Then would the Government be harmed or would the taxpayers be benefited in any way?

MR. SMITH: I don't think the -- let me put it to you this way, let me emphasize one part of that question. I don't think the taxpayers would be particularly benefited in these cases. They have brought these suits based on the statutory exception to the Anti-Injunction Act urging that they are entitled to go into the Tax Court. But that is not a particularly favorable mode of redress in these cases.

I suppose the world would not come to an end if these

cases were heard in the Tax Court. But it's simply our position that it's a statutory matter. Congress has allocated the jurisdiction of the Tax Court and the district court in this particular way, and that termination cases are not allocated to the Tax Court. That court is a creature of statute, and it doesn't have the power. I suppose the Tax Court could easily take the position based upon its consistent holdings which go up until last year, which were sort of based on the Ludwig Littauer, that it doesn't have jurisdiction. So even if the Commissioner were to issue a notice of deficiency, the Tax Court could take the position that it didn't have to hear these cases involving assessments for termination.

QUESTION: Where would the money be in the meantime?

MR. SMITH: The money would still be in the hands of the Government. That's another decision that Congress has made. With respect to people like these taxpayers who presumably, the Commissioner has made a finding that they have taken steps to defeat the collection of taxes, affirmative steps during the taxable year, the Commissioner has made a finding, the Congress has decided they are to be subjected to summary collection procedures, and while the litigation proceeds, the Commissioner is entitled to keep the money because I think that these kinds of taxpayers that Congress sets out in 6851 are not people who are expected to reliably

pay their tax liability.

QUESTION: Is it really realistic to suggest that a taxpayer like Mrs. Hall has a remedy which is based on her paying the deficiency, in this case \$52,000, when the Government has made a levy on all of her known assets, arguably she might get a bond and release them, but the likelihood of a woman in her plight getting a bond is not terribly bright, is it?

MR. SMITH: Well, I don't know what the likelihood of her getting a bond would be. But the point is that she has brought this suit, Mr. Justice Powell, to enjoin the Commissioner's action. I suppose that she has expended funds in connection with this suit, and we would think that if she had channeled her litigation energies toward the right remedy, she would be well on her way to a disposition in this.

QUESTION: She really didn't have to pay \$52,000 to get into court, though.

MR. SMITH: Exactly. She doesn't have to pay \$52,000 to get into court. In my colloquy with Mr. Justice Rehnquist, I think it was pointed out in our brief, we don't think that the Flora case bars. Now, the courts that have held against us, that is, the Sixth Circuit in this case, the Fifth Circuit in Clark v. Campbell, and the Schreck case where the District Court of Maryland more or less started with a decision on this issue, has made quite a good deal

about the fact that Flora would bar such a refund. We don't think it would. We don't think that a fair reading of this Court's Flora decision yields such a result. The Second Circuit has held Flora wouldn't bar such a suit both in the Irving case and presumably in this case, too, because the Second Circuit in this case said she could bring a refund suit at any time.

QUESTION: You wouldn't mind if the Court said so.

MR. SMITH: I wouldn't mind if the Court said so, no, not at all. I don't think the Commissioner would mind either.

QUESTION: Was that the declaratory judgment in this context, or was that an essential holding?

MR. SMITH: I think, without attempting to classify it, I think that it would be both essential from the Commissioner's point of view and the Tax Court's.

QUESTION: I meant advisory rather than declaratory.

MR. SMITH: If the Court held here as we urge that the Tax Court has no jurisdiction in these cases, I think it would concomitantly have to reach the question as to the bar of Flora, because the Bar of Flora is a significant bar. If you can't get to the district court with respect to if you don't pay the whole thing, then I think that the taxpayers here have a significant problem, because in effect it bars for quite a long time.

QUESTION: It's more than a problem here; it's a

significant constitutional question.

MR. SMITH: Indeed. And I don't think that the Code -- I think since we are right on the statutory question and the interpretation of Flora, I think the constitutional question vanishes.

QUESTION: But you have to say what is right about Flora before the constitutional question vanishes.

MR. SMITH: Yes.

QUESTION: Don't you mind that we would have to say that.

MR. SMITH: I think that's right, Mr. Justice White.

Indeed, and I think it's an important point, Mr. Justice Brennan, and I think the courts that have held against us have acknowledged, I think Judge Kaufman's opinion in Schreck, which we think is erroneous because we don't think that it focuses on the statutory history in this case, we think that it has overlooked the Revenue Act of 1921 which more or less introduced the jeopardy assessment provision into the Code as an exception to the administrative appeal provision which later became the Tax Court, the jurisdiction of the Tax Court. But I think Judge Kaufman acknowledged in this case that the statutory questions were close and that you could read them either way. But what prompted his concern and which prompted the result he reached in this case, that is, holding that the Commissioner is required to issue such a

notice, is what he thought was significant constitutional questions. I think that if you look at the statutory history with the point of view in mind as to how the sequence developed and how the Tax Court is not a forum which is mandated by the Constitution. Congress has made a decision that the Tax Court has jurisdiction over certain cases, and the district court and the court of claims have jurisdiction to resolve other kinds of tax cases. And if these cases can go to the district court, as we submit, I think Judge Kaufman's concerns and I think the concerns that Judge Brown articulated in the Clark v. Campbell opinion, which this Court is holding on our petition, vanish. Once you recognize that the taxpayer can go into the district court for this rapid remedy of a refund suit, I don't think that there are any significant constitutional problems.

In my remaining time I would like to talk a little bit about this statutory history because I think that it sheds important light on the congressional decision not to give the Tax Court jurisdiction over these cases.

QUESTION: You haven't forgotten Mr. Justice Blackmun's --

MR. SMITH: Yes. Perhaps I ought to just briefly tell Mr. Justice Blackmun and the Court as to the basis for the assessment in the Hall case.

Now, with respect to Mrs. Hall, the Commissioner terminated her taxable year as of the end of January 1973.

QUESTION: Just one month.

MR. SMITH: Just one month.

And the assessment figures were based upon confidential reliable informants, from presumably the local law enforcement officers, that Mrs. Hall was involved in the sale of illegal drug substances, and the volume of that was also communicated to the Internal Revenue Service. Based on that volume and presumably daily business, the Internal Revenue Service reached a gross income figure. I suppose it's something like over a hundred thousand dollars if you are going to wind up with a \$52,000 tax liability. Then gave her credit for the personal exemption and for the standard deduction and then we state the \$52,000 figure. I think though the record doesn't reflect that, that's my information, I have been advised by the Service that's how they reached this result.

QUESTION: And then the value of her property.

MR. SMITH: The value of her property was small by comparison to that \$52,000 figure. There was I think a bank account. I think also a safety deposit box with a few thousand dollars was also levied upon.

QUESTION: Was it a Volkswagen automobile?

MR. SMITH: A Volkswagen automobile, yes. The district court ordered the return of that car, I think, on a preliminary injunction immediately.

But that's how the facts arise in those cases.

QUESTION: That was all her discoverable property, wasn't it?

MR. SMITH: That was all her discoverable property, yes, that's correct, or at least that's all the Internal Revenue Service could discover as of the time they made this assessment. I'm not aware of any other property they had been able to discover.

I would like to turn to the statutory history in these cases because I think they shed important light on this question.

