1986

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Levying on Joint Bank Accounts: A Ticking Bomb for the Nondelinquent Joint Account Holder

The Internal Revenue Service is currently experiencing great difficulty in reducing the government's massive delinquent tax receivable. At the end of fiscal year 1983, the amount of delinquent taxes owed to the Treasury totaled $23.4 billion.\(^1\) During the ensuing fiscal year, the Service wrote off $757 million of the delinquent tax receivable because the statutory period for collection had expired.\(^2\) The amount of delinquent taxes outstanding at the end of fiscal year 1984, moreover, increased approximately twenty-six percent to $29.4 billion.\(^3\)

The Service is under great pressure to collect these delinquent taxes.\(^4\) Congress, confronted with a growing federal defi-
cit,\(^5\) has once again focused its attention on tax reform as a means of alleviating the government's financial problems.\(^6\) In the scramble to locate sources of federal revenues, the billions of dollars of delinquent taxes have not escaped scrutiny and criticism.\(^7\)

This Note examines one of the Service's most powerful tools of collection, the administrative levy procedure. Part I outlines the statutory provisions that facilitate the timely collection of tax revenues, focusing on the lien-foreclosure and administrative levy sections of the Code. Part II reviews a recent Supreme Court decision that extended the Service's broad power to levy on funds held in joint bank accounts. Part III suggests that neither the administrative levy procedure, as interpreted by the Court, nor the statutory remedies for wrongful levy provide the nondelinquent codepositor with adequate procedural due process. Part IV then analyzes the Service's increased use of the administrative levy and discusses how Congress, although cognizant of the problem, has failed to mitigate the expanding risk of injury to nondelinquent codepositors resulting from this increased application. This Note concludes that, in light of the significant increase in the Service's use of the administrative levy on joint bank accounts, the nondelin-

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5. The Secretary of the Treasury estimated that the United States government would incur a deficit of approximately $167 billion during fiscal 1985. FINANCIAL MANAGEMENT SERVICE, TREASURY BULLETIN 3 (4th Quarter, Fiscal 1984).

Recently, the Senate approved and sent to the House a bill raising the government's borrowing authority above $2 trillion. As a reporter for The Wall Street Journal noted:

The proposed debt ceiling of $2.079 trillion represents a $255 billion increase necessary to carry the government through [fiscal year 1986] and compares with the $935.1 billion debt President Reagan inherited when he took office in 1981. Though the administration promised then to balance the budget by 1984, the proposed ceiling is $1 trillion above the fiscal 1982 debt ceiling incorporated in Mr. Reagan's first budget.


7. For a discussion of a 1980 congressional report criticizing the Service's collection practices relating to small businesses, see infra notes 172-179 and accompanying text. The General Accounting Office has also strongly criticized the Service's delinquent tax collection policies and procedures. See GENERAL ACCOUNTING OFFICE, WHAT IRS CAN DO TO COLLECT MORE DELINQUENT TAXES (1981); GENERAL ACCOUNTING OFFICE, IRS SEIZURE OF TAXPAYER PROPERTY: EFFECTIVE, BUT NOT UNIFORMLY APPLIED (1978).
quent joint account holder should receive stronger procedural protection.

I. INTERNAL REVENUE CODE COLLECTION PROVISIONS

Congress has given the Internal Revenue Service "formidable power to act summarily to collect and protect the public revenues." Pending an adjudicatory hearing, the Service may create a lien upon, and, if necessary, seize all of the delinquent taxpayer's property and rights to property.

A. FEDERAL TAX LIENS

If a taxpayer neglects or refuses to pay any tax within ten days after notice and demand by the Service, section 6321 of the Internal Revenue Code provides that the unpaid amount, including any interest or civil penalties, becomes a lien in favor of the United States "upon all property and rights to property" belonging to the delinquent taxpayer. Three events must occur before a general tax lien attaches under section 6321: the Service first must make a tax assessment; the Service then


9. McGregor and Davenport note that "[i]n the case of proposed assessments of disputed income, gift, estate, and private foundation excise taxes, the taxpayer will have the opportunity to litigate for redetermination of the deficiency by the Tax Court before collection efforts may be undertaken." Id. at 614 n.55.

10. Id. at 614.

11. I.R.C. § 6321 (1982). Section 6321 provides as follows:

   If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

   Id. For a detailed analysis of the federal tax lien, see generally 4 B. Bittker, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS § 111.5.4 (1981); M. Saltzman, IRS PRACTICE AND PROCEDURE § 14.04-.09 (1981); McGregor & Davenport, supra note 8, at 614-19; Saltzman, IRS as a Creditor: Liens and Levies Preferences, Other Creditors, Tax Levy Authority, Discharge and Removal of Levy; Informal Arrangements, 34 INST. ON FED. TAX'N 433, 433-50 (1976).

12. Section 6201 of the Code grants the Secretary the authority to make "assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title . . . which have not been duly paid . . . at the time and in the manner provided by law." I.R.C. § 6201(a) (1982). Pursuant to § 6203, "[t]he assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary." Id. § 6203. Generally, the assess-
must give the required notice, stating the amount of the assessment and demanding payment;\textsuperscript{13} finally, the taxpayer must refuse or neglect to pay the tax within the ten-day grace period.\textsuperscript{14} Once these events have occurred, however, no further government action is required to perfect the lien and to subject the taxpayer's property to possible seizure by administrative levy.\textsuperscript{15} Moreover, because of the tax lien's priority status, the government need not establish its interest in the taxpayer's property as against other creditors or persons having claims against the taxpayer.\textsuperscript{16} The tax lien expires six years after the date of assessment is effectuated by an assessment officer signing the summary record of assessment. Treas. Reg. § 302.6203-1, T.D. 6585, 1962-1 C.B. 290, 291. The date of the assessment is the date the summary record is signed by the officer. The Service will provide the taxpayer with a copy of the record of assessment upon request. \textit{Id.}

The Service is authorized to assess the amount of tax reported on the taxpayer's return without any preliminary procedural steps. I.R.C. § 6201(a)(1) (1982). Section 6213 of the Code, however, provides procedural protection to the taxpayer if the Service makes an assessment based on a deficiency. Specifically, a taxpayer's right to petition the Tax Court for a redetermination of the deficiency is protected for a period of 90 days after receipt of the statutory notice of deficiency. \textit{Id.} § 6213(a). During this period, the Service is prohibited from making a formal assessment under § 6201. \textit{Id.} Moreover, if a petition is filed in the Tax Court, no assessment may be entered until the court renders its decision. \textit{Id.}

13. Once the formal act of assessment has occurred, the Service must comply with the statutory notice requirements of § 6303 of the Code. Specifically, § 6303(a) requires that

\begin{quote}
the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax . . . give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address.
\end{quote}

I.R.C. § 6303(a) (1982).

Unless the Service complies with the notice and demand provisions of § 6303(a), no general tax lien will attach nor can the administrative levy be used to secure payment of the tax. See United States v. Coson, 286 F.2d 453, 462-63 (9th Cir. 1961); M. Saltzman, \textit{supra} note 11, ¶ 14.06, at 14-28.

14. Technically, the taxpayer has 10 days to remit the amount assessed by the Service. As a practical matter, however, IRS internal operating procedures effectively provide the taxpayer considerably more than 10 days before the assessment is classified as delinquent. Saltzman, \textit{supra} note 11, at 435. The Service Center computers are programmed to send out a series of notices prior to referring the case to the local district director's collection division. \textit{Id.}

15. M. Saltzman, \textit{supra} note 11, ¶ 14.06, at 14-27. For discussion of the administrative levy, see infra notes 31-55 and accompanying text.

16. M. Saltzman, \textit{supra} note 11, ¶ 14.06, at 14-27. Although the language of § 6321 permits application of the tax lien to "all property and rights to property, whether real or personal," belonging to the taxpayer, I.R.C. § 6321 (1982), § 6323 limits the scope of the general tax lien. Specifically, § 6323(b)
assessment if the government has not collected the tax or initiated court proceedings.\footnote{17}

\section*{B. Collection Procedures}

The section 6321 federal tax lien is not self-executing.\footnote{18} Although the language of section 6321 authorizes the creation of “a lien in favor of the United States upon all property and rights to property”\footnote{19} of the delinquent taxpayer, the statute is silent as to enforcement procedures after the lien becomes effective.\footnote{20} The Service must therefore look to other provisions of the Code for the power to collect an outstanding tax liability. The primary\footnote{21} collection tools are the lien-foreclosure suit\footnote{22} and the administrative levy.\footnote{23}

\subsection*{1. Foreclosure of Tax Liens}

Sections 7401\footnote{24} and 7403\footnote{25} permit the government\footnote{26} to

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  \item lists 10 classes of claimants who are protected against the federal tax lien absent actual notice. \textit{Id.} \textsection 6323(b). Moreover, Congress granted preferred priority status to those individuals making disbursements under a security agreement entered into prior to the filing of the tax lien. \textit{Id.} \textsection 6323(d). Similarly, Congress exempted certain types of “commercial transactions financing agreements” from the subordinating effect of \textsection 6321. \textit{Id.} \textsection 6323(c).
  \item I.R.C. \textsection 6502(a)(1) (1982). The time period can be extended, however, if a written agreement is consummated between the Secretary and the delinquent taxpayer prior to the expiration of the initial six-year period. \textit{Id.} \textsection 6502(a)(2). Moreover, “the period so agreed upon may be extended by subsequent agreements in writing made before expiration of the period previously agreed upon.” \textit{Id.} \textsection 6502(a).
  \item See \textit{M. SALTZMAN}, \textit{supra} note 11, \textsection 14.07.
  \item I.R.C. \textsection 6321 (1982).
  \item See \textit{id.}
  \item In addition to the lien-foreclosure suit and the administrative levy, Congress has provided the Service with emergency procedures should it become apparent that the assessment or collection of a tax is endangered. If the district director believes that collection of a tax would be “jeopardized by delay” if normal assessment procedures are followed, the tax may be immediately assessed and collected. I.R.C. \textsections 6861(a), 6331(a) (1982). Moreover, \textsection 6851 empowers the district director to truncate a taxpayer’s tax year and declare the tax to be immediately due and payable if the director “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 partially ineffectual proceedings to collect the income tax for the current or the immediately preceding taxable year . . . . \textit{Id.} \textsection 6851(a)(1).
  \item See \textit{infra} notes 24-30 and accompanying text.
  \item See \textit{infra} notes 31-55 and accompanying text.
  \item Section 7401 provides: “No civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the
bring a civil action in federal district court to foreclose its tax lien or to subject any property or property right of the delinquent taxpayer to the satisfaction of the outstanding tax liability.27 Under the lien-foreclosure provisions the government, as plaintiff, is required to join as parties to the action "[a]ll persons having liens upon or claiming any interest in the property involved in such action."28 After the interested parties have been notified,29 the court may adjudicate all of the issues involved and determine the merits of all claims and liens on the property.30

Secretary authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced." I.R.C. § 7401 (1982).

