

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

IN THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-215

TITLE UNITED STATES, Petitioner, v. WHITING POOLS, INC.

PLACE Washington, D. C.

DATE April 19, 1983

PAGES 1 thru 49



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C O N T E N T S

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on behalf of the Petitioner

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in United States against Whiting Pools.

4 Mr. Smith, I think you may proceed when you
5 are ready.

6 ORAL ARGUMENT OF STUART A. SMITH, ESQ.,

7 ON BEHALF OF THE PETITIONER

8 MR. SMITH: Mr. Chief Justice, and may it
9 please the Court, this bankruptcy tax collection case
10 comes here on writ of certiorari to the Second Circuit.
11 It presents an important question under the new
12 Bankruptcy Code, whether a Bankruptcy Court in a
13 reorganization proceeding under Chapter 11 may compel
14 the government under Section 542(a) of the Bankruptcy
15 Code to turn over to the debtor in possession property
16 which the government had seized by levy to satisfy the
17 debtor's delinquent federal tax liabilities prior to the
18 filing of the bankruptcy petition.

19 The facts are relatively simple, and can be
20 summarized as follows. Respondent is a corporation
21 engaged in the business of servicing swimming pools. In
22 1979 and 1980, it had unpaid assessments for
23 withholding, employee withholding and social security
24 taxes amounting to some \$92,000. These liabilities had
25 gone unpaid for almost as much as two years, and on

1 January 14th, 1981, the Internal Revenue Service
2 exercised its statutory rights to levy on Respondent's
3 inventory equipment and other tangible property.

4 This was done by placing a padlock on the
5 premises, and the property therefore was seized pursuant
6 to Section 6331(a) of the Internal Revenue Code. The
7 very next day, January 15th, 1981, Respondent filed a
8 petition for reorganization under Chapter 11 of the
9 Bankruptcy Code.

10 QUESTION: What was the value of the property
11 seized when the adjustment, \$20,000 adjustment was made?

12 MR. SMITH: Well, the value of the property
13 was found by the Bankruptcy Court to have a liquidating
14 value of \$35,000.

15 QUESTION: What was the amount of the
16 government's claim?

17 MR. SMITH: The amount of the government's
18 claim is \$92,000. The \$20,000 adjustment, Mr. Chief
19 Justice, is somewhat of a -- well, it is really not
20 before the Court, because it involves the adequate
21 protection question, but let me simply say in passing
22 that the government took the position, correctly, we
23 think, below, that that \$20,000 did not constitute
24 adequate protection because that was \$20,000 in the bank
25 account that the government had exercised its seizure

1 rights.

2 So what was being done essentially was saying
3 -- was the Bankruptcy Court saying, well, you have
4 adequate protection here because I am going to take this
5 \$20,000. You have got \$20,000 already. That was with
6 respect to another seizure.

7 But in any event, it is not before the Court.

8 By doing this, by filing this petition, the
9 Respondent became a debtor in possession, and one month
10 later, in February, the Internal Revenue Service sought
11 to exercise its statutory rights under Section 6335 of
12 the Code to sell the seized property and to reduce it to
13 cash and to apply it against the tax liability. It
14 then, because of that, because it wished to do that, it
15 went into bankruptcy -- it went into the Bankruptcy
16 Court on February 18th and sought an order from the
17 bankruptcy judge that the automatic stay provisions of
18 Section 362 did not bar its sale of the property,
19 principally because the property was seized. It was not
20 part of the bankruptcy estate.

21 Respondent counterclaimed and sought an order
22 which is at issue here, the propriety of which is at
23 issue here, requiring the government to turn over the
24 seized property under Section 542(a) of the Bankruptcy
25 Code.

1 The Bankruptcy Court upheld the government on
2 the issue that is before the Court. It held that
3 Respondent was not entitled to compel a turnover order
4 -- to a turnover order under 542(a), and the District
5 Court on review likewise upheld the government. It
6 basically held, in accordance with our submission here,
7 that the seized property was not property of the estate
8 within the meaning of the pertinent provisions of the
9 Bankruptcy Code, and was hence not subject to turnover.