You see, the courts that have held against us in these cases and imposed the filing of a notice of deficiency had in our view impermissibly merged two different statutory provisions, that is, the termination provision and the early assessment provision of Section 6861. We don't think they can be merged. We think that the statutory history indicates that they are separate and distinct provisions which stand by themselves in the Code. Indeed, the fact that they came in at different times, we think, suggest that they are separate.

The termination provision is the older provision. It came in in the Revenue Act of 1918. Now, from 1918 to 1921 there was no early assessment provision. So Congress had just given the Commission the power to make terminations of taxable years of people who were engaged in tax avoidance.

activities for that current year.

Now, in 1921 Congress decided to establish an administrative appeal procedure. Now that administrative appeal procedure was new, and what it essentially said was -- because before the Commissioner would simply make an assessment and then collect it. If the taxpayer didn't pay, he was levied upon and then had to sue for a refund. But in 1921 the Commissioner decided to set up a procedure whereby the taxpayer's claim, that is, that he disputed the amount, could be heard at least administratively. So it set up this procedure whereby the Commissioner would have to issue a notice to the taxpayer and the taxpayer then would have 30 days in which to file a protest or some statement of his position. And then that administrative appeal would be invoked.

Now, Congress also determined that while this administrative appeal was to be invoked, the Commissioner was not permitted to make an assessment or collect the taxes at issue. But because of this administrative appeal procedure, Congress recognized that there would be cases in which the delay of the administrative appeal would produce a danger to the revenue and that perhaps the taxpayer's assets might be wasted or there might be competing creditors waiting in the wings, so Congress authorized a proviso. And I think that proviso is important. We set it out at pages 70 and 71 of Appendix B to our brief. The proviso, which is sort of at the

end of the first paragraph on page 71 says, "Provided, that in cases where the Commissioner believes that the collection of the amount due will be jeopardized by such delay he may make the assessment without giving such notice or awaiting the conclusion of such hearing."

Now, this is the statutory predecessor of section 6861. It came into the Code only to provide a means to the Commissioner to have means of collection while the administrative appeal procedure was invoked. It has nothing to do with the termination provision.

Now, it's important for the Court to remember that once the Commissioner terminates somebody's taxable year, that statute, that is, 6851, does not provide the Commissioner with any assessment authority. That assessment authority derives from the general assessment authority of section 6201 of the Code which is set forth in Appendix A of our brief, on page 53.

QUESTION: When did 6201 first come into being?

MR. SMITH: That is a very old statute, Mr. Justice Rehnquist. I'm not exactly sure when it came in, but it came in probably at the beginning of the time when the Treasury was empowered -- when taxes began.

QUESTION: Before 1918.

MR. SMITH: Oh, much before 1918. In fact, I know that it derived at least from section 3226 of the Revised statutes which I think, you know, that's about 1866, I think.

But I think it probably even, you know, has roots, historical roots before that.

So essentially you have these two provisions in the Code standing separately. You have the termination provision, and you have the early assessment provision which is an exception to the administrative appeal.

Now, in 1924, Congress decided that the administrative appeal was not a sufficient remedy for the taxpayers, because essentially it was conducted by the Bureau of Internal Revenue employees. They established an independent forum for the review of these cases, and it was called the Board of Tax Appeals.

Now, the important thing to remember is that the jurisdiction of the Board of Tax Appeals was roughly equivalent to this administrative appeal, and again because there would be a delay, possible delay, in the Board of Tax Appeals proceeding and the Commissioner was not permitted in general to assess or collect taxes while the Board of Tax Appeals proceeding was being invoked, Congress again provided this kind of proviso, that is, despite the fact that you have the Board of Tax Appeal proceeding, that the Commissioner could assess and collect taxes even though the taxpayer had invoked the jurisdiction of the Board of Tax Appeals.

Now, that essentially in our view demonstrates two things: Number one, it demonstrates that the termination

provision and the early assessment provision, which originated the proviso, are entirely separate provisions, and they shouldn't be merged.

Now, one of the assumptions, one of the basic assumptions upon which the decision of the Sixth Circuit here and the decision of the Fifth Circuit in Clark v. Campbell rest is that the Commissioner's assessment authority in a termination case derives from Section 6861, this early assessment provision, and that the Commissioner can't -- that in effect the early assessment provision must be invoked as part of the termination process. But as the statutory history demonstrates that is not so. The early assessment provision came in simply as an exception to the administrative appeal procedure, and that administrative appeal procedure as Congress later sort of transformed it into the jurisdiction of the Board of Tax Appeals was never intended as the statutes indicate to cover these termination cases.

Now, I have five minutes left. I would prefer to save it for rebuttal unless the Court has any further questions.

MR. CHIEF JUSTICE BURGER: Very well.

QUESTION: Mr. Smith, the one word in Section 6851, which is set forth on page 60 of your brief, the last two lines on page 60 it talks about "effectual proceedings to collect the income tax." Then on the next line on page 61, "unless such proceedings." Your view, then, would be that

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QUESTION: Mr. Smith, the one word in Section 6851, which is set forth on page 60 of your brief, the last two lines on page 60 it talks about "effectual proceedings to collect the income tax." Then on the next line on page 61, "unless such proceedings." Your view, then, would be that

Word "proceedings" refers to proceedings under 6401.

MR. SMITH: Well, in other words, these are summary administrative proceedings. These are the proceedings that connote assessment and the levying power and restraint power under Section 6331. In other words, first you have your determination and then you have administrative acts proceedings, so to speak, which include the sections under 6201, and if the taxpayer refuses then to pay, the involuntary means of extracting payment by levy and restraint.

QUESTION: But under 6851 you have already levied.

MR. SMITH: No, no, no. We haven't levied. The levy provision is in Section 6331 on page 57 of our brief. All Section 6851 authorizes the Commissioner to do is to terminate someone's taxable year and then determine that an amount is due, immediately due and payable. Just on that statutory language alone, collection cannot be effected. For the collection to be effected, the Commissioner then has to make the administrative act of recording the taxpayer's tax liability on the Service's books of account as an assessment, and once having taken that act, which is entitled to tremendous presumption of correctness and operates very much like a civil judgment, then the Commissioner presents that assessment to the taxpayer and says, "Pay this assessment," and if he doesn't pay, then the Commissioner must invoke other statutory remedies to effect collection.

But 6851 simply authorizes termination and a determination of an amount immediately due and payable, because without that statute, the taxes would not be due and payable until the following April.

QUESTION: What section specifically, was it 6331, authorized you to seize the money in the Laing case?

MR. SMITH: Yes.

QUESTION: Immediately without saying word one, you just seize it.

MR. SMITH: Without saying -- I'm not sure exactly --

QUESTION: What did you do before you seized the money?

MR. SMITH: What did we do before the money? We seized the money and made an assessment and we asked the taxpayer to pay the assessment.

QUESTION: But 6331 at least starts out by saying pay the same within 10 days.

MR. SMITH: Oh, yes, but if you look down at the bottom it says if the Secretary or his delegate makes the finding that the collection of such taxes is in jeopardy, notice and demand for immediate payment may be made. Upon failure or refusal to pay, collection thereof by levy shall be lawful without regard to the 10-day period provided in the section.

MR. CHIEF JUSTICE BURGER: Mr. Heavrin.