25. The relevant sections of § 7403 provide:

(a) Filing

In any case where there has been a refusal or neglect to pay any tax . . . whether or not levy has been made, the Attorney General . . . may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title . . . or to subject any property . . . of the delinquent, or in which he has any right, title, or interest, to the payment of such tax . . . .

(b) Parties

All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) Adjudication and decree

The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property . . . .

Id. § 7403(a)-(c).

26. Pursuant to § 7401 and the regulations, a civil action for the collection of taxes cannot commence until the Commissioner or the Chief Counsel for the Internal Revenue Service or his or her delegate authorizes the proceedings. Id. § 7401; Treas. Reg. § 301.7401-1(a), T.D. 7188, 1972-1 C.B. 376, 379.

Once a suit authorization is received from the Service, the case becomes the responsibility of the Department of Justice's Tax Division. After formal review, the Justice Department determines whether judicial action is proper. If foreclosure of the lien is deemed the appropriate method to collect the tax, a trial attorney in the Tax Division in Washington is assigned to litigate the matter. Once the Service forwards the collection case to the Justice Department, the Tax Division assumes complete authority to settle the dispute. All proposed settlements with the taxpayer must be approved by the Tax Division's Review Section. M. Saltzman, supra note 11, ¶ 14.09, at 14-46.

27. For a concise explanation of the procedures involved in foreclosing a § 6321 tax lien, see generally 4 B. Bittker, supra note 11, ¶ 111.5.6; M. Saltzman, supra note 11, ¶ 14.09, at 14-47 to 14-48.


29. Although § 7403(c) requires that all parties be "duly notified of the action," no guidance is provided in either the statutory text or the relevant regulations regarding the specific notice requirements for an action initiated under § 7403. See id. § 7403(c); Treas. Reg. § 301.7403-1, T.D. 7305, 1974-1 C.B. 339, 342.

30. I.R.C. § 7403(c) (1982). An action to enforce or foreclose a tax lien is generally initiated when title to the property claimed to be subject
2. The Administrative Levy

In addition to the Service’s power to secure taxes by lien-foreclosure, section 6331 permits the government to collect delinquent taxes by administrative levy. The Service may use the administrative levy procedure if the taxpayer fails to remit the tax within the ten-day period subsequent to notice and demand. The ten-day grace period may be ignored and the Service may proceed immediately, however, if it concludes that collection would be “jeopardized by delay.” Unlike the lien-foreclosure suit, the levy occurs prior to any adjudication.

M. Saltzman, supra note 11, ¶ 14.09, at 14-47 n.10. Moreover, if the property “is in [the] possession and control of a third person who either claims an interest or claims that someone else has an interest in the property that is superior to the tax claim,” the government will typically initiate a lien foreclosure action. Id.

31. Section 6331 provides in relevant part:

(a) Authority of Secretary

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax . . . by levy upon all property and rights to property . . . belonging to such person or on which there is a lien provided in this chapter for the payment of such tax . . . .

(b) Seizure and sale of property

The term “levy” . . . includes the power of distraint and seizure by any means . . . . [A] levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property . . . .

(c) Successive seizures

Whenever any property or right to property . . . is not sufficient to satisfy the claim . . . the Secretary may, thereafter, and as often as may be necessary, proceed to levy in like manner . . . until the amount due . . . is fully paid.

(d) Requirement of notice before levy

(1) In general

Levy may be made under subsection (a) upon the . . . property of any person with respect to any unpaid tax only after the Secretary has notified such person in writing of his intention to make such levy. . . .

I.R.C. § 6331(a)-(d) (1982). For a thorough analysis of the administrative levy statutory framework, see generally 4 B. Bittker, supra note 11, ¶ 111.5.5; M. Saltzman, supra note 11, ¶ 14.10-18; Saltzman, supra note 11, 450-62.

32. See supra note 14.

33. See I.R.C. § 6861(a) (1982). The emergency procedures are described supra note 21.

34. Under the administrative levy statutory framework, different procedures exist to effectuate the levy, depending upon the individual or entity possessing the taxpayer’s property. If the asset is held by a third party, the Service executes a formal levy by serving a notice of levy on the third party
Seizure and sale may, therefore, occur prior to the determination of the parties’ claims to the property.

When a delinquent taxpayer’s property is held by another individual or entity, the Service can demand the property by serving a notice of levy on the third party pursuant to section 6332(a). This notice of levy gives the Service the right to the property and creates a custodial relationship between the third party and the IRS such that the property comes into the constructive possession of the government.

After seizure of the delinquent taxpayer’s property pursuant to section 6331, section 6335 authorizes the Service to dispose of the asset. The Service, however, must follow detailed

pursuant to § 6332(a). See I.R.C. § 6332(a) (1982). When the taxpayer possesses the property, however, a levy is accomplished by seizure and sale of the asset pursuant to § 6331(b). See id. § 6331(b); M. Saltzman, supra note 11, ¶ 14.15, at 14-70 to 14-71.

35. Section 6332(a) provides, in relevant part:

[A]ny person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, except such part of the property or rights as is . . . subject to an attachment or execution under any judicial process.

I.R.C. § 6332(a) (1982).

36. See United States v. Eiland, 223 F.2d 118, 121 (4th Cir. 1955). Phelps v. United States, 421 U.S. 330, 334 (1975). The most common custodial relationship occurs when the Service serves notice of levy on a bank. See infra notes 60-96 and accompanying text. If a bank, as a third party, fails to honor the levy request, the financial institution is subject to the civil penalties outlined in § 6332. See I.R.C. § 6332(c) (1982). Specifically, § 6332(c)(1) imposes personal liability on a third party equal to the value of the property or rights withheld, but not exceeding the amount of taxes for the collection of which such levy has been made, if the notified third party does not surrender the property or property rights. Id. § 6332(c)(1). In addition, failure to honor the notice of levy will result in a civil penalty equal to 50% of the value of the property or property rights withheld, unless the third party has “reasonable cause” for dishonoring the levy. Id. § 6332(c)(2). The meaning of the “reasonable cause” language in § 6332(c)(2) is nebulous, however, and the regulations provide little assistance in ascertaining the meaning of this phrase. See Treas. Reg. § 301.6332-1(b)(2), T.D. 7180, 1972-1 C.B. 386, 388.

37. Section 6332(d) exonerates a third party from liability to the delinquent taxpayer upon complying with the levy. I.R.C. § 6332(d) (1982). The regulations indicate, however, that a person who “mistakenly” surrenders to the United States property or rights to property not properly subject to levy is not relieved from liability to a third party who owns the property. Treas. Reg. § 301.6332-1(c), T.D. 7180, 1972-1 C.B. 386, 388 (emphasis added). Both the Code and the regulations are curiously silent as to the status of a third party’s liability to a nondelinquent taxpayer who possesses joint ownership rights in the property surrendered pursuant to the notice of levy. See I.R.C. § 6332(d) (1982); Treas. Reg. § 301.6332-1(c), T.D. 7180, 1972-1 C.B. 386, 388.

38. Section 6335 provides:
procedures throughout the cash-realization process. Specifically, section 6335 requires that (1) a notice of seizure and notice of sale be delivered to the owner of the property seized, (2) a notice of sale be published in a county newspaper, and (3) the sale take place not less than ten or more than forty days from the date of notice of sale. If the Service fails to comply with these requirements, the sale will be voidable.

Although section 6331 grants the Service broad power to seize property to satisfy a tax liability, the statutory language and the related regulations provide little guidance on when the levy should be used. The decision to seize the property is left to the discretion of the revenue officer, who is provided no statutory standards for making the decision. If a taxpayer

(a) Notice of seizure
As soon as practicable after seizure of property, notice in writing shall be given ... to the owner of the property ... or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located ... the notice may be mailed to his last known address ....

(b) Notice of sale
The Secretary shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a), and shall cause a notification to be published in some newspaper published or generally circulated within the county wherein such seizure is made ....

I.R.C. § 6335(a)-(b) (1982).

40. After seizing the property, the revenue officer must give timely written notice “to the owner of the property (or, in the case of personal property, to the possessor thereof).” Treas. Reg. § 301.6335-1(a) (1954). The statutory notice must include “the sum demanded,” an inventory listing of any personal property seized, and a “reasonable” description of any real property seized. Id.
41. The regulations vest the district director with the responsibility of providing timely written notice of sale to the “owner” of the seized asset. The written notice “must specify the property to be sold, and the time, place, manner, and conditions of the sale thereof, and shall expressly state that only the right, title, and interest of the delinquent taxpayer in and to such property is [being] offered for sale.” Treas. Reg. § 301.6335-1(b)(1), T.D. 7180, 1972-1 C.B. 386, 391.
42. Id.
43. I.R.C. § 6335(a)-(b), (d) (1982).
44. M. SALTMAN, supra note 11, ¶ 14.17[1], at 14-81 to 14-82. In response to the conditions precedent established by § 6335, the Service has published over 150 pages of detailed procedures to assist revenue agents in the seizure and sale of levied assets. See 2 INTERNAL REVENUE MANUAL (CCH) ¶¶ 5310-53(10)19, at 6531-6692 (Nov. 15, 1982).
45. Section 6331 is quoted in relevant part supra note 31.
47. M. SALTMAN, supra note 11, ¶ 14.15, at 14-71 to 14-77. Application of
has refused to cooperate with the officer, levy is usually made without further notice.\textsuperscript{48} The officer is, however, urged to consider the potential impact of the levy power on persons other than the taxpayer, particularly if the focus of the levy is the seizure of an operating business.\textsuperscript{49} The Service has been strongly criticized for not following this policy consistently.\textsuperscript{50}

The administrative levy provision provides the Service with an effective and powerful tool to collect the government's tax revenues. To protect property owners from the wrongful use of this device, Congress has provided two separate remedies for the injured property owner. The regulations, promulgated under section \textsection{6343(b)},\textsuperscript{51} provide an administrative remedy for the return of the property.\textsuperscript{52} In addition, section \textsection{7426} authorizes a person other than the taxpayer claiming an interest in or lien on the levied property to institute a wrongful levy civil action directly against the United States in federal district court.\textsuperscript{53} The court may grant an injunction if it concludes that the levy is wrongful and that either the levy or the sale of the property pursuant to the levy would irreparably injure rights of a third party in the property that are superior to the rights of

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\item the administrative levy by service personnel is not limited by rigid guidelines. Provided the taxpayer has received proper "notice and demand" for the tax pursuant to \textsection{6303(a)}, the Service need not provide any additional pre-levy notice, unless the levy is directed at salary and wages. \textit{Id.} at 14-71. The Service, however, has promulgated internal operating procedures that afford the taxpayer pre-levy notice. \textit{Id.} Prior to levy or seizure, "the Service notifies the taxpayer of the contemplated action and, except in jeopardy situations, gives the taxpayer a reasonable opportunity to pay voluntarily." \textit{Id.} Moreover, although revenue officers have the discretion to serve a levy, the Service cautions the officers to use the levy authority "judiciously," because the careful application of the administrative levy benefits the Service through improved public relations. \textit{Id.}
\item \textsuperscript{48} \textit{Id.} at 14-77.
\item \textsuperscript{49} \textit{Id.}
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} \textit{See infra} notes \textsuperscript{172-180} and accompanying text.
\item \textsuperscript{52} \textit{See Treas. Reg. \textsection{301.6343-1}, T.D. 7180, 1972-1 C.B. 393-94.
\item The regulations indicate that the injured party may submit a "written request for the return of property wrongfully levied upon . . . to the district director . . . for the internal revenue district in which the levy was made." Treas. Reg. \textsection{301.6343-1(b)(2)}, T.D. 7180, 1972-1 C.B. 394. Pursuant to the authority granted under \textsection{6343(b)}, the district director may return "(1) the specific property levied upon, (2) an amount of money equal to the amount of money levied upon, or (3) an amount of money equal to the amount of money received by the United States from the sale of such property." I.R.C. \textsection{6343(b)} (1982).
\item \textsuperscript{53} I.R.C. \textsection{7426(a)(1)} (1982). The statute also provides that "[s]uch action may be brought without regard to whether such property has been surrendered to or sold by the Secretary or his delegate." \textit{Id.}
the United States. The district court may also grant other types of relief if it determines that the government's levy was wrongful.