10 QUESTION: Do you think the District Court or
11 the Bankruptcy Court based that view on the --
12 analogizing the government's position here to that of any
13 seizing secured creditor, or on the basis of peculiar to
14 the government's position?

15 MR. SMITH: I think on the basis of peculiar
16 to the government's position, that the government is not
17 simply seizing secured credit, but operates, as the
18 Court -- as we point out in our brief, and the Court
19 recognized in Phelps, the government -- the government's
20 position as tax collector is really quite different and
21 distinct, and Congress has so made it different and
22 distinct because of the involuntary nature of the
23 government's creditor relationship.

24 In other words, we did not -- unlike a bank,
25 we did not enter into a voluntary relationship with

1 Respondent to lend it money, and hope, you know, and
2 take collateral. We basically -- Here we are in the
3 position where, as the Court of Appeals itself
4 recognized, the Respondent helped itself to the
5 government's money. This was -- these were with
6 principally employee withholding taxes.

7 So the Respondent paid net payrolls, never
8 paid over the money that the -- you know, in a timely
9 way that you are supposed to.

10 QUESTION: Mr. Smith, would your position be
11 any different if it were just the income tax liability?

12 MR. SMITH: No, no.

13 QUESTION: It would be the same?

14 MR. SMITH: I think the aspect of employee
15 withholding taxes gives this case peculiar force. I
16 mean, I think what it does is show that, you know,
17 essentially this was an involuntary -- essentially
18 Respondent was borrowing money from the government in an
19 involuntary way.

20 QUESTION: Well, it wasn't the Respondent's
21 money. You could take that position.

22 MR. SMITH: Exactly. Right. Exactly.

23 QUESTION: Which makes, I suppose --

24 MR. SMITH: And indeed, the Court of Appeals
25 recognized that that was something of somewhat peculiar

1 force because of that fact.

2 QUESTION: But you don't restrict your case to
3 that.

4 MR. SMITH: Again, I think it would be the
5 same with respect to income taxes, and the Code suggests
6 that, you know, once taxes are delinquent and owing, the
7 full panoply of statutory authority rests in the
8 Commission to take these steps.

9 QUESTION: Mr. Smith, in all these bankruptcy
10 situations, there obviously isn't enough money to go
11 around or we wouldn't be having bankruptcy proceedings
12 filed, and isn't -- if the government were able to sell
13 the property, it would only recover part of the taxes.
14 The theory of these reorganizations, of course, is to
15 get the bankrupt back on its or his feet to be able to
16 pay the creditors perhaps in full.

17 Is the government not better off if your
18 security is adequate waiting it out with the rest of the
19 creditors and getting more of the tax money?

20 MR. SMITH: Justice O'Connor, that may well be
21 the case in a particular case. I don't think that in
22 hindsight any of us can sit back and say what the
23 government ought to have done here. This was a
24 situation in which these taxes went unpaid for almost
25 two years. I can assure you and the Court on the basis

1 of how the Internal Revenue Service behaves that levies
2 do not occur gladly or with alacrity. They are done
3 really as a last resort, and I would -- and the
4 instruction --

5 QUESTION: Well, the concern I have -- the
6 concern I have is that probably in almost every case of
7 a bankruptcy reorganization there are taxes owed the
8 government, and if the government is going to take the
9 position on all these cases that it wants its levy and
10 its money out, then probably the reorganization aspects
11 will not be able to proceed in many cases, and so I was
12 curious why --

13 MR. SMITH: Yes. Well, I would simply -- I
14 would simply suggest -- suggest that the government
15 exercises its levy rights only, I am sure, when it is
16 satisfied that the debtor in possession or the bankrupt
17 corporation is not going to be able to survive.

18 QUESTION: Yes, but that may be against the
19 judgment of the Bankruptcy Court. The Bankruptcy Court
20 lets the reorganization petition be filed. It survives
21 motions to dismiss. There is -- That requires a
22 judgment that there is a possibility of reorganization.