ORAL ARGUMENT OF DONALD M. HEAVRIN ON  
BEHALF OF RESPONDENT ELIZABETH JANE HALL

MR. HEAVRIN: Mr. Chief Justice, and may it please the Court, I am Don Heavrin, the attorney for Elizabeth Jane Hall, the respondent in the case of the United States v. Elizabeth Jane Hall.

I would like to start out and say this morning that the issue simply stated is what restrictions, if any, are there on the Internal Revenue Service when the Internal Revenue Service undertakes to collect tax that the Service believes is due and owing.

Now under the Code, section 6203 provides that the Regional Director can issue an assessment, and the way he issues the assessment is by writing in the ledger in the Regional Director's office the name of the taxpayer and the amount of money that's owed.

The interesting aspect of this mechanical procedure is that as soon as the Regional Director makes the entry and writes down your name, as Mr. Smith said, that's very akin to a civil judgment. In fact, it has the same weight because as soon as that entry is made, the taxpayer at that moment is in debt to the United States Government for whatever amount the Regional Director puts in the book.

Now, the Regional Director can make this entry without any particular knowledge about the taxpayer. He can

make this entry without any evidence whatsoever that the taxpayer owes the money. In other words, he can choose any person and any amount and put it in the book under 6203 and at that moment the taxpayer becomes indebted to the United States.

Now, I would submit to this Court that such a situation is dangerous under the best of conditions. But the danger is greatly magnified when the Government is not making a sincere effort to collect taxes. In the case at bar the Government had no interest in Mrs. Hall's tax liability. What the IRS was doing was endeavoring to punish Mrs. Hall nonjudicially for an activity that they had concluded that she was involved in. And they elected to punish Mrs. Hall because of the Presidential directive which is reproduced in the appendix of our brief for the then President of the United States, Mr. Nixon, suggested that anyone who is suspected of being involved in the drug trafficking, the Government use the most vigorous procedures imaginable to enforce the collection of taxes.

Now, the trap, as I said in the brief, was set and through fortuity of circumstances, Mrs. Hall stepped into the trap and the Government presented her the \$52,000 tax bill and they said, "Pay up."

QUESTION: I find that trap description a little bit opaque. Do you mean that the informants informed the police and then the police informed the Internal Revenue?

MR. HEAVRIN: No. The reliable informant that Mr. Smith referred to was not a reliable informant. Mrs. Hall was not involved in any illegal drug trafficking. Mrs. Hall was residing quietly at her rental home in Shelby County, Kentucky, when the Internal Revenue Service showed up and said, "Pay this bill."

Now, she was trapped by fortuity of circumstances. Her husband was arrested, prosecuted and convicted, and the State trooper Powers, who is referred to in my brief, for some reason which I have never been able to determine, concluded that Mrs. Hall must likewise be involved in her husband's illegal activities. So he obtained a search warrant and went out and thoroughly searched Mrs. Hall's premises. The search produced two narcotic -- not narcotic substances, but two control substances. One of them was less than one gram of hashish, and one was one amphetamine crystal. Both of these narcotic substances were not the property of Mrs. Hall, but were substances that had been used by her husband and Mrs. Hall quite frankly felt that they had all been removed from her home. The husband's difficulty had caused some marital problems -- I don't want to go outside the record, but I am trying to explain to your Honors what led up to this.

Now, when the Government showed up and presented the tax bill to Mrs. Hall, the bill was approximately ten times her entire worth. Now, in the questioning from Mr. Justice

Blackmun and Mr. Justice White, I see that the Court is understanding and seizing on the issue. Now, Mr. Smith says it's a very simple matter for the taxpayer to go into the United States District Court after he has filed a tax return. But the insidious and extremely dangerous thing about this situation is that the tax bill continues. So when they deliver the \$52,000 tax bill to Mrs. Hall, they seized her Volkswagen. They take it, they immediately put it up for sale, which is exactly what happened in this case. Assume for the purposes of this argument the sale of the Volkswagen produces a thousand dollars. They take the thousand dollars and they apply it to the \$52,000 tax bill.

Now, Mrs. Hall owes \$51,000, and the collection procedures are still moving. The collection procedures have in no way stopped. They have in no way been abated by the fact that they have seized and sold her Volkswagen. So Mrs. Hall goes to work the following Monday morning and she works a week and she gets a paycheck from her employer. The Government seizes the paycheck. The Government seized \$57 from her bank account. The Government said that they were going to come back and take certain --

QUESTION: Wouldn't that be true whether you get into the Tax Court or the district court?

MR. HEAVRIN: Mr. Justice Rehnquist, that's very important. The reason it's so important is that, you see,

filing the suit in the Tax Court holds the levy and the restraint power of the Government. So the \$52,000 tax bill is then stopped until the deficiency can be redetermined.

QUESTION: You mean, so that in the case of your fellow petitioner, in that case, Mr. Laing, he would then get the \$300,000 in the suitcase back while the tax deficiency is being determined?

MR. HEAVRIN: Mr. Justice Rehnquist, with due respect to the Court, I think that that is a correct statement of the law. We have alluded this morning to the fact that they do not get the money back. Under the conditions, there may be certain portions of the Code not in question at this time that would enable the Government to keep it. I don't know exactly what status Mr. Laing is in. I do know that the two taxpayers are in radically different positions because the money that was assessed against Mr. Laing was available, but the money that was assessed against Mrs. Hall was not available. So my research has not been directed towards the issue of what happens if the money is available and can be readily paid, my research has been directed towards what happens if the money cannot be paid.

QUESTION: I read the Fifth Circuit's opinion where they ruled in your client's favor as simply saying the Government had to issue a notice of deficiency and not going on to say that your client was entitled to relief of restraint.

MR. HEAVRIN: No. I think that if we take a look at the 6213, the taxpayer can file for redetermination within 90 days. And then if we look at 6321 for the lien for the taxes and a person refuses to pay and so on and then 6331 which is levy and restraint, and then 6335 which is sale of seized property, I think that an examination of those sections will reveal that the collection procedures stop.

Now, I'm not so much concerned about the Volkswagen, you see, that was taken. I'm more concerned about the continuing collection procedures. Now, you have a right to redetermine the deficiency in Tax Court. The Government sends the taxpayer the notice. The door to Tax Court is open. Within the 90-day period the taxpayer files the suit. When the suit is filed for the redetermination of the deficiency, assume they sold the Volkswagen and there is \$51,000 still owed. When she files the suit, that prevents the IRS from then trying to collect the other \$51,000 until the deficiency has been redetermined. And this is the protection --

QUESTION: Even though the IRS feels that the collection is in jeopardy.

MR. HEAVRIN: Yes, Mr. Justice Blackmun, because again this is really a tricky constitutional problem. The due process clause is right here between the taxpayer and the Government, and the Government clearly -- to illustrate the absurdity -- go ahead, sir.

QUESTION: I don't mean to interrupt you, but I thought your argument and the one which Mr. Justice Blackmun -- you are arguing as a statutory matter that the property should be returned and that the restraint should be relieved.

MR. HEAVRIN: As a statutory matter the property should be returned. I'm not sure that I follow your question, Mr. Justice Rehnquist.

QUESTION: Well, I may have interrupted Mr. Justice Blackmun. Let me make this observation to you. I think you probably sensed during Mr. Smith's argument a feeling on the part of several members of the Court that the revenues weren't in jeopardy and all we were talking about was a notice of deficiency and a fairly close legal question that the Government wasn't prejudiced and the taxpayer was being denied an opportunity to litigate, that there was some reason in a close case to resolve that in favor of the taxpayer.