The administrative levy provision affords the Service with broad power to collect the government's tax revenues. The statutory structure of seizure, notice, sale, and post-seizure challenge contains a flaw, however. The statute permits the seizure of all property and rights to property of the delinquent taxpayer; this could apply to the taxpayer's interest in jointly held property. Thus, it is questionable whether the statute provides adequate notice to the nondelinquent joint owners of the seized property.

In most situations, the statute does afford adequate notice. The notice of seizure and notice of sale provisions of section 6335 provide for notice to "the owner" of the property prior to

54. Id. § 7426(b)(1).
55. Id. § 7426(b)(2). Section 7426 empowers the court to grant two possible remedies for wrongful levy, depending on whether the asset has been sold. See id. § 7426(b)(2). If the property is still in the possession of the government, the court can order its return. Id. § 7426(b)(2)(A). If the asset was sold prior to the wrongful levy action, the court may grant a money judgment "not exceeding the greater of (i) the amount received by the United States from the sale of such property, or (ii) the fair market value of such property immediately before the levy." Id. § 7426(b)(2)(C).
56. See id. § 6331(a). Although the statutory language of § 6331 subjects all of the delinquent taxpayer's assets to levy by the Service, id. § 6331(a), this all-inclusive language is limited by § 6334 of the Code, see id. § 6334. Section 6334(a) exempts nine categories of property from levy: clothing, household items, books and tools necessary for the taxpayer's business, unemployment compensation, undelivered mail, payments under certain annuity and pension plans, workmen's compensation, child support payments, and a minimum subsistence allowance. Id. § 6334(a)(1)-(9). Moreover, the notice of a § 6331 levy does not operate to seize property acquired by the taxpayer or a third person holding property of the taxpayer subsequent to the levy date. See id. § 6331(c). To reach such property, the Service must instead make successive levies until the outstanding tax liability is liquidated. Id. The Service, however, is not required to make successive levies on salary and wages. Section 6331(e) provides that "a levy on salary or wages payable to or received by a taxpayer shall be continuous . . . until the liability out of which such levy arose is satisfied or becomes unenforceable by reason of lapse of time." Id. § 6331(e)(1).
57. Section 6331 makes no mention of the Service's power to levy on property held jointly by the delinquent taxpayer and other individuals who have satisfied their respective tax liabilities. See id. § 6331. Moreover, jointly owned property is not listed as property exempt from levy under § 6334. See id. § 6334. The situation is also not addressed in the relevant treasury regulations. See Treas. Reg. § 301.6331-1(a)(1), T.D. 7620, 1979-1 C.B. 402-03; Treas. Reg. § 301.6334-1(a), T.D. 6870, 1966-1 C.B. 288, T.D. 7180, 1972-1 C.B. 390, T.D. 7182, 1972-1 C.B. 395, T.D. 7620, 1979-1 C.B. 403-04.
Yet certain types of property and rights to property do not need to be seized and sold pursuant to section 6335 to realize the cash required to satisfy the delinquent tax. By far the most common of these, and a very common target of the administrative levy, is the right to withdraw the funds contained in a bank account. Because this asset is essentially cash, it does not need to be seized and sold, and therefore the section 6335 notice of seizure and notice of sale provisions do not apply. The right of the Service to levy on joint bank accounts had never been tested, however, until 1985, when the Supreme Court considered the question in *United States v. National Bank of Commerce.*

II. UNITED STATES V. NATIONAL BANK OF COMMERCE

In *United States v. National Bank of Commerce,* the Internal Revenue Service brought suit against an Arkansas bank for collection of money held jointly by three depositors in two accounts. The bank had refused to relinquish the

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58. *See supra* notes 40-41.
61. After failing in its efforts to collect the outstanding tax liability of Roy J. Reeves, the government served a notice of levy on the National Bank of Commerce pursuant to I.R.C. § 6331(d), demanding that the bank remit to the United States all sums the bank owed to Mr. Reeves up to a total of $1,302.56. *National Bank of Commerce,* 105 S. Ct. at 2922. When the bank refused to honor the levy, the government instituted an action in the United States District Court for the Eastern District of Arkansas pursuant to I.R.C. § 6332(c)(1).
62. After serving notice of levy on the bank, the Service executed a Partial Release of Levy which reduced the amount requested on the original levy from $1,302.56 to $856.61. *National Bank of Commerce,* 105 S. Ct. at 2922.
63. On the date the notice of levy was served, the bank held $321.66 in a checking account and $1,241.60 in a savings account, each in the names of "Roy Reeves or Ruby Reeves or Neva R. Reeves." *Id.* at 2922.

At the time of this dispute, the relationship between the parties to a joint bank account was governed by two Arkansas statutes. Section 67-521 authorized each of the account holders to make withdrawals from the account and specifically released the bank from any subsequent liability for honoring such requests unless one of the codepositors notified the institution of a change in
funds pursuant to an administrative levy on the grounds that only one of the codepositors was delinquent and that neither its records nor the Service's notice disclosed the extent of the delinquent taxpayer's interest in the accounts.64

The case was submitted to the district court on cross motions for summary judgment and on the bank's motion to dismiss the complaint.65 The district court concluded that due process required stronger procedural protection than that afforded by a post-seizure lawsuit.66 In the district court's opinion, due process required that the Service identify the nondelinquent codepositors and provide them with notice and an opportunity to be heard.67 The court granted the bank's motion to dismiss to give the Service the opportunity to obtain the funds sought by means of the administrative levy in a manner consistent with the court's due process analysis.68

The United States Court of Appeals for the Eighth Circuit affirmed the district court's decision.69 The Eighth Circuit, however, expressed no opinion on the due process analysis.70 The court instead reached the same result on the basis of statutory construction, holding that the Service must establish the delinquent taxpayer's actual interest in the joint bank account before seizing the funds.71 The Eighth Circuit concluded that

the relationship. ARK. STAT. ANN. § 67-521 (1980), repealed by Act of March 25, 1983, § 2, 1983 Ark. Acts 2039, 2043 (substance of this statute is currently codified at ARK. STAT. ANN. § 67-552(a) (1983)). Section 67-552 also granted withdrawal rights to each of the named individuals on the account unless one of the codepositors notified the bank in writing that the approval of more than one codepositor was required to effectuate a transaction. ARK. STAT. ANN. § 67-552 (1980), amended by Act of March 25, 1983, § 1, 1983 Ark. Acts 2039, 2039-42.

66. Id. at 114.
67. Id. at 114-15. The court applied a three-part analysis outlined in Matthews v. Eldridge, 424 U.S. 319 (1976), to ascertain what process is required when the government issues a notice of levy against a joint bank account. The court, after considering the interests of the innocent parties and the government, concluded that procedures exist that would "increase the probability of insuring that no property interest of the co-depositor is taken while at the same time adding minimal burdens upon the government in lawfully seizing property for tax liabilities." National Bank of Commerce, 554 F. Supp. at 114.
70. Id. at 1293 ("We do not reach the constitutional questions decided by the District Court.").
71. Id. The Eighth Circuit based its statutory conclusion on the Sixth Circuit's decision in United States v. Stock Yards Bank, 231 F.2d 628 (6th Cir.
because the rights of the various parties to the joint account had not been determined, the government had not established that the bank was in possession of the delinquent taxpayer's property or property rights.\textsuperscript{72}

The Supreme Court reversed, holding that the Service could rightfully levy on the joint accounts in question.\textsuperscript{73} The Court's majority opinion, authored by Justice Blackmun, noted initially that under section 6332(a) of the Code a bank served with a notice of levy has only two defenses for not honoring the Service's request.\textsuperscript{74} One defense is that the bank is "neither 'in possession of' nor 'obligated with respect to' property or rights

\textsuperscript{72} In \textit{Stock Yards Bank}, the Service served a notice of levy on the appellee bank, which had in its possession 150 $25.00 Series E United States Savings Bonds, each registered in the names of "Clarence J. Theobald or Mrs. Theas Theobald." Clarence Theobald owed the government taxes, penalties, and interest totaling $129,960.67 for the years 1943 through 1946. Mrs. Theobald, however, was not a delinquent taxpayer. The bank refused to honor the levy, and the government brought suit to hold the financial institution personally liable under I.R.C. § 3710 (1939), the predecessor statute to §§ 6331 and 6332 of the present Code. \textit{Id.} at 629.

The Sixth Circuit, in holding for the bank, initially noted that the bonds were held in co-ownership form, which is not the equivalent of tenancy by the entirety or joint ownership. \textit{Id.} at 630. The court then indicated that federal regulations and judicial decisions have recognized that the extent of a co-owner's property interest is a question of fact and not of law. \textit{Id.} at 631. Therefore, under the language of the predecessor statute to I.R.C. § 6331, "[p]roof of the actual value of the taxpayer's interest was an essential element of the government's case under the statute, and for lack of such proof the case falls." \textit{Id.}

The Eighth Circuit, relying on its statutory analysis regarding the property interest created under state law and its conclusion that the government’s position was analogous to that of an ordinary creditor under Arkansas garnishment law, rejected the government’s assertion that "‘Stock Yards Bank took place in a significantly different legal environment than the one here involved.’" \textit{National Bank of Commerce}, 726 F.2d at 1297 (quoting Brief for Appellant at 18). The court noted that the fact that the rights of the co-owners in \textit{Stock Yards Bank} depended on federal law, as opposed to state law, was a difference "without legal significance." 726 F.2d at 1297. The court concluded that the difference "pertains only to the law governing the nature of the taxpayer's property rights. It has nothing to do with the operation of the levy statutes on those rights, once their nature and extent are ascertained." \textit{Id.}

\textsuperscript{73} \textit{National Bank of Commerce}, 726 F.2d at 1300. The court expressed no concern about the possible adverse impact of its decision on the Service’s ability to collect delinquent taxes under the levy provisions of the Code. Instead, the court noted that "[t]he government is free to pursue the taxpayer's interest in the bank account in question by bringing suit to foreclose its lien under Section 7403, joining as defendants the three co-owners of the account." \textit{Id.}

\textsuperscript{74} \textit{Id.} at 2925 (citing United States v. Sterling Nat'l Bank & Trust Co., 494 F.2d 919, 921 (2d Cir. 1974)).
to property belonging to the delinquent taxpayer." The other defense arises if the "taxpayer's property is 'subject to a prior judicial attachment or execution.'" The Court concluded that the only viable statutory defense available to the bank was that the joint accounts did not constitute "'property or rights to property'" of the delinquent taxpayer.  