23 MR. SMITH: Indeed, but I suggest to the Court
24 that the exercise of these statutory rights of levy are
25 rights which Congress has vested in the Commissioner to

1 take, notwithstanding --

2 QUESTION: You have only got Phelps to defend
3 your position under the previous Chapter 10, haven't
4 you?

5 MR. SMITH: Well, I would not say only got
6 Phelps.

7 QUESTION: Well, that wasn't even a Chapter 10
8 case. Give me a Chapter 10 case. I mean the old
9 Chapter 10. Give me one of those.

10 MR. SMITH: There is no -- there are no
11 Chapter 10 cases.

12 QUESTION: The bankruptcy law -- Chapter 10
13 had been on the books a long time.

14 MR. SMITH: Um-hm. Um-hm.

15 QUESTION: And did you think the government
16 regularly or even often got away with levying on
17 property that -- or saying that they didn't have to turn
18 over property that had been levied on in that Chapter 10
19 proceeding?

20 MR. SMITH: Let me -- as we point out in our
21 brief, Justice White, there have been -- there are no
22 decided cases --

23 QUESTION: That isn't what I asked you. I
24 asked you what the practice was --

25 MR. SMITH: The practice --

1 QUESTION: -- that you were able to get away
2 with it.

3 MR. SMITH: The practice, as I understand it,
4 is that the government exercised its rights of levy when
5 it felt that they were necessary and appropriate.

6 QUESTION: Well, all right, they exercised
7 them. And did Bankruptcy Courts always say, yes, if you
8 have levied before a Chapter 10 petition is filed --
9 that's the old Chapter 10 -- that you may keep the
10 property? Was that --

11 MR. SMITH: I'm aware -- I'm aware of no
12 decisions forbidding the government from doing that.

13 QUESTION: Or approving it.

14 MR. SMITH: Or approving it. And the point we
15 are simply making is that here --

16 QUESTION: Every other secured creditor could
17 be required to turn it over, in the old Chapter 10.

18 MR. SMITH: Indeed. Indeed. But I think the
19 government is --

20 QUESTION: You are saying now that one of your
21 arguments is that the new bankruptcy law has permitted
22 all creditors to seize property before the petition and
23 keep it. One of your arguments would --

24 MR. SMITH: Indeed it is, although I think
25 that, you know, our primary and principal argument is

1 that the government stands in a very distinct position.

2 QUESTION: Well, that is one of your arguments
3 in your brief. I am not sure it is the principal one.

4 MR. SMITH: Well, it is the argument that we
5 make, you know, and basically it is an argument based on
6 this Court's recognition in Phelps, a unanimous
7 recognition --

8 QUESTION: It's a Chapter 11. That was an old
9 Chapter 11 case. It wasn't a bankruptcy -- it wasn't a
10 Chapter 10 case, was it?

11 MR. SMITH: No. No, but the point --

12 QUESTION: Well, that was a completely
13 different operation with respect to secured creditors.

14 MR. SMITH: But we think that Phelps is
15 persuasive on this, and let me explain why. Phelps
16 dealt with the situation that the Court had to decide
17 who had possession of this fund that was in the hands of
18 an assignee for the benefit of creditors. The
19 government had served notice of seizure which the Court
20 recognized was tantamount to a levy in that situation.

21 Now, once the government -- once the
22 government did that, then after that the debtor filed a
23 petition for reorganization, and the --

24 QUESTION: Yes, under Chapter 11.

25 MR. SMITH: Under Chapter 11. The government

1 -- the question before the Court was whether this was
2 subject to the summary jurisdiction of the Bankruptcy
3 Court or whether it was subject to plenary jurisdiction,
4 but in deciding whether it was subject to summary or
5 plenary jurisdiction, the Court necessarily had to
6 determine who had possession of this property --

7 QUESTION: Exactly. Exactly.

8 MR. SMITH: -- and the Court held that the
9 assignee was holding the property in constructive
10 possession for the government. It's as if, really, what
11 the Court said, and I would like to quote it, the Court
12 said --

13 QUESTION: Do you think the case would have
14 come out any differently in Phelps if it had been a
15 non-government creditor? I don't -- Don't you think any
16 other secured creditor who would seize property ahead of
17 the bankruptcy would have been able to hold it under
18 Chapter 11?