But now you in effect are arguing that the revenues will be in jeopardy, that this man who had \$300,000 in the suitcase in the engine compartment will just be free to leave the country until his tax determination is finally determined. Now, that puts the equity in quite a different situation.

MR. HEAVRIN: Yes, I agree with you that that shifts the equity. If I could say that this is probably a two- or three-tiered argument, one, in my case I think the facts are so radically different. Mrs. Hall was making no effort to

leave the country. I can't argue with your logic that if you catch someone at the border who is trying to get out of the country, the Government should have the right to seize the property and hold it until such time as the actual tax liability can be litigated.

But I'm not entirely sure that that analogy applies to a taxpayer who is not trying to depart the country. In other words, if the Court holds the way you are thinking, Mr. Justice Rehnquist, this could produce some incredible inequity. In Mrs. Hall's case, when she filed a 1973 tax return, the Government after the most scrupulous audit imaginable refunded her \$77 in taxes. So it was clear that at no time did she owe \$52,000 tax bill or anything like that. So when the Government --

QUESTION: We can have jeopardy with a domestic taxpayer who isn't leaving the country. Suppose she had \$50,000 and went off to Las Vegas and started putting it in the slot machines. Are you saying the Government can't move in even though she has instituted a suit in the Tax Court?

MR. HEAVRIN: No. I'm saying that after the Government has moved the initial seizure is made and the litigation begins. You see, I am obviously not making myself clear. Let me step back one step.

The bill, \$52,000. The Government comes in to collect. The Government makes the seizure of her property and

all available assets. The seizure does not equal the amount of the assessment. Mrs. Hall now owes the Government \$50,000 after everything is taken. Is it the Court's position that the Government can then use this machinery to continue to strip her of her assets forever? She can never take another paycheck home? She can never have another bank account? She can never have any clothing or any furniture that exceeds \$250, and so forth? Is the Court's position that the Government can continue to strip her of her assets? She continues to work, the Government continues to take its satisfaction of that bill.

Clearly some place along the line the Internal Revenue Service must be stopped, because to hold otherwise would give the opportunity to the Government to destroy Mrs. Hall, financially and put her into a condition of indigency on the whim of a Regional Director. There must be some way to stop the repeated collections. So if the Government issues this deficiency notice which we so argued about this morning, that opens the door to Tax Court. That gives the taxpayer the opportunity to redetermine the deficiency. And if it takes two years to do it, during that two-year period the taxpayer is not continually stripped of his assets, he is not continually impoverished. In other words, he can continue working, he can continue producing, he can continue to have a bank account, he can continue to hold assets.

QUESTION: You are saying that by filing a petition in the Tax Court, restraint is impossible.

MR. HEAVRIN: I am saying that that holds the collection procedure, or should.

QUESTION: Mr. Heavrin, are you familiar with Clark v. Campbell, decided --

MR. HEAVRIN: Yes.

QUESTION: Recently by the Fifth Circuit. The court in that case addressing this very issue expressly said that the Government did have the right under the circumstances you described to continue to hold the taxpayer's property in an amount sufficient to cover the assessed deficiency. Do you disagree with that?

MR. HEAVRIN: No. I think it is correct, Mr. Justice Powell. The problem, though, is that if the taxpayer does not have it -- now, in all of these other cases that we have discussed and the Sixth and Second Circuit faulted out over, the taxpayers had the money. For example, in the Irving case they had \$650,000, I believe, and Laing had \$300,000. So the Government wasn't asking for an amount that it seized what the taxpayer had. So they could make that seizure of the \$600,000 or the \$300,000. But in the Hall case they have asked for \$52,000. Mrs. Hall by no stretch of the imagination had anything that even approached \$52,000. So if the

Government was not enjoined and stopped from coming back again and again and again throughout the course of the litigation, they could continue to strip Mrs. Hall of every dime that she made. But in the Clark case and in the Irving case and in the Laing case, there wasn't any additional money being taken from the taxpayer.

Am I making myself clear, Mr. Justice Powell? In other words, they took what they found, the \$300,000, and then they faulted out over who was entitled to the \$300,000. In the Hall case they said it's \$52,000 and they found approximately a thousand dollars in total assets. Now, what happens to that other \$51,000 bill? If they had assessed \$50,000 and she had \$50,000, then she could continue her life in a normal way while the Government held onto the money. But when they assessed the \$52,000 and she didn't have it, and they took everything she had and everything she had did not satisfy the amount of the assessment.

QUESTION: But then you think that the deficiency notice which you say is required stops the Government in its tracks from --

MR. HEAVRIN: Further.

QUESTION: -- further levying.

MR. HEAVRIN: Yes, Mr. Justice --

QUESTION: And what is your statutory support for that? Or is it purely constitutional?

MR. HEAVRIN: I think it's constitutional, and I would have to sit down here and read these statutes one word at a time, and I will say that if that's not provided in those four statutes that I cited to the Court, then clearly it's unconstitutional. I believe that it is embodied in either 6213 or 6321, 6331, or 6335, but I would have to sit down and just carefully pick it out. But if it's not embodied in those sections, then I think there are very serious constitutional questions because the Regional Director could on the whim destroy any citizen in this country.

QUESTION: Which amendment of the Constitution.

MR. HEAVRIN: Fifth amendment.

QUESTION: Taking without due process?

MR. HEAVRIN: Taking without due process of law.

And the fascinating thing and at the same time the extremely dangerous thing is that -- this is probably the most important point in the whole argument -- if the Government is allowed this power, there is no one who is beyond the reach of the Internal Revenue Service, because --

QUESTION: The same argument was made last term in Americans United. This was a tax exempt organization originally. But the argument didn't prevail.

MR. HEAVRIN: Well --

QUESTION: I think we also stipulate that no one is beyond the reach of the Internal Revenue Service.

MR. HEAVRIN: Yes. I think that's pretty clear. And you see the amount of the assessment -- this is what happened in this case, the amount of the assessment can be anything that the Director writes down, which is extremely dangerous, because they can write down an amount that exceeds the assets of anyone. And if nothing else is gotten out of my rambling up here, I hope the Court sees that there is an inherent danger when, if you were a multi-millionaire, they could just simply write in the assessment book a figure bigger than what you owned and take everything away from you and then continue to seize your property until the assessment was satisfied.

QUESTION: I have difficulty in drawing lines that way. Suppose she had \$49,000.

MR. HEAVRIN: O.K. The Government takes it.

QUESTION: Or suppose she has exactly the amount that they assessed.

MR. HEAVRIN: The Government takes it.

QUESTION: The rent is still due next month, maybe. The grocery bills. It seems to me that she is then just as distressed in the situation you painted for us.

Or if she had \$3,000 more than they assessed she could be distressed.