In determining whether the taxpayer's association with the other codepositors constituted "property or rights to property" under section 6331(a) of the Code, the Court concluded that "'state law controls in determining the nature of the legal interest which the taxpayer had in the property.'" Once state law has defined the nature of a taxpayer's interest in property, however, the state law consequences of the definition are of no concern to the operation of the federal tax law. The Court concluded that the Eighth Circuit "applied state law beyond the point of that law's specification of the nature of the property right, and bound the IRS to certain consequences of state property law."  

The Court emphasized that the delinquent taxpayer had an absolute right under both Arkansas state law and his contract with the bank to withdraw any or all of the funds in the accounts. The Court found that this withdrawal right constituted "'property [or] rights to property'" under section 6331(a)

76. Id.
77. Id. The Court dismissed consideration of the defense involving attachment or execution, noting that there was "no suggestion here that the Reeves accounts were subject to a prior judicial attachment or execution." Id. Moreover, the Court indicated that there was no "doubt that the bank was 'obligated with respect to' the accounts because ... 'Roy Reeves did have a right under Arkansas law to make withdrawals from the bank accounts in question.'" Id. (quoting Brief for Respondent at 2, United States v. National Bank of Commerce, 105 S. Ct. 2919 (1985)).
78. National Bank of Commerce, 105 S. Ct. at 2925 (quoting Aquilino v. United States, 363 U.S. 509, 513 (1960)) (emphasis added). The Court added that such a conclusion "follows from the fact that the federal statute 'creates no property rights but merely attaches consequences, federally defined, to rights created under state law.'" 105 S. Ct. at 2925 (quoting United States v. Bess, 357 U.S. 51, 55 (1958)).
81. See supra note 63.
83. Id.
of the Code. Moreover, because the bank was obligated, under Arkansas law, to honor any withdrawal request made by any party to the joint accounts, the bank was obligated with respect to the taxpayer's right to that property under section 6332(a) of the Code. The Court thus concluded that the bank had no justification for refusing to honor the levy because, in a levy proceeding, the Service acquires the same rights as the taxpayer.

The Court indicated, moreover, that the Eighth Circuit's concern for the property interests of the nondelinquent codepositors failed to consider the statutory remedies established by Congress to protect against wrongful levy. Justice Blackmun indicated that other claimants may assert their rights because the final judgment in a levy action settles no rights in the property subject to seizure. Congress, Justice Blackmun maintained, has balanced the interest of government in the timely collection of taxes against the interests of any claimants to the property, and reconciled these conflicting needs by permitting the Service to levy on assets immediately. Any subsequent ownership disputes can be resolved in a post-seizure administrative or judicial proceeding. The Eighth Circuit, therefore, had no basis to ignore the congressional decision that "certain property rights must yield provisionally to governmental

84. Id. Justice Powell, in his dissenting opinion, criticized the majority's conclusion, stating:

"The right to withdraw funds was no more than that. It was a right accorded parties to joint accounts as a matter of mutual convenience and it was independent of any right to or in the property. It encompassed no right of possession, use, or ownership over the funds when withdrawn."


86. Id. at 2926-27. In addition to its attack on the majority's treatment of the taxpayer's right to withdraw, see supra note 84, Justice Powell's dissent also asserted that the relevant Code provisions do not grant the Service the right to levy on joint bank accounts when nondelinquent taxpayer property rights are implicated. Id. at 2931 (Powell, J., dissenting). Justice Powell, in analyzing the statutory language of I.R.C. §§ 6331 and 7403, reasoned that § 6331 permitted the seizure and sale of property or property rights belonging to the delinquent, while § 7403 allowed the government to seize and sell any property right in which the delinquent has an interest—even a partial interest. Id. at 2933. As a result, Justice Powell concluded that "[a] property right in which the delinquent has only a partial interest does not 'belong[ ]' to the delinquent and hence is not susceptible to levy." Id. at 2934.


88. Id.

89. Id. at 2929.

90. Id.
need."

Justice Blackmun's analysis of the statutory scheme failed, however, to include a discussion of the adequacy of procedural due process protection afforded to the nondelinquent codepositor. Justice Powell, in his dissenting opinion, identified this flaw in the administrative levy procedure and observed that the majority's result places "the property rights of third persons in serious jeopardy." The dissent concluded, however, that the statutory language was "dispositive" and that the analysis of the Eighth Circuit was correct. Therefore,

91. Id.
92. Justice Blackmun stated:
   We do not pass upon the constitutional questions that were addressed by the District Court, but not by the Court of Appeals, concerning the adequacy of notice provided by § 6343(b) and § 7426 to persons with competing claims to the levied property. There is nothing in the sparse record in this case to indicate whether Ruby or Neva Reeves were on notice as to the levy, or as to what the Government's practice is concerning the notification of codepositors in this context.
Id. at 2929 n.12.

93. Id. at 2939 (Powell, J., dissenting). Justice Powell, in criticizing the majority's classification of the administrative levy as a "provisional" remedy, asserted that:
   one would hardly characterize as "provisional" the Government's taking of an innocent party's property without notice, especially when, even if the taking is discovered, the burden is then on the innocent party to institute recovery proceedings. Furthermore, absent notice of any kind, the nine months that the administrative . . . and judicial . . . remedies ordinarily give third parties to contest a levy is a short time indeed. There is no certainty that within this time they will discover that their property has been used to pay someone else's taxes. . . . In short, the Court's decision often will place the property rights of third parties in serious jeopardy.
Id. at 2938-39.

Justice Powell also found fault in the majority's statement that the "'[the levy] merely protects the Government's interests so that rights to the property may be determined in a postseizure proceeding.'" Id. at 2938 n.12. He concluded:
   This statement incorrectly states the law. Under the levy statute, the IRS has the power not only to seize but also to sell property. A co-owner of a house seized and sold to pay a delinquent's taxes would indeed be surprised to discover that the IRS's levy "merely protects the Government's interests . . . ." Assuming that the co-owner discovered within nine months that the IRS had levied on the property (for no notice to him is required), he could recover in a wrongful levy action at most some of the proceeds from the sale. This "remedy" hardly "punctiliously protect[s]" the rights of third parties, as the Court claims.
Id. (citations omitted).
94. Id. at 2939 n.14.
95. Id. at 2939.
Justice Powell also did not address the due process issue.\textsuperscript{96}

III. PROCEDURAL DUE PROCESS INADEQUACIES UNDER THE ADMINISTRATIVE LEVY STATUTORY FRAMEWORK

In the \textit{National Bank of Commerce} case,\textsuperscript{97} both the majority and the dissent avoided consideration of the constitutional question concerning the adequacy of notice provided by the administrative levy statutory scheme to persons with competing claims to the levied property.\textsuperscript{98} Application of the tenets of procedural due process to the statutory framework established by Congress to protect against wrongful levy, however, reveals that the administrative levy provisions of the Code fail to afford minimum procedural due process protection to a nondelinquent joint bank account holder.

A. BASIC TENETS OF PROCEDURAL DUE PROCESS

The Supreme Court has long held that the "root requirement" of procedural due process is the right to reasonable notice and an opportunity to be heard.\textsuperscript{99} The form of the notice\textsuperscript{100} and the procedure for delivery or posting of the notice\textsuperscript{101} must represent a legitimate effort to alert all interested parties to the proposed government action.\textsuperscript{102} The practicalities and peculiarities of a case, however, may result in different notice procedures that nonetheless satisfy the minimum constitutional

\begin{itemize}
\item \textsuperscript{96} \textit{Id. at} 2939 n.14.
\item \textsuperscript{97} \textit{See supra} notes 60-96 and accompanying text.
\item \textsuperscript{98} \textit{See supra} note 92 and text accompanying note 96.
\item \textsuperscript{99} \textit{See} Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (within the limits of practicality a state must afford an individual a meaningful opportunity for a hearing before deprivation of property).
\item \textsuperscript{100} The Supreme Court, in analyzing the notice requirement under the due process clause, noted that "the notice must be of such nature as reasonably to convey the required information, ... and it must afford a reasonable time for those interested to make their appearance." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (citations omitted).
\item \textsuperscript{101} The delivery or advertising of the notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." \textit{Id.}
\item \textsuperscript{102} \textit{See, e.g.,} Greene v. Lindsey, 456 U.S. 444, 445, 455-56 (1982) (posting notice of eviction action on door of apartment in public housing unit did not satisfy constitutional due process standard); Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1, 14 (1978) (notice of possible termination of utility service did not meet due process standard for informing the individual of the opportunity to present objections to termination).
\end{itemize}
requirements. Thus, where conditions render impractical formal notice to interested parties, the notice will not be deemed constitutionally deficient if the form chosen is the best of the feasible and customary alternatives.

Postponement of procedural due process until after seizure is justified only when extraordinary circumstances compel immediate action. The Supreme Court, in *Fuentes v. Shevin*, stated that such situations arise when "the seizure has been directly necessary to secure an important governmental or general public interest [and] there has been a special need for very prompt action." The Court also required that any seizure prior to a hearing must operate under strict legal controls. The action will be upheld only when "the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance."

The Supreme Court, in defining the parameters of procedural due process for persons whose property interests are im-

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103. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950). For instance, notice by publication has been deemed constitutionally sufficient "where it is not reasonably possible or practicable to give more adequate warning." Id. at 317. The *Mullane* court noted that "in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." Id. (citing Cunnis v. Reading School Dist., 198 U.S. 458 (1905)).

104. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950). The Supreme Court outlined the due process hearing requirement in *Fuentes v. Shevin*, 407 U.S. 67 (1972). The *Fuentes* Court noted that "due process tolerates variances in the form of hearing appropriate to the nature of the case." Id. at 82. The form of the hearing depends "upon the importance of the interests involved and the nature of the subsequent proceedings." Id. Although the hearing required by due process is flexible in form and is subject to waiver, "the Court has traditionally insisted that, whatever its form, the opportunity for that hearing must be provided before the deprivation at issue takes effect." Id. There are, however, "extraordinary situations" that justify postponing notice and the opportunity for a hearing until after the property seizure. Id. at 90. These situations must qualify as "truly unusual." Id. Seizure of property prior to a hearing has been permitted to collect taxes, Phillips v. Commissioner, 283 U.S. 588, 597 (1931), to protect against the economic disaster of a bank failure, Fahey v. Mallonee, 332 U.S. 245, 253-54 (1947), and to protect the public from misbranded drugs, Ewing v. Mytinger & Cas-selberry, Inc., 339 U.S. 594, 599-600 (1950), and contaminated food, North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306, 315 (1908).