MR. HEAVRIN: The point is well taken. The point is well taken, and to carry it one step further, I think tier

number one they shouldn't be allowed to do this. Tier number two, if they are allowed to do it and they are allowed to take the taxpayer's property as security while the litigation goes on, then we are entitled to go into Tax Court and there is a sum of money, \$100, the Government says you owe \$100, they take the \$100. Then you litigate in Tax Court and the Government continues to hold the \$100 as security to make sure that the taxpayer does not squander it. But if the Government says you owe \$200 and you only have the \$100 and we do not get in Tax Court, in other words, if they pick a figure that's bigger than the total assets of the taxpayer, a figure is chosen that exceeds the total assets of the taxpayer, that puts the taxpayer in a much worse position Mr. Justice Blackmun, than it would if they seized an amount of tax because then that would be in one lump sum and one ball, so to speak, that they could fight over. But if the amount assessed was ten times greater than what she had, as she continued to work to pay the rent and as she continued to work to buy food and so on, as you have described, the Government would continue to strip her of her additional income. So if the Government can wrap it up in a package in \$300,000 in a suitcase under the hood of a car and put the suitcase in the safe and fight it out over that without affecting Mr. Laing's other income-making potential, I think that's a different situation than when the Government makes

an assessment ten times greater than the amount of money that you have in your total assets.

QUESTION: Let me bring this down to where you are with your Volkswagen. You hypothesize that it sold for a thousand dollars and the Government has a thousand. If you prevail here, would it be your claim that you are entitled to get that thousand dollars back or only that future property could not be restrained?

MR. HEAVRIN: I think if we prevail here the status quo is maintained until we litigate. Actually, the tax year for 1973 is closed. The Government refunded \$77 to Mrs. Hall and there is some question in my mind as to whether they would not be entitled to anything. ✓

QUESTION: What does that do to your constitutional argument? If the Government can hold the property which it has already seized?

MR. HEAVRIN: Mr. Chief Justice, our District Judge in his wisdom said this is highly impractical. The Government couldn't derive more than a thousand for the sale of the car and that isn't even going to make a dent in the tax bill. Mrs. Hall needs to get to and from work so he said if you will post a bond that will equal the approximate value of the car, we will let you have it back. So we got a corporate surety company, we went over and posted the bond on the Volkswagen and Mrs. Hall has had it in her possession

and has been driving it ever since. If the Court decides in our favor, I don't think there will be any enormous repercussions anywhere because the status quo will simply be maintained. Mrs. Hall will continue to drive her 1970 Volkswagen.

QUESTION: Am I to take that response as meaning that yes, the Government can continue to hold what it seized but it can't seize anything additional?

MR. HEAVRIN: No, Mr. Justice, the three tiers --

QUESTION: It holds the bond or doesn't it?

MR. HEAVRIN: I think the Government shouldn't be able to do this. I think it is unconstitutional to seize a taxpayer's property on an arbitrary assessment from a Regional Director.

Step No. 2, if the Court disagrees with that premise, having Step No. 2, the relief the taxpayer is entitled to is to maintain the status quo, the Government comes in, seizes what it can, it doesn't equal the amount of the tax bill, what they have seized. But I don't think the Government should then be allowed to continue to come in and take a weekly paycheck.

QUESTION: You still leave me in doubt as to what your answer is. The status quo is that the Government's got a bond for a sum of money for her car.

MR. HEAVRIN: Yes, Mr. Chief Justice.

QUESTION: That is in the place of the car.

MR. HEAVRIN: Yes, sir.

QUESTION: Does that status quo continue until the end of the litigation if you prevail, or must the bond be dissolved? That's what I'm trying to get at.

MR. HEAVRIN: I can answer that by saying I don't know. It's very interesting.

QUESTION: Perhaps we will hear some enlightenment on that from your friends.

MR. HEAVRIN: I hate to admit my total ignorance, but that is an interesting situation. I would say that the bond would be dissolved, because the 1973 tax year has been completely concluded, apparently to the satisfaction of the Internal Revenue Service and to the satisfaction of the taxpayer.

QUESTION: Mr. Heavrin, is this argument of yours made in your brief?

MR. HEAVRIN: Which argument?

QUESTION: The argument that once a deficiency notice is sent, there can be no more levies on the part of the Government.

MR. HEAVRIN: I don't think that's specifically said there. I believe that I have said that the Government was not interested in a fast resolution of this thing and I believe that we have discussed that -- let me see if I can find it for you, sir.

QUESTION: I thought that the question before us has come up narrower and somewhat different, that is, whether after a termination by the Commissioner there is an obligation to send a deficiency notice and a consequent opportunity for the taxpayer to go to the Tax Court.

MR. HEAVRIN: Yes. That is before the Court, definitely. The question of whether further collections can be made during that period of time is a collateral issue, but it's vital because if the Government is allowed to continue its collection or seizures during the pendency of the action, when the taxpayer does not have the money to pay the assessment, Mrs. Hall would have been forced into indigency and been kept there. She would have been on welfare because nothing that she would have produced could have been applied to the rent, as Mr. Justice Blackmun said.

QUESTION: Nor money to hire a lawyer.

MR. HEAVRIN: Money to hire a lawyer. That's very important.

QUESTION: That argument really isn't made in the brief, is it? Or did I miss something in your brief?

MR. HEAVRIN: I don't know, to be quite frank. I would have to read the thing again. I have read through ... so many times. This is a collateral issue which the Court seized upon during Mr. Smith's statement about who would hold the property. My position, the respondent's position is

that the Government shouldn't be allowed to seize the property. If the Court so holds that the Government can seize the property as collateral for the taxes, then the respondent's position is that at least keep the status quo until we can get this thing litigated.

QUESTION: And what's the third tier?

MR. HEAVRIN: The third tier -- excuse me, the second tier and first tier are entwined with the codal aspects of the thing. The third tier is the thing is unconstitutional. It's more or less an equity situation and it's not an easy case because the Code is extremely complicated and the Government has first used one section, then another, and then argue that the history and the aspects of these things -- I think the codal argument alone defeats the Government's position.

For example, in the codal argument, if you read Section 6201, that grants assessment authority for taxes that are to be paid by stamps. And the Government continues to ignore that provision in Chapter A of 6201. Then the last sentence of the first paragraph says, the authority for the Secretary to assess taxes shall extend to, and it lists four other situations. But none of those situations equal or approach or approximate what we have in the case at bar. So it seems that the Government has grasped this one code section and said, now, this empowers us to do what we have

done in the instant case. And I don't think that it does. I think the Government's wrong on the codal argument. Mr. Smith said that even a fair reading of the Code illustrates that the Government is correct. I think that a fair reading of the Code indicates the opposite is true. I can't get it through my thick head that 6201 really gives them the authority to make assessments in jeopardy situations.

I think I have covered about everything I want to.

Oh, one interesting aspect which the Second Circuit suggested that a bond be posted, and the Government -- Mr. Smith argued that the bond aspect was viable. Well, assume that it is viable, 6863 is the Code section that provides for the posting of bonds. But Section 6863 does not refer to Section 6851 in the Code. It refers to 6861 of the Code. So the Government is saying under 6851 situation you can post a bond, but really the Code provides for the posting of a bond only under 6861 situation.

I thank you all for your attention.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Heavrin.

Mr. Oteri.

ORAL ARGUMENT OF JOSEPH S. OTERI ON  
BEHALF OF PETITIONER JAMES BURNETT

McKAY LAING

MR. OTERI: Mr. Chief Justice, and may it please the Court: My situation unfortunately is somewhat different from

my brother's. I have a foreign national who had been in the United States for 25 days, who was departing the United States over the Canadian border, was turned back, was now returning to the United States because he was unable to get into Canada and on a search of his car the Government found \$310,000.

I think it's important to first state in answer to the question asked by the Chief Justice, I expect or I am asking this Court to return the \$310,000. It's my contention --

QUESTION: You are, you say?

MR. OTERI: Yes, your Honor, I am.

QUESTION: Otherwise there wouldn't be really much point in your being here.

MR. OTERI: Absolutely, your Honor.

QUESTION: You wouldn't be going to all this trouble over just whether -- over a purely legal point at this stage.

MR. OTERI: I'm not a charitable institution, your Honor.

QUESTION: You want this money in your hands so your client is free to do with it whatever he wants to do with it, including taking it to Zurich or Ottawa.

MR. OTERI: Anywhere he likes, your Honor, after he leaves my fee. But the facts of the matter are in this instance they seized this money. Maybe we ought to take a look at how the money was seized. There were three people involved, your Honor. There was a lady and two gentlemen in the car.

They were starting to cross the border. The Government agents, the Customs agents called the IRS District Director in Vermont. He sent down Mr. O'Kane, Chief of Intelligence, and Mr. Perry, who was his collector, and they interviewed the three people. It's my information that the two people other than Mr. Laing, the petitioner, disclaimed any knowledge of the money. They disclaimed any ownership. Mr. Perry -- in the appendix in our brief, your Honor, Mr. Perry's testimony, limited as it was, is very revealing. Mr. Perry said in answer to a question that he went down there with the preordained concept, the idea it was a foregone conclusion, he says, to assess a jeopardy assessment on these people.

But what did he do? He didn't assess \$310,000 against Mr. Laing only. He assessed the \$310,000 assessment against all three people.

QUESTION: At that stage was he in possession of sufficient facts to determine which potential taxpayer owned how much and owed how much taxes?

MR. OTERI: Precisely the question, your Honor. He was not in sufficient possession of any kind of facts that would jeopardize any kind of an assessment against anyone. All he had was the fact that, as he says, there was \$310,000 attempting to be taken out of the country.

Now, I can see if he wants to assess it against Mr. Laing who admits ownership of the money. Laing doesn't deny it. ✓

Why is it important, your Honor, that he assessed it against the three people? It's important, because at a later time the Government then reduces the \$310,000 assessment to \$195,985.55 against each of the three people involved in the car.

QUESTION: That was divided among them, wasn't it?

MR. OTERI: No, your Honor, against each of them.

QUESTION: A total of almost \$600,000.

MR. OTERI: They assessed \$930,000 worth of assessments, based on finding \$310,000 in money. Then they give us a break and they reduce it to \$195,000 against each, and what do they do to us? We didn't file a tax return showing zero tax liability because it's our contention that our client did not earn the money in the United States and no tax is due. But not only do we not have a forum, in an attempt to get a forum to prove this, we file for a refund, and what do they tell us? We say we have \$114,000 coming to us fellows. They say no, we have assessed the \$300,000 taken in the following manner: \$100,100 each to each of the three of you on \$195,000 tax you owe.

Now, I am here with a refund suit filed and I am staring the Flora decision right in the face. And despite what Mr. Smith says to you, I know that the Government when we come to go before the judge up in Vermont, the Government's going to say to me, you haven't complied with the full payment requirement of Flora and you're out, unless, of course, you

remedy that in this opinion, which I certainly hope you will do.

QUESTION: Just back up a minute here. When you speak of these concessions by Laing that it was all his money and therefore by implication all his tax liability, if any.

MR. OTERI: That's right.

QUESTION: Where would the Government be if later on the other two people came into the litigation and said, Oh, no, it's ours, and it's our money, and, if any, our tax liability. Do you suggest that the Government is bound by a concession made by Mr. Laing at that time?

MR. OTERI: I don't suggest that it's bound by it in a strictly legal sense, your Honor, but I do suggest, one, that as the Government must have some valid basis for making some form of a seizure of a person's property. I think Mr. Laing has the equal right to say the property is mine and it's no one else but mine. I think if we are going to give the Government the right to without any kind of a hearing and this is probably the only case or the only situation under the Code, the short year jeopardy taxpayer is probably the only person with no forum he can go to under the codal provisions. And yet you allow his property to be taken with no kind of preliminary hearing.

Maybe, your Honor, I say just assuming arguendo, maybe the Government has a right because this man was leaving the country and he had the money and there was a good chance

that the Government was going to lose its ability to collect the tax if in fact one was owed. Maybe the Government has the right to seize that property, and upon seizing it, I maintain that due process demands that the petitioner in this case be given a meaningful hearing at a meaningful time in a meaningful place. And by that I mean within at least 30 days the Government should go before some judicial officer and allow the defendant, the petitioner, to be there and convince that officer that basically the money is in jeopardy. It doesn't seem a difficult thing to do. Two, that there is some authenticity to the figure assessed, and, three, that the money was earned in America.

I think that's the minimum due process standard my man is entitled to. A simple answer to those three questions determined by a judicial answer, not by the Commissioner of Internal Revenue who is very much busy in ferreting out criminals as well as collecting revenue today, your Honor, because this whole jeopardy provision, it is my understanding there are some 1800 uses of this provision last year. There has been an enormous upswing in the number of them, and I can basically based upon my practice as a criminal lawyer who defends people generally charged with drug offenses, every time a person is caught with any kind of significant amount of money, the Government seizes the money, notifies the IRS, and the IRS comes in and levies on that money. This has been

the rule since the war on drugs was declared in 1972. It's not the exception. And I maintain in these situations, your Honor -- a pornographer is entitled to prior determination as to whether or not it's filth or whether it's protected; a criminal who has stolen property in his home is entitled to a prior determination by a judicial person to determine whether or not there is probable cause to go in his home.

My man --

QUESTION: Didn't the Phillips case uphold substantially the kind of proceedings we have here?

MR. OTERI: No, your Honor. The Phillips case said you have a right to protect the revenue. But the Phillips case, one of the holdings in Phillips was that there was an immediate, there was a hearing going to be granted. There was a deficiency notice, there was a hearing. My man has no deficiency notice.

Just if I may, Mr. Justice Rehnquist, my man was grabbed, the money was grabbed on the 24th of June. Today, even though in 1973 we filed a tax return, we still have not received the deficiency notice. We still do not have a ticket to the Tax Court. ✓

My brother -- and beware of prosecutors who worry about your clients -- my brother tells us the Government doesn't want to burden us with the Tax Court appeal because after all it takes two years. They want to make sure we get a

quick suit for our money. But what they are not telling us is that the Tax Court is the place where they know tax law. The average lawyer like myself who is out practicing criminal law, I don't know anything about taxes. This has been the most painful preparation of my life trying to get even conversant with this law. We don't know what's happening. If we go to the Tax Court experts, they will decide, and they will decide in one way and everybody will be bound by those decisions. If we have to be in the North Dakota District Court, in the Florida District Court, your Honor, there will be 700 different opinions on every single case, the courts will be just bogged down with litigation.

QUESTION: This is true of the whole body of tax law. You have duplicate adjudication, two systems of adjudication in tax law, one in the district courts and one in the Tax Court. I mean that's not peculiar to your situation.

MR. OTERI: But it is, your Honor, in this respect: In this case, and I can't understand why, all the Government has to do -- maybe my brother can answer a question if you choose to ask him -- why won't they give us a deficiency notice? They tell us that there is no jurisdiction in the Tax Court in a short-year jeopardy proceeding. I don't buy that.