107. Id. at 91.
108. Id.
109. Id.
plicated, has held that the character and length of the
deprivation is irrelevant. The Court, moreover, has indicated
that the Constitution’s protection of “property” has never been
limited to safeguarding only the rights of undisputed owner-
ship. Instead, the Constitution extends protection to any sig-
ificant property interest. Similarly, the invocation of the
Constitution’s due process protection is not contingent upon the
magnitude of the property interest at stake. Characterizing
the property interest as de minimis is not a legitimate justifica-
tion for denial of procedural due process.

Before the government may deprive an individual of his or
her property, it must establish adequate procedures to ensure
that any action taken will comply with the due process
clauses. In Mathews v. Eldridge, the Supreme Court out-
lined a balancing test to determine what process is due when a
governmental action deprives an individual of a property inter-
est. Under the Mathews test, a court must balance the im-
portance of the property interest at stake and the extent to

110. Id. at 84-86. The Fuentes Court noted that “it is now well settled that
a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in
terms of the Fourteenth Amendment.” Id. at 84-85 (emphasis added). In addi-
tion, while the length and consequent severity of a deprivation may be factors
influencing the form of the hearing, “it is not decisive of the basic right to a
prior hearing of some kind.” Id. at 86.

111. Id.

112. Id. (citing Boddie v. Connecticut, 401 U.S. 371, 379 (1971)).


114. Id. at 90 n.21. The relative weight of the property interest is one of the
factors influencing the form of notice and hearing required by due process.
The Court indicated, however, that “some form of notice . . . is required before
deprivation of a property interest that 'cannot be characterized as de
minimis.'” Id. (emphasis in original).

115. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 554
(2d ed. 1983). The due process procedure established by the government, how-
ever, does not have to guarantee the right to a hearing prior to state action.
See, e.g., Barry v. Barchi, 443 U.S. 55, 63 (1979) (post-suspension hearing for a
horse trainer sufficient where suspension is based on detection of illegal drugs
in the horse immediately after the race); Mackey v. Montrym, 443 U.S. 1, 18-19
(1979) (post-suspension hearing sufficient for suspending a person's driver's li-
cense for refusal to take a drunk-driving test); Calero-Toledo v. Pearson Yacht
Leasing Co., 416 U.S. 663, 679-80 (1974) (government seizure of ship used to
transport contraband permissible without prior hearing).


117. Id. at 335. The Mathews case involved the termination of social security
disability benefits and the due process protections afforded the claimant
under the fifth amendment. The Court concluded that an evidentiary hearing
is not required prior to the termination of the disability payments and that the
administrative procedures prescribed under the Social Security Act satisfied
due process. Id. at 349.
which the suggested procedure mitigates the possibility of an erroneous decision against the government's interest in avoiding the increased administrative and fiscal burdens that result from the application of the procedure.\textsuperscript{118} Courts applying the Mathews test have permitted governmental deprivation of an individual's property interest without a prior hearing only if adequate post-deprivation process is guaranteed.\textsuperscript{119}

B. PROCEDURAL DUE PROCESS DEFICIENCIES IN SECTION 6331

The right of the United States to collect its revenues by summary administrative proceedings is one of the "extraordinary situations" justifying the postponement of procedural due process.\textsuperscript{120} In its analysis of the forerunner to sections 6343(b) and 7426, the Supreme Court noted that “[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate.”\textsuperscript{121}

The critical inconsistency in the administrative levy statutory framework is that the existence or nonexistence of procedural due process protection depends entirely on the type of property interest seized by the Service. Under the current levy framework, if the Service seizes a tangible asset under section 6331\textsuperscript{122} to satisfy the delinquent taxpayer's outstanding liability, all owners of the asset are afforded adequate procedural due process protection.\textsuperscript{123} If the Service levies upon an intangible

\textsuperscript{118} Id. at 335.

\textsuperscript{119} See, e.g., Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 298-303 (1981) (order of partial or total cessation of surface mining without a prior hearing does not violate due process when the mining operation creates an immediate danger to the health or safety of the public); Barry v. Barchi, 443 U.S. 55, 66 (1979) (New York post-suspension hearing statute deemed unconstitutional because it did not afford a timely hearing); Mackey v. Montrym, 443 U.S. 1, 13 (1979) (prompt post-suspension hearing sufficient for suspending a person's driver's license for refusal to take a drunk-driving test).

\textsuperscript{120} Phillips v. Commissioner, 283 U.S. 589, 597 (1931).

\textsuperscript{121} Id. at 596-97. The Phillips holding, although permitting the postponement of due process until after seizure, provides no guidance on what post-seizure process is due. The taxpayer-stockholder in Phillips received due notice that the Commissioner proposed to assess against and collect from him the entire remaining amount of the deficiencies accrued by the Coombe Garment Company prior to its liquidation. See id. at 591. The Court concluded that the Commissioner's notice satisfied due process since the taxpayer was afforded an adequate opportunity for judicial review of the assessment. Id. at 597.

\textsuperscript{122} See supra text accompanying notes 31-55.

\textsuperscript{123} When the Service decides to seize and sell a delinquent taxpayer's tangible asset, it must comply with the strict procedural protections incorporated in § 6335 of the Code. Specifically, the Service is required to give written no-
asset, however, such as funds held in a joint bank account, the section 6335 procedural protections\textsuperscript{124} applicable to seized tangible assets are not triggered.\textsuperscript{125} Instead, when the Service levies and seizes the funds held in a joint bank account, the only statutory notice provided is the original demand served upon the delinquent taxpayer under section 6331.\textsuperscript{126}

This lack of notice to the nondelinquent joint account holder implicates the overall effectiveness of the two statutory

tice to the “owner of the property” as soon as practicable after the seizure of the asset. I.R.C. § 6335(a) (1982). Moreover, the Service must provide the “owner” with notice of sale and cause newspaper publication of a notice specifying the property to be sold and the time, place, manner, and conditions of the sale. Id. § 6335(b). The requirements outlined in § 6335 “are conditions precedent to the asset sale, and the Service’s failure to follow them makes the sale voidable.” M. SALTZMAN, \textit{supra} note 11, ¶ 14.17[1], at 14-82.

Although § 6335 and the related regulations do not define the term “owner,” the Service has interpreted the language of this Code provision broadly. Thus, the Service requires that “a copy of the notice of sale . . . be provided by regular mail to all interests of record (joint owners, senior and junior lienholders, nominees, transferees, etc.).” 2 \textsc{Internal Revenue Manual} (CCH) ¶ 56(13)7.1, at 6869 (Nov. 15, 1985). In addition, the IRS policy manual requires the revenue agent to conduct a new search of the public records to identify subsequently recorded interests if the original search of the public records occurred over 90 days prior to the date of sale. \textit{Id}.

In regard to tangible property, Justice Powell’s concerns expressed in his dissent, see \textit{supra} note 93, are unwarranted. The procedural protections of § 6335, in combination with IRS policies regarding notices of sale, afford all owners of the seized tangible asset adequate procedural due process.

\textsuperscript{124} \textit{See supra} note 123.

\textsuperscript{125} Under the current levy framework, the § 6335 procedural protections are applicable only when the Service proceeds to sell the seized asset to realize cash. When the Service serves a notice of levy on a bank pursuant to § 6332, however, the financial institution complies with the levy by disbursing cash. Thus, the Service never has to comply with the notice requirements of § 6335 when it levies on the funds in a joint bank account because there is no need to sell the asset. See I.R.C. §§ 6332, 6335 (1982).

\textsuperscript{126} At oral arguments in United States v. National Bank of Commerce, 105 S. Ct. 2919 (1985), discussed \textit{supra} text accompanying notes 73-96, Justice O’Connor was concerned that all codepositors do not receive notice of the levy when the Service levies on a joint bank account. Rosen, \textit{Supreme Court Will Decide Fate of Tax Levies on Joint Bank Accounts}, 27 \textsc{Tax Notes} 350, 351 (1985). The government replied to this concern by stating that, under the language of §§ 6331 and 6332, the “IRS is not required to notify third parties.” \textit{Id}.

The government’s response to Justice O’Connor was utterly pragmatic. The Service prefers to use its levy power on intangible assets such as bank accounts because it can completely avoid the procedural requirements of notice of seizure and sale under § 6335. The Service justifies this preference by claiming that “seizure and sale of tangible property involve a slow and drawn-out process, often burdensome to the taxpayer, invariably costly for the IRS, and usually unpleasant for all involved.” Brief for Petitioner at 45, United States v. National Bank of Commerce, 105 S. Ct. 2919 (1985).
remedies available for wrongful levy. Under the present statutory framework, if the nondelinquent codepositor discovers that his or her property interest in the joint account has been levied and believes it was wrongful, his or her only recourse is to seek administrative review under section 6343(b) within nine months or file suit in federal district court pursuant to section 7426 within the same amount of time.129

The anomaly of this statutory scheme is that it saddles the nondelinquent joint account holder with the burden of continually monitoring the intangible property interest to protect it from government seizure.130 This situation conflicts directly with fundamental procedural due process policies. Due process

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127. See supra notes 51-52 and accompanying text.
128. See supra notes 53-55 and accompanying text.
129. The administrative levy is considered a provisional remedy because it serves to protect the government's potential tax revenue against diversion or loss while the claims are being resolved. United States v. National Bank of Commerce, 105 S. Ct. 2919, 2925 (1985) (citing 4 B. Bittker, Federal Taxation of Income, Estates and Gifts § 111.5.5 (1981)). The enigmatic aspect of this classification under the current statutory framework is that the nondelinquent codepositor's opportunity to make a claim utilizing the two post-seizure remedies, see supra notes 51-55 and accompanying text, is severely restricted. Absent any notice of levy, the nine-month statute of limitations applicable to the wrongful levy administrative and judicial remedies is a dangerously short time for the nondelinquent codepositor to discover that his or her property has been used to pay someone else's taxes. Justice Powell noted that "this may be particularly true as to the owners of joint savings accounts . . . where there may be little occasion to know that one's property has been seized by an IRS levy." 105 S. Ct. at 2939 (Powell, J., dissenting) (emphasis in original).
130. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), the Supreme Court, in dictum, indicated that it is reasonable for the state to assume that an owner of tangible property will continually monitor this interest. Id. at 316 (emphasis added). The Court noted that "[t]he ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights." Id. (emphasis added). Thus, the Court concluded that "publication or posting affords an additional measure of notification" when the state seizes an individual's tangible property. Id. Significantly, although the property at issue in Mullane was intangible personal property, id. at 309, the Supreme Court did not state that owners have a similar responsibility to monitor their intangible property interests.

The most puzzling aspect of the current levy framework centers on why Congress and the Service meticulously protect all interests in seized tangible property, yet permit the taking of intangible property without affording any procedural due process to the joint owners. The Subcommittee on Oversight identified this discrepancy within the context of the Service's practice of indiscriminately levying on the bank accounts and accounts receivable of small businesses. See infra text accompanying notes 172-180. This statutory discrepancy and its implications for joint bank accounts have never been examined by Congress, however.
imposes a duty on the government to follow a fair process of
decisionmaking when it acts to deprive persons of their posses-
sions.\footnote{131} This requirement serves to protect an individual's use
and possession of property from arbitrary encroachment.\footnote{132} It
seeks to minimize substantively unfair or mistaken depriva-
tions of property, a danger that is heightened when the state
seizes goods simply upon the request of and for the benefit of a
private party.\footnote{133} The prohibition against the deprivation of
property without due process of law reflects the high value this
nation traditionally has placed on an individual's right to enjoy
his or her property, free from government interference.\footnote{134}

The Service defends its joint bank account levy notice pro-
cedure on the basis of statutory law and practical realities. The
Service contends that section 6331\footnote{135} of the Code does not re-
quire notice to the nondelinquent codepositor when the govern-
ment levies on a joint bank account.\footnote{136} Moreover, the Service
asserts that, as a practical matter, it is highly probable that the
codepositor will receive actual notice from either the bank or
the delinquent taxpayer.\footnote{137}

The Service's argument that the statute relieves it of all
duty to notify, however, completely contradicts the Supreme
Court's reasoning in \textit{Mennonite Board of Missions v. Adams}.\footnote{138}
Under the provisions of the Indiana tax-foreclosure statute, the
county auditor was required to post notice of an impending tax
sale of real property in the county courthouse and to publish
notice once a week for three consecutive weeks.\footnote{139} The statute
mandated that the property owner be notified by certified
mail.\footnote{140} The statute, however, contained no provision for notice
by mail or personal service to mortgagees of the property.\footnote{141}
The Court, in holding that neither notice by publication and
posting nor mailed notice to the property owner were means
"such as one desirous of actually informing the [mortgagee]
might reasonably adopt to accomplish it." \textsuperscript{142} stated the following principle:

Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of \textit{any} party, whether unlettered or well versed in commercial practice . . . . \textsuperscript{143}

The \textit{Mennonite Board of Missions} Court adopted this actual notice principle even though the state statutory scheme required the publication of notice in a newspaper once each week for three consecutive weeks. \textsuperscript{144} The Service, in contrast, provides no notice whatsoever when it levies on the funds held in a joint bank account. \textsuperscript{145} The Supreme Court's failure to apply \textit{Mennonite Board of Missions} to the \textit{National Bank of Commerce} situation produces an anomalous result: although a mortgagee must be notified when cash is realized from an asset to satisfy a tax liability, the actual joint bank account holder need not be notified when that asset is seized for the same purpose. The Court's reasoning in \textit{Mennonite Board of Missions} mandates that the Service must provide notice to all account holders, regardless of the terms of the statute. \textsuperscript{146}

The Service's "practical realities" justification, \textsuperscript{147} moreover, cannot be relied upon to satisfy the Constitution's procedural due process requirements. The Service cannot shift the burden of giving required notice to any other party. In \textit{Eisen v. Carlisle & Jacquelin}, \textsuperscript{148} the Supreme Court rejected a similar attempt by a party to a legal proceeding to shift the cost of providing notice to another party. \textsuperscript{149} In that case the Court

\textsuperscript{142} Id. at 799 (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950)).

\textsuperscript{143} \textit{Mennonite Board of Missions}, 462 U.S. at 800 (emphasis in original).

\textsuperscript{144} Id. at 793. The Court discounted the published notice because it was "designed primarily to attract prospective purchasers to the tax sale" and was "unlikely to reach those who, although they have an interest in the property, do not make special efforts to keep abreast of such notices." \textit{Id.} at 799.

\textsuperscript{145} See supra text accompanying notes 122-126.

\textsuperscript{146} In \textit{Mennonite Board of Missions}, the Court noted that a mortgagee has a legally protected property interest that entitles the mortgagee to notice of the pending tax sale. \textit{Mennonite Board of Missions}, 462 U.S. at 798. Similarly, in \textit{National Bank of Commerce}, the Court concluded that a delinquent taxpayer's right to withdraw from a joint bank account was a property interest subject to levy. See \textit{United States v. National Bank of Commerce}, 105 S. Ct. 2919, 2927 (1985). Therefore, it follows that the nondelinquent codepositor also possesses a property interest subject to the \textit{Mennonite Board of Missions} notice protections.

\textsuperscript{147} See supra text accompanying note 137.

\textsuperscript{148} 417 U.S. 156 (1974).

\textsuperscript{149} Id. at 175.
held that if the cost of notifying more than 2,000,000 potential class members was greater than the plaintiff could bear, then the plaintiff's class action motion must fail for lack of due process. Here the Service argues that it can shift the burden of notice to the banks or to the delinquent taxpayer. It is not the responsibility of these parties, however, to ensure that all parties affected by the Service's seizure of money are properly notified.

Even if the burden of notice is placed upon the other parties, there is no guarantee that it actually will be satisfied. Reliance on the delinquent taxpayer, who may be benefitting from the satisfaction of his or her tax liability with another's funds, is clearly misplaced. Procedures for notice to depositors vary widely among banks, depending on the size and sophistication of the financial institution. Some parties to joint accounts may receive absolutely no notice of the levy debit. Others who re-

150. Id. at 177.
151. See Goodly, supra note 137, at 124.
152. The Court noted in Eisen that "the usual rule is that a plaintiff must initially bear the cost of notice to the class." Eisen, 417 U.S. at 178. The Court added that this rule is particularly applicable when "the relationship between the parties is truly adversary." Id. at 178-79.
153. The delinquent taxpayer's motive not to disclose the seizure is particularly acute when all the funds in the joint account were deposited by another party. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), the Supreme Court observed that notice to a resident fiduciary of a trust account cannot be construed as actual notice to the beneficiaries when circumstances create an adversarial relationship between the fiduciary and the beneficiaries. Id. at 316. Likewise, it is fallacious to conclude that a delinquent taxpayer will notify his adversaries (codepositors) after the funds have been surrendered to the government.

A codepositor's knowledge of the delinquent taxpayer's plight with the IRS, moreover, is not necessarily sufficient notice of a potential levy on the joint account. The Mennonite Board of Missions Court noted that "a mortgagor's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending." Mennonite Board of Missions, 462 U.S. at 800.

154. Discussions with seven banks in the Minneapolis/St. Paul area during the week of January 27, 1986, revealed a definite lack of uniformity in dealing with levies served on joint bank accounts. Smaller institutions either call or write only the delinquent taxpayer and state that they are disbursing funds to the government. The larger banks, in addition to notifying the delinquent taxpayer, also make an effort to notify any codepositors by sending a formal letter and a copy of the notice of levy to the address where the monthly statements are mailed. Telephone interviews with account personnel at seven major Twin Cities banks (week of Jan. 27, 1986) (names and telephone numbers of banks and bank officers on file in the offices of the Minnesota Law Review). This voluntary effort to notify codepositors can hardly be classified as a "means... such as one desirous of actually informing the absentee might reasonably
ceive bank statements will only see a single debit entry on an account statement. This type of incidental notice is roughly analogous to the small-print public notice of sale, placed on the back page of a local newspaper, found inadequate to provide notice to a mortgagee in *Mennonite Board of Missions*. Moreover, the notice's form must be "'reasonably calculated' to inform [the parties] of the availability of an 'opportunity to present their objections.'" A debit entry on an account statement cannot be said to perform this function.

Even if the joint depositors do receive adequate and timely notice of the levy, however, the statute still may be void. Section 6331 authorizes the taking of a jointly owned property interest without expressly providing for notice to all interested parties. In *Wuchter v. Pizzuti*, the Supreme Court reviewed a New Jersey statute that permitted a resident of the state to serve process on the Secretary of State for actions against a nonresident motor vehicle operator. The Court concluded that the statute violated the defendant's due process rights even though the defendant had actual notice because the provision contained no language requiring either the Secretary of State or the plaintiff to communicate notice of service to the

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155. The seven banks in the Minneapolis/St. Paul area contacted during the week of January 27, 1986, do not present a separate disclosure highlighting the levy debit on the joint account statement. In addition, the banks do not send out duplicate copies of the statement containing the levy debit to all individuals named on the account. Telephone interviews with account personnel at seven major Twin Cities banks (week of Jan. 27, 1986) (names and telephone numbers of banks and bank officers on file in the offices of the Minnesota Law Review).

156. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14 (1978). Unless the bank's notice specifically apprised the codepositors of the statutory remedies available for wrongful levy, see supra text accompanying notes 51-55, the notice would still result in a deprivation of due process.

157. If by chance the nondelinquent codepositors received the bank statement and subsequently managed to identify the levy debit, such notice still may not satisfy due process. The Supreme Court, in concluding that publication in a newspaper and posted notices were inadequate to apprise the property owner of New York City's plan to divert a portion of the Neversink River, noted that the property owner's "knowledge of a change in the appearance of the river is far short of the notice that the city had diverted it and that the appellant had a right to be heard on a claim for compensation for damages resulting from the diversion." *Schroeder v. City of New York*, 371 U.S. 208, 214 (1962).

158. See supra text accompanying note 126.

159. 276 U.S. 13 (1928).

160. Id. at 16-17.
nonresident defendant.¹⁶¹

The National Bank of Commerce decision reaffirmed the Service’s broad power to use the administrative levy on “all property and rights to property” belonging to the delinquent taxpayer.¹⁶² The decision also expanded the definition of “property” subject to administrative levy by permitting the seizure of funds held in a joint bank account.¹⁶³ In expanding the reach of the administrative levy, however, the Court ignored the procedural inadequacies of both the language of the statute and the practices of the Service. Neither the statute nor the Service’s procedures provide for adequate notice of a levy on a joint bank account to the nondelinquent coholders of the account.

The importance of this decision is underscored by a significant increase in the use of the administrative levy in recent years.¹⁶⁴ This increased application greatly increases the risk of placing the property rights of nondelinquent joint account holders in serious jeopardy. Congress, although cognizant of the dramatic increase in the application of the administrative levy collection procedure, has failed to implement any procedural protections to mitigate the correspondingly increased risk of injury to the nondelinquent codepositor.

IV. CONGRESSIONAL RESPONSE TO THE GROWING RISK OF INJURY TO NONDELINQUENT CODEPOSITORS

The Service’s increased application of the Code’s collection provisions is partially attributable to the significant growth¹⁶⁵

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¹⁶¹ Id. at 18-19. The Court considered it irrelevant that the defendant eventually did receive actual notice by service. Instead, the Court declared that “[the defendant] did not . . . appear in the cause and such notice was not required by the statute. Not having been directed by the statute, it can not, therefore, supply constitutional validity to the statute or to service under it.” Id. at 24.


¹⁶³ Id. at 2926-27.

¹⁶⁴ See infra note 185.