QUESTION: He says why won't you sue for a refund?

MR. OTERI: I have. I have, your Honor. But nothing

has happened. We are holding it in abeyance until this case is decided. Why don't I want to sue for a refund immediately? Because they are going to hit me with the Flora rule. They say I owe \$195,000 in taxes. They took \$310,000 away from me, but they only give me credit for \$100,000. They give the other \$100,000 to my --

QUESTION: The Government says now that it's view of Flora is that you have got a perfect right to sue for a refund.

MR. OTERI: That's what they say here, your Honor, and I don't accuse my brother of any kind of bad faith. But when you are up there in the district court of Vermont, somebody is going to raise Flora against me unless somebody tells them they can't do it.

And the other thing, descending from that right now, the fact of the matter is back at its inception they were wrong. They took my client's money, held it for two and a half years, and won't give us any kind of an opportunity to get a shot at getting that money back. I filed a motion asking that they put it in an interest-bearing account. My client could get 12 to 15 percent interest on that money. He's living on a house boat in New Zealand. He hasn't got the money to call me. He calls me collect, because he doesn't have any money.

Now, all I want is an interest-bearing account yet. It's defies my imagination when we see the Government acting

in this kind of totally high-handed manner.

QUESTION: Will you tell me again why you haven't gone ahead with the trial of the case in the District Court in Vermont?

MR. OTERI: On the refund suit, your Honor?

QUESTION: Yes.

MR. OTERI: I haven't gone ahead on the refund suit because we have agreed to wait until there is an adjudication of this case.

QUESTION: You didn't have to agree, did you?

MR. OTERI: I didn't have to, sir, but if I didn't I was going to get Flora stuffed down my throat and I would have been thrown out and I would have had nothing. This way I'm here in front of you on what I think is the basic remedy that's available to me getting all the money back because the Government did not give us the deficiency notice which it's required by law to give us.

QUESTION: I go back. You could have put this case on the calendar for trial and forced the trial in the Vermont District Court long since. It's probably the lightest court calendar in a district court in the whole United States.

MR. OTERI: I don't dispute that, your Honor.

QUESTION: But you --

MR. OTERI: I would have been thrown out.

QUESTION: Well, you are assuming that.

MR. OTERI: I'm not assuming it, your Honor. I can only say again, your Honor --

QUESTION: Had you gone in, we would know that and you might be here on that route.

MR. OTERI: I very well might be, your Honor.

QUESTION: Instead of now seeking an advisory opinion from the Court.

MR. OTERI: Well, I don't think it's really an advisory opinion, your Honor, in the sense that I am asking you to say that the Government is required to issue a deficiency notice when it makes a short-year termination under 6851. And it's failure to make that vitiates their seizure of my client's money. And I am entitled to have that injunction granted to return that money to me.

QUESTION: Does the giving of that deficiency notice require that the Government return the money to you?

MR. OTERI: No, your Honor, it doesn't. But what it does do is it then, if they give me a deficiency notice now, your Honor, I don't think it does. But if in fact you find they were required to give me a deficiency notice by statute, as I think they are, then I think that would compel the District Court Judge to grant my injunction and return the money to me.

I know the Court is probably reluctant to return the money, but I do think that's --

QUESTION: What makes you think that?

MR. OTERI: Well, I certainly -- we are all interested in protecting the revenue of the United States, your Honor. I as a taxpayer --

QUESTION: You think this is just a matter of equity that the Government has omitted a statutory duty, they just ought to give the money back.

MR. OTERI: Yes. It's more than a matter of omitting a statutory duty, your Honor. I think it goes beyond that. I think they have encroached upon a serious right of a citizen or non-citizen who has the same rights as a citizen. They have denied him any kind of summary hearing where he can justify his possession of that money. They have deprived him of his property for 30 months, your Honor, for almost two and a half years thus far, without any interest, maybe they pay 6 percent or something if he gets it back. But the fact of the matter is the man has been really reduced to a status of poverty because of this kind of action. And I think of all the cases, your Honor, Kelly v. Goldberg and all the rest of them where this Court has said some kind of a hearing before a property right is terminated.

QUESTION: Or at least immediately thereafter.

MR. OTERI: At least immediately thereafter. I say this may be one of the few, very few exceptions, your Honor. I am in a very untenable position in that everything about me

cries out that you can't take property rights away from a person without a prior hearing.

But in this case I think maybe there is some justification because of the fact that the man was leaving the country with the money. But I think that if in fact this is one of those exceptions that have been recognized, there must be engrafted on that type of a ruling a requirement that within a meaningful time and place he has an opportunity to get an answer to those three questions as to the validity of the assessment, the amount, and the rest of it, your Honor, whether or not the money was earned in the United States and it was in fact in jeopardy of being removed from the United States.

This man could very well have \$5 million in a bank prepared to pay the tax. He doesn't, but the Government's know that. When you look at a case like Rimieri which was decided in New York, your Honor, you see that a Frenchman was arrested in the United States with \$247,000 on him. After 46 months he finally got a hearing and a tax agent by the name of Mr. Silver was asked on cross-examination what was the basis for the assessment, and he hemmed and he hawed through a number of answers and finally he was forced to state that the basis for the assessment was that was the amount of money the man had, that's what he was told to assess and that's what he assessed. And I maintain that's exactly what happened in my case, only in my case they took \$310,000 because there were three people they

multiplied it by three. Well, if that kind of conduct can be countenanced on the part of the IRS, I maintain there is substantial due process violations, and I think for that reason, if for no other reason, this man should have his money returned and should be at least granted a hearing within 30 days of any seizure in the future. Because, among other things, you are talking about statutes of limitations. One of the things I have to be afraid of in this case, your Honor, is that if in fact the money is returned to me as counsel for this man, I think the Government has the right to re seize it. That happens to be one of the options that I think is available to the Government.

The other question you were talking about statutes of limitations, the Government has three years in which to issue a notice of deficiency. That three years has not expired yet. They still have not issued the notice to me. I think that was another one of the statutory questions you were asking.

At this time, your Honor, if I could address myself briefly to the problem, the statutory problem, such as it is, this short-year termination was made under the aegis of 6851 of the Code. That's a section of the Code entitled "Jeopardy." And 6851 is the short-year provision under jeopardy. The Government claims that it can go to 6201 of the Code which is the general assessment power and does carry in it the statement "by stamp" which may mean that it can only

collect taxes under that section assessed by stamp. But nonetheless, it's a general assessment power. They go to that for their assessment authority. They don't in their brief quote section (d) of that particular statute which in effect directs the -- section 6201(d) specifically states the special rules applicable to deficiencies of income, et cetera, see subchapter (b), subchapter (b) being Section 6211 to 6216.

When you go to Section 6216 of the Code, your Honor, Section 6216(2) they say, procedures relating to jeopardy assessments see subchapter (a) of chapter 70. In effect what we are saying is the Government, when you follow its argument to its completion, had they included that section (d) in their brief referring them to section 6216, you would find that they make a complete circle. They start under the jeopardy assessment provision of chapter 70, subtitle (a); they go to 6201, they get sent to 6216, which sends them back to chapter 70.

I think it's pretty obvious if they are going to make an assessment under 6251, it has to be done under the authority of 6261 -- 6861, I'm sorry, your Honor.

Now, why don't they want to assess under 6861, which is the next following statute? They terminate your short year under 6851, but they don't have the authority to assess under that --

QUESTION: You say it's the next following step. There is a provision in the Code, isn't there, that says the

juxtaposition of sections after all these revisions isn't to be given any great weight.

MR. OTERI: Absolutely, your Honor. I don't in any way say that because it follows it, it invariably means that it has to be applied. But when you look at both of them under the jeopardy heading, both of them concerning jeopardy assessments, there being no other sections concerning jeopardy assessments, I think you would have to be somewhat blinded not to feel there must be some correlation between the two of them. And practically, your Honor, if in fact the Government doesn't use 6861, they are in effect avoiding the necessity of giving the taxpayer a deficiency notice which allows him to go into the Tax Court for an adjudication. And that's exactly why they don't want to use 6861. They would much rather take a taxpayer's assets and deny him the right to go to the Tax Court for any kind of a prepayment or any kind of an even post payment decision.

Thank you very much.

QUESTION: Mr. Oteri, what is your answer to the question that was showered on your co-counsel. If you have a way into the Tax Court, is the Government forthwith restrained from levy?

MR. OTERI: If you have a way into the Tax Court? Well, your Honor, again, in a short-year jeopardy assessment, it's my feeling that they can assess but they cannot restrain.

They may levy, but they cannot restrain. I don't think they can sell the property. They may be able to take the property provided the due process requirements are granted by giving you an immediate or at least a reasonable hearing at a meaningful time and place and manner so that you can have a determination by a judicial officer as to the validity of this whole thing.

You see, your Honor, the difference in this particular case, this type of situation, is that this is a totally capricious and arbitrary act by the Commissioner, and it's done generally in cases involving a means of punishing people who are suspected of drug dealings or gambling. It's not a bona fide attempt to collect a tax. Because if in fact it was, and I can't speak for my brother, Mrs. Hall is a very unoffensive little lady sitting there in a rented house with a little Volkswagen. She's not hurting anybody. They don't have to destroy her to collect the tax. And I think when you see in fact that it's really a means of law enforcement, of punishment, not a means of obtaining revenue for the Government, you then see the necessity for putting an impartial magistrate between the Government and the citizenry of the United States.

QUESTION: Of course, your client's case, quite different from Mrs. Hall's perhaps, does suggest that the Government may have been motivated by a desire to protect the revenue.

MR. OTERI: I don't dispute that at all, your Honor.

I just say that if that is true, if in fact that's true, there is no reason why they couldn't seize the money and hold it for a reasonable period of time, 30 days, 20 days, some such time where they have to go before a judge. All I want is a judge, somebody who had sit there and say, "Look, fellows, you're not acting in accordance with the constitutional standards of the United States." When you have to go to the Commissioner of Internal Revenue who may be a great guy, I don't even know his name, he may be a wonderful man, but he is still the Commissioner of Internal Revenue, and he is still a law enforcement officer, and he still is helping enforce a situation that in fact may well have terminated by now, but he is still a law enforcement. And when there is law enforcement on one side, there is no impartial determination. The way I see things in the best interests of my client, he sees them in the best interest of the Government. Give me a fellow in a black robe who has no interest, who merely wants to see justice done in the abstract, and I think we have got what this country is all about.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Oteri.

Do you have anything further, Mr. Smith?

REBUTTAL ORAL ARGUMENT OF STUART A. SMITH ON

BEHALF OF THE UNITED STATES

MR. SMITH: Just a few points, Mr. Chief Justice.

I think that the record in both these cases cannot support any inference that the Commissioner's efforts in this regard are anything but tax collection efforts. There is no suggestion on these records that these cases involve any harassment. Indeed, the Court last term in Bob Jones University and American United said simply that you cannot impute that kind of motivation other than tax collecting efforts to the Commissioner without a solid factual foundation.

QUESTION: In the Hall case, maybe I misunderstand it, but the sum of \$52,500 was assessed. They levied on a couple of thousand dollars, and then at the end of the year it turned out that she got a refund.

MR. SMITH: Yes. I want to make that clear. What happened in the Hall case was she filed a tax return reporting \$530 of gross income for the full taxable year and claiming a refund of some \$76 on taxes withheld. Now, the Commissioner was subject to an injunction by the District Court which was affirmed in the Sixth Circuit in Hall which said that he was not permitted to take any tax collection steps against her for the assessment for the terminated period.

It was determined that unless the refund was paid, because no stay was sought, that the Commissioner might well be in contempt of the district court's order. So that amount was paid. That payment in no way connotes that the Commissioner is satisfied that Mrs. Hall has fully complied with her tax

liability for the year 1973. To the contrary, it was simply made in order to avoid any suggestion that the Internal Revenue Service might be violating a court order by applying the \$76 claimed to the amount of the assessment.

I think I want to make something else clear because there seems to be some confusion on the point of the effect of the filing of the notices of deficiency. The effect of filing of a notice of deficiency in a jeopardy situation does not restrain -- and an indication of Tax Court jurisdiction does not restrain the Commissioner of Internal Revenue from continuing to collect taxes. If you look at Section 6213(a) which is set forth at page 56 of Appendix A of our brief, you see that there is an exception down at the last three lines, "Except as otherwise provided in section 6861 no assessment of a deficiency," and so forth and so on. So the jeopardy situation is an exception to the normal rule that a Tax Court proceeding stays collection.

But what I want to emphasize --

QUESTION: Will you give us that reference again.

MR. SMITH: 6213(a), page 56 of our brief.

QUESTION: Thank you.

MR. SMITH: But what I want to emphasize here is that what this case really involves is a congressional decision to allocate jurisdiction in these particular cases to the district courts and not to the Tax Court. And, indeed, sending

a notice of deficiency to the taxpayers, as I think the Court is well aware, doesn't really provide them with any particular benefit.

QUESTION: What is the earliest possible time, assuming you are right, that he has to go to the district court that he could ever get anybody to rule, a judicial officer to rule on even that there was probable cause to believe that you were right -- probable cause to believe that a taxpayer --

MR. SMITH: The earliest possible time, I suppose, is the day after the levy and collection was made, the taxpayer could file claim for refund with the District Director's office --

QUESTION: I know, but he could hardly -- it takes him, what, six months?

MR. SMITH: That's the maximum.

QUESTION: Well, the taxpayer can't go to court until he gets turned down, and he can take six months to do it.

MR. SMITH: The Commissioner can take six months under I think it's section 6532. And then he can file a complaint the day after that.

QUESTION: So is six months the earliest possible time?

MR. SMITH: Quite frankly, I think on the basis of what the Court said a moment ago in the Phillips case, I think that that constitutes an adequate post-collection judicial remedy.

QUESTION: That may be for the total resolution of the case, I mean for a decision on the merits. But there is no way that anybody can even, that plainly erroneous levy assessments could be sorted out.

MR. SMITH: That's not quite so, because the court audit people were aware of the fact that if something is completely without any foundation, this Court has created an exception to the Anti-Injunction Act in the Williams Packing case. That is if a taxpayer could demonstrate that under no circumstances could the Government prevail on the merits of its claim and that its equity jurisdiction otherwise exists. So there is that narrow remedy for the case in which the Commissioner has made a totally wild and unsupported claim.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.  
The case is submitted.

(Whereupon, at 12 noon, the oral arguments in the above-entitled matters were concluded.)

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