¹⁶⁵ For example, in fiscal year 1946, total internal revenue collections were a mere $40.7 billion. See COMMISSIONER & CHIEF COUNSEL OF THE INTERNAL REVENUE SERVICE, 1984 ANNUAL REPORT 54 [hereinafter cited as 1984 ANNUAL REPORT]. Over a period of 38 years, total revenue collections increased approximately 1572% to $680.5 billion. See id. (percentage calculated by author). During 1946, the Service was responsible for collecting $1.7 billion in employment-related taxes. Id. In fiscal 1984, however, the Service gathered approximately $199.2 billion from employers. Id. The collection of individual
in the dollar volume of revenue collections. Simultaneously with this tremendous growth in revenue collection responsibility, recent actions by taxpayers and Congress have necessitated increased use of the statutory collection provisions by the Service. During the 1980's, the Service encountered the growing phenomenon of the illegal tax protester. In fiscal year 1982 alone, for example, the Service examined approximately 41,300 illegal protest returns.

Congress, moreover, has not funded the Service's efforts to improve collection results. From fiscal 1979 to 1984, the total congressional appropriation to the Internal Revenue Service increased an average of only 9.2 percent per year. As a result, the Service is currently allocating a larger proportion of its income and corporate income and profits taxes has also increased at an astounding rate. In fiscal 1975, individual and corporate tax collections totaled $202.1 billion. Over a period of nine years, however, these tax collections increased to $497.1 billion. Individual income tax collections, which were $156.4 billion, or 77.4% of the total income and profits taxes collected in fiscal 1975, were $362.9 billion and accounted for 83.0% of the $437.1 billion of individual and corporate taxes collected in fiscal 1984. See id. (percentages calculated by author).

166. The IRS groups as "tax protesters" those individuals who [claim] the right to stop paying taxes on moral or constitutional grounds. In the mid-1960s, when the Service began [compiling statistics], fewer than a thousand protest returns a year were filed, mostly by people objecting to the Vietnam war. Since then a minor nuisance has grown into a major problem: in 1983 the IRS identified over 58,000 protest returns. And since protest leaders often advise their followers simply not to file a return, protesters have undoubtedly helped swell the ranks of the estimated six million nonfilers.

To beat down this challenge, the IRS has targeted flagrant offenders for criminal prosecution. Usually these are tax-protest profiteers, who use the mails and telephone hotlines to sell tax-avoidance schemes based on crackbrained "Constitutional" arguments. In exchange for a fee of up to $2,000 and a "vow of poverty," for example, Jerome Daly, self-proclaimed pope of the Basic Bible Church, offered his "ministers" exemption from federal taxes. In 1983, Daly was sentenced to 16 years in prison and fined $95,000. Seven of his ministers, all former Braniff Airways pilots, were also hit with prison sentences.

Putting the Heat on Tax Protesters, FORTUNE, Apr. 2, 1984, at 84.

167. See COMMISSIONER & CHIEF COUNSEL OF THE INTERNAL REVENUE SERVICE, 1982 ANNUAL REPORT 11 [hereinafter cited as 1982 ANNUAL REPORT]. The illegal protest problem appears to have abated somewhat. Although the number of illegal protest returns examined in fiscal 1983 had increased to 54,871, COMMISSIONER & CHIEF COUNSEL, INTERNAL REVENUE SERVICE, 1983 ANNUAL REPORT 12 [hereinafter cited as 1983 ANNUAL REPORT], in 1984, the number examined declined to 51,895, 1984 ANNUAL REPORT, supra note 165, at 14.

168. For the years 1979 to 1984, total obligations, appropriations and reimbursements to the Internal Revenue Service were as follows:
annual congressional appropriation to the collection of outstanding tax liabilities.\textsuperscript{169} Congress's failure to fund the tax collection function adequately has forced the Service to utilize the cost-effective administrative levy procedure to secure delinquent taxes.\textsuperscript{170}

<table>
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<tr>
<th>Fiscal Year</th>
<th>Amount (in thousands)</th>
<th>Percentage Increase</th>
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<tr>
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<tr>
<td>1979</td>
<td>2,123,271</td>
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</table>


\textsuperscript{169}. In fiscal 1978, for example, the Service expended $258.3 million to collect delinquent taxes. COMMISSIONER \& CHIEF COUNSEL OF THE INTERNAL REVENUE SERVICE, 1979 ANNUAL REPORT 71 [hereinafter cited as 1979 ANNUAL REPORT]. The fiscal 1978 collection expenditure was approximately 42.6\% of the $606.4 million disbursed by the Service for investigation, collection, and taxpayer service. \textit{See id.} (percentage calculated by author). Over a period of six years, however, the Service has significantly increased disbursements for delinquent tax collections relative to total investigative, collection, and taxpayer service expenditures. After a brief proportional decline in fiscal years 1979, \textit{see id.} (41.2\% of $680.6 million total) (percentage calculated by author), and 1980, \textit{see} 1980 ANNUAL REPORT, \textit{supra} note 168, at 77 (41.4\% of $720.2 million total) (percentage calculated by author), collection expenditures increased to $604.1 million in fiscal 1984, accounting for 59.0\% of the Service's $1,024.1 million investigation, collection, and taxpayer service disbursements. \textit{See} 1984 ANNUAL REPORT, \textit{supra} note 165, at 71; \textit{see also} 1982 ANNUAL REPORT, \textit{supra} note 167, at 61 (43.4\% of $804.3 million total in 1981 and 47.2\% of $868.9 million total in 1982); 1983 ANNUAL REPORT, \textit{supra} note 167, at 65 (53\% of $998.3 million total) (percentages calculated by author).

\textsuperscript{170}. The Service's application of the statutory collection tools, in combination with the increased allocation of funds to collection and enforcement activities, has generated a positive return on investment for the Treasury. In fiscal 1984, Service collection personnel assessed nearly 1.5 million delinquency penalties relating to individual income taxes, totaling $447 million. 1984 ANNUAL REPORT, \textit{supra} note 165, at 67. Total dollar value of individual income tax delinquency penalties assessed in fiscal 1984 increased approximately 17\% from the prior year. \textit{Compare id. with} 1983 ANNUAL REPORT, \textit{supra} note 167, at 61 ($381 million individual income tax penalties assessed) (percentage calculated by author). Moreover, over a period of six years, total dollar value of individual income tax delinquency penalties abated has increased from the fiscal 1978 level of $25.8 million, COMMISSIONER \& CHIEF COUNSEL, INTERNAL REVENUE SERVICE, 1978 ANNUAL REPORT 95, to $92.0 million in 1984, 1984 ANNUAL REPORT, \textit{supra} note 165, at 67. The most startling statistic related to this resource allocation, however, is the increase in the dollar amount of delinquent taxes collected by the Service. In fiscal 1978, the Service collected approximately $4.3 billion in delinquent taxes. \textit{See} 1979 ANNUAL REPORT, \textit{supra} note 169, at 21. Over a period of six years, however, this amount has increased approxi-
Internal Revenue statistics disclose that the increased application of the administrative levy has significantly improved the Service’s efficiency in the collection of delinquent taxes.\textsuperscript{171} As a result of the procedural inadequacies of the levy, however, the Service’s increased utilization of this collection device significantly increases the risk of jeopardizing the property rights of nondelinquent codepositors.

Although Congress has expressed concern over the notice deficiency in section 6331, it has failed to implement any legislation to improve the procedural due process protection under this Code provision. In October 1980, the Subcommittee on Oversight of Government Management issued a scathing report regarding the Service’s application of the administrative levy against small businesses.\textsuperscript{172} The report contained numerous criticisms\textsuperscript{173} and recommendations\textsuperscript{174} relating to tax collection.

\textsuperscript{171} The amount of revenue collected from each dollar spent by the Service on direct enforcement activities increased, in constant fiscal 1983 dollars, from $5.46 in fiscal 1980 to $9.70 in fiscal 1984. See 1984 ANNUAL REPORT, supra note 165, at 19 (percentage increase calculated by author).

\textsuperscript{172} SUBCOMM. ON OVERSIGHT OF GOV’T MANAGEMENT, 96TH CONG., 2D SESS., REPORT ON INTERNAL REVENUE SERVICE COLLECTION PRACTICES—IMPACT ON SMALL BUSINESS (Comm. Print 1980) [hereinafter cited as SENATE REPORT]. The report was developed from a July 31, 1980, hearing focusing on IRS “collection practices and their effect on small businesses.” Id. at 1; see IRS Summary Collection Policy Impact on Small Business: Hearings Before the Subcomm. on Oversight of Gov’t Management of the Senate Comm. on Governmental Affairs, 96th Cong., 2d Sess. (1980) [hereinafter cited as 1980 Senate Hearings].

\textsuperscript{173} Specifically, the Subcommittee concluded that the Service was violating “its own formal policy by taking excessive and harsh enforcement actions against small businesses without considering all its available collection alternatives.” SENATE REPORT, supra note 172, at 3. Moreover, the Service was admonished for using “closed-case and seizure and levy statistics as a principal measure of collection effectiveness [without showing] any correlation between the number of closed-cases or seizures and the amount of taxes actually recovered.” Id. at 3-4. The Subcommittee also concluded that “IRS’ group managers abuse their supervisory review authority and require Revenue Officers to take harsh unnecessary enforcement actions contrary to the [officers’] professional judgment and individual discretion . . . .” Id. at 4.

\textsuperscript{174} The Subcommittee presented numerous recommendations based on its finding of excessive and harsh enforcement actions by the Service against small businesses. For example, the Subcommittee urged Congress to amend § 6325(b)(1) to require the IRS to make a timely “assessment of the fair market value of liened property and [to] retain a lien on a part of the property equal in value to no more than double the amount of the tax delinquency.” Id. at 4. Moreover, the Subcommittee recommended that the IRS “immediately issue a memorandum reiterating a formal national policy toward seizures of
practices and procedures. As a result, the Subcommittee proposed both statutory and administrative changes affecting the Service's application of the administrative levy collection tool.

In response to complaints that the Service was indiscriminately levying on the bank accounts and accounts receivable of small businesses to collect delinquent social security trust fund payments without affording adequate notice, the Subcommittee urged that the administrative levy provision of the Code be amended "to require that current notice provisions in section 6335 applicable to seizures be extended to levy actions as well." The Subcommittee suggested that the amendment require written notice to the taxpayer as soon as practicable after levy of taxpayer property. The Subcommittee indicated that effective notice would require that the notice be given to the taxpayer or left at his or her home or business. The Service resisted the Subcommittee's proposed amendment to section on-going businesses." Id. at 5. The Subcommittee also suggested that the IRS policy manual "be revised to require that installment pay plans be used for business taxpayers with no prior history of delinquent [social security] trust accounts." Id.

The Subcommittee also formulated a four-part recommendation based on its finding that the Service relied on collection statistics without verifying the cost effectiveness or the debt recovered. The crux of the recommendation was that the Service should institute a study to determine whether there is any correlation between the collection statistics, the use of various enforcement tools, and the actual debt recovered. Id.

175. Numerous complaints were voiced concerning the Service's practice of levying on accounts receivable and bank accounts of small businesses. The Subcommittee noted that, because the Service is not required to notify the business taxpayer when it levies on these two forms of intangible assets, such action can have a detrimental impact on the taxpayer's reputation and credit standing in the business community. Id. at 9-10. Specifically, regarding levies on business bank accounts, the Subcommittee concluded:

Levies on checking accounts require no notice to the taxpayer, so that a taxpayer's first word of such a levy comes when its checks to creditors are returned as a result of levy. The damage to the business' credibility in the eyes of its colleagues and essential supplies [sic] is a very real threat to a business' survival.

Id. at 10.

176. See supra notes 31-55 and accompanying text.

177. SENATE REPORT, supra note 172, at 4. For a discussion of the notice provisions of § 6335, see supra notes 38-44 and accompanying text. The Subcommittee also recommended the following revision to Internal Revenue Policy Statement P-5-34: "The facts and circumstances of the particular case must be thoroughly considered before a decision is reached to levy against a going business or to seize a going business and offer it for sale under levy proceedings." SENATE REPORT, supra note 172, at 4 (revision in italics).

178. SENATE REPORT, supra note 172, at 4.

179. Id.
While the Subcommittee was conducting its investigation, Senator Max Baucus introduced a bill to amend the Internal Revenue Code to provide greater protection for taxpayers' rights. The bill, entitled "Taxpayer's Bill of Rights Act," proposed a six-point program of specific taxpayer protections. The most significant protection in the amendments focused on the prevention of unwarranted seizure of taxpayer property. Specifically, Senator Baucus proposed an amendment to section 6331 that would have required procurement of a court order prior to any levy action by the Service.

180. The Commissioner's response to the findings and recommendations of the Subcommittee was defensive. Regarding the Subcommittee's finding concerning levies, the Commissioner responded that "[w]hile there may be instances in which notices of levy are precipitously issued by IRS Collection personnel, we do not believe that the record of the Service as a whole would support the Subcommittee's finding." Hearings Before the Subcomm. on Export Opportunities and Special Small Business Problems of the House Comm. on Small Business, 97th Cong., 2d Sess. 373, 377 (1983) (letter from the Acting Commissioner of the IRS to Senator Carl Levin, Chairman, Subcommittee on Oversight of Government Management). Moreover, the Commissioner's response to the Subcommittee's proposed amendment to make the written notice requirement of § 6335 applicable to levies as well as seizures was predictable. The Commissioner asserted that "[t]o apply similar procedures to the far more frequent use of notices of levy would substantially increase the cost of issuing such notices by . . . making it impossible for the Service to fully utilize its Collection Office function . . . personnel." Id. at 378. The Commissioner concluded that, while the taxpayer "would receive no additional material protections . . . the cost of collecting delinquent accounts would increase substantially." Id.

181. At the date of the bill's introduction, Senator Baucus was a member of the Finance Committee and Chairman of the Oversight Subcommittee of the Internal Revenue Service. See 1980 Senate Hearings, supra note 172, at 28.

182. S. 2825, 96th Cong., 2d Sess., 126 CONG. REC. 14,416-18 (1980). The first five proposed protections would have:

(1) Established an office of ombudsman to act as an advocate for the taxpayer in dealings with the IRS;

(2) Exempted all back taxes and penalties if the IRS failed to issue regulations within 18 months of passage of the new Code provision;

(3) Removed the requirement of small businesses to file W-2 forms in mid-year when an employee terminates his position with the business;

(4) Ended the requirement for declarations of estimated tax when no payment is due; and

(5) Protected tax preparers from unwarranted penalties.

1980 Senate Hearings, supra note 172, at 29.

183. Under the proposal, "any Federal judge or any judge of a State court of record within the district wherein the property (or right to property) to be levied upon [was] located" could issue the order. S. 2825, 96th Cong., 2d Sess. § 3, 126 CONG. REC. 14,416-17 (1980). The judge, however, could act only if the
The introduction of the “Taxpayer’s Bill of Rights Act” and the recommendations of the Subcommittee on Oversight reveal that some legislators are aware of the procedural due process weaknesses in the administrative levy provision of the Code. Congress, however, has not enacted any legislation to improve procedural protections under section 6331.¹⁸⁴ The Service, moreover, has dramatically increased its use of the administrative levy¹⁸⁵ without any significant modification in levy practices and procedures regarding joint bank accounts. This increase, together with Congress’s failure to provide adequate procedural due process protection to all property owners under the levy provision, leaves the property rights of nondelinquent joint bank account holders in serious jeopardy, absent any protection from the courts.

V. CONCLUSION AND PROPOSAL

The Supreme Court did not reach the issue of the due process inadequacies of the administrative levy procedure in National Bank of Commerce.¹⁸⁶ The issue remains, however, and in the absence of congressional action, the property interests of nondelinquent joint account depositors are unprotected. Judicial protection should be provided. As an alternative to voiding section 6331,¹⁸⁷ courts could void all levies conducted by the

¹⁸⁴. S. 2825 was referred to the Finance Committee. See 126 CONG. REC. at 14,414 (1980). The bill, however, was never enacted.

¹⁸⁵. Collection activity involving the administrative levy has increased sharply. In fiscal 1978, the Service reported slightly over 5,000 seizures of taxpayer property. In fiscal 1984, however, the Commissioner disclosed that collection personnel effectuated approximately 20,000 seizures. Moreover, the number of notices of levy served upon third parties has increased over 233% from fiscal 1978 to fiscal 1984. See 1979 ANNUAL REPORT, supra note 169, at 66; 1984 ANNUAL REPORT, supra note 165, at 66 (percentage increase calculated by author). Specifically, the number of levies served on banks during fiscal 1981 totalled 308,622. In fiscal 1984, however, the Service served approximately 600,000 notices of levy on financial institutions. Brief for Petitioner at 41 n.29, United States v. National Bank of Commerce, 105 S. Ct. 2919 (1985). In addition, during the past three and a half years, the Service has served notices of levy on approximately 800,000 joint bank accounts. Id. at 41.

¹⁸⁶. See supra text accompanying notes 92-96.

¹⁸⁷. See supra text accompanying notes 153-161. Under the current levy framework, § 6331 operates harmoniously with other Code provisions when the Service seizes tangible property. See supra text accompanying notes 122-123. The only inconsistency in § 6331 materializes when the Service levies on a joint bank account. Thus, as a practical matter, courts should avoid invali-
Service in which the Service fails to deliver timely, adequate notice to all parties with an interest in the seized joint bank accounts.\textsuperscript{188}

The notice sent to the nondelinquent joint account holders would have to specify that the funds in the account are being seized for delinquent taxes. More importantly, the notice would have to clearly advise the codepositors that remedies are available if their property interest has been wrongfully taken by the government.\textsuperscript{189}

This notice procedure would comply with the \textit{Mennonite Board of Missions} due process notice requirements\textsuperscript{190} and strike the requisite balance dictated by the Supreme Court in \textit{Matheus v. Eldridge}.\textsuperscript{191} The minimal increase in the government's burden resulting from compliance with the \textit{Mennonite Board of Missions} notice requirements clearly would be out-dating § 6331 when less disruptive alternatives are available to correct the due process deficiency.

\textsuperscript{188} The Service has expressed concern that such a procedure would impose on them the impossible burden of proving the ownership interests of the codepositors. Brief for Petitioner at 42, United States v. National Bank of Commerce, 105 S. Ct. 2919 (1985). There is no language in the relevant levy provisions, however, that requires the government to shoulder the burden of establishing ownership interests. See I.R.C. §§ 6331-6332 (1982). Moreover, the suggested notice procedure does not delegate this burden to the Service.

Under the notice procedure, the bank would still surrender the funds to the Service pursuant to § 6332. The sole purpose of the notice requirement is to inform the nondelinquent codepositor as soon as practicable after compliance by the bank that his or her property interest may have been seized and that remedies are available for wrongful seizure. There is no requirement that the Service establish ownership at any time prior to the nondelinquent codepositors' initiating a wrongful levy action under either § 6343(b) or § 7426.

\textsuperscript{189} Without this express disclosure, the substance of the notice would not satisfy the requirements established by the Supreme Court in \textit{Memphis Light, Gas & Water Division}. See \textit{Memphis Light, Gas & Water Div. v. Craft}, 436 U.S. 1, 14-15 (1978).

The government implies that providing notice to joint account holders will result in a massive increase in litigation, costing the government "tens of millions of dollars." Brief for Petitioner at 44, United States v. National Bank of Commerce, 105 S. Ct. 2919 (1985). This increase in litigation, moreover, "would impose a tremendous strain on the federal courts." \textit{Id}. These observations, however, conflict with an earlier statement in which the government claimed that "[v]ery few of these cases [levies on joint bank accounts] resulted in litigation, be it an enforcement action by the Commissioner or a wrongful levy action by the co-depositor. Rather, the bank simply paid the funds to the IRS, the taxpayer acquiesced, the co-depositor raised no objection, and no one ever went to court." \textit{Id}. at 41. On the basis of this historical observation, it is difficult to imagine an "explosion" in future litigation merely from providing notice to nondelinquent codepositors.

\textsuperscript{190} \textit{See supra} text accompanying notes 138-143.

\textsuperscript{191} \textit{See supra} notes 116-119 and accompanying text.
weighed by mitigation of the risk that the nondelinquent joint account holder's property interest was seized unfairly.\textsuperscript{192} Moreover, if a notice procedure were implemented, the Service's use of the administrative levy would be supported by those Supreme Court decisions that have permitted takings without a prior hearing, provided a post-deprivation hearing was guaranteed.\textsuperscript{193} If timely and adequate notice is given to all concerned parties, the post-seizure remedies of the Code will serve the purpose for which they were designed: the protection of the rights of the nondelinquent taxpayer.

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\textsuperscript{192} The Service's response to this conclusion is predictable. The Service would claim that the requirement of notice to all joint bank account holders "would make administrative levies so burdensome as to be impractical whenever a delinquent taxpayer's property is titled in more than one name." Brief for Petitioner at 42, United States v. National Bank of Commerce, 105 S. Ct. 2919 (1985). Moreover, the Service would argue that such a procedure is both costly and inefficient. See id. at 44.

The Service's response, however, appears to ignore the realities of the banking industry. Discussions with account personnel at Marquette Bank Minneapolis, Norwest Bank Minneapolis N.A., First Bank Minneapolis, and Twin City Federal Savings & Loan Association during the week of January 27, 1986, revealed that the application forms for joint accounts require the names and addresses of all parties to the accounts. Telephone interviews with four Twin Cities banks (week of Jan. 27, 1986) (names and telephone numbers of banks and bank officers on file in the offices of the \textit{Minnesota Law Review}). In addition, every joint account holder is required to list his or her social security number on the application. By working with the bank and the delinquent taxpayer, the Service should experience minimal difficulty in notifying all codepositors.

\textsuperscript{193} See \textit{supra} note 119 and accompanying text. As the administrative levy framework currently operates, the lack of any notice to a nondelinquent codepositor does not guarantee a post-deprivation hearing or remedy. See \textit{supra} text accompanying notes 127-129.