19 MR. SMITH: That may well be, but I think the
20 important --

21 QUESTION: Well, then, Phelps couldn't have
22 rested on the special position of the government.

23 MR. SMITH: I beg to differ with the Court,
24 only because the middle part of the opinion discusses at
25 great length the effect of a levy. It says, "Here we

1 are concerned not with the priority of tax liens, but
2 with the effect of a tax levy."

3 QUESTION: Right.

4 MR. SMITH: "Historically, service of notice
5 has been sufficient to seize a debt, and notice of levy
6 and demand are equivalent to seizure."

7 QUESTION: What if a mortgagee, what if a
8 mortgagee in a case just like that had taken possession
9 of the property before the Chapter 11 petition had been
10 filed?

11 MR. SMITH: Well --

12 QUESTION: Do you think they could have
13 turned, been --

14 MR. SMITH: There is authority that is cited
15 by the Court of Appeals below that suggests that that
16 would have been subject to a turnover.

17 QUESTION: In a Chapter 11?

18 QUESTION: Not in the old --

19 MR. SMITH: No, under a Chapter 10.

20 QUESTION: Well, that is a different thing,
21 old Chapter 10.

22 MR. SMITH: Well, the point -- I think the
23 essential point of Phelps is, no matter what kind of
24 proceeding existed under the old bankruptcy law, Phelps
25 turns on the recognition as to what the effect of a levy

1 is, and I think the important thing about the effect of
2 a levy is that for all intents and purposes, it means
3 that the government has virtually all rights to the
4 property except a few narrow rights.

5 QUESTION: All Phelps had to decide for
6 purposes of deciding whether a plenary hearing was
7 required or summary jurisdiction under the old
8 Bankruptcy Act was that the government had reduced this
9 property possession prior to the filing of bankruptcy.
10 So that is all the case can stand for.

11 MR. SMITH: That is all the case could have --
12 could have said, but the Court went on and discussed
13 what the effect of a levy was, and it said basically
14 that the levy therefore gave the United States full
15 legal right to the \$38,000 levied upon as against the
16 claim for the petitioner receiver.

17 Now, that to us is very significant, and when
18 you take that recognition as to what the effect of a
19 levy is, and you consider it against -- in the context
20 and in the perspective of the new Bankruptcy Code
21 provisions, I think the answer is very clear that the
22 Court of Appeals below erred, because what you had -- I
23 would like to refer the Court, if I may, to the
24 pertinent provisions of statutory the language needs to
25 be construed.

1 On Page 52-A, and 53-A, and 54-A of the
2 appendix to our petition, the pertinent provisions are
3 set forth, and basically we start, if I may, on Page
4 54-A, with the turnover provision, the very provision
5 that the Court of Appeals thought was applicable here.
6 It says here, "Except as provided in Subsection C or D
7 of this section, an entity in possession, custody, or
8 control during the case of property that the trustee may
9 use, sell, or lease under Section 363 of this title
10 shall deliver to the trustee."

11 Now, the question -- the IRS is an entity, and
12 the question is, what is property that the trustee may
13 use, sell, or lease, and we have to go to Section 363.

14 QUESTION: May I interrupt you right there? Is
15 it not true that in a withholding case, as Phelps was,
16 you've got cash involved that should have been paid out,
17 you know, the withholding money, that that would not be
18 property that the trustee could use.

19 MR. SMITH: That's right.

20 QUESTION: Whereas in this case, the physical
21 assets would be property that could be used?

22 MR. SMITH: Yes, but the point -- the point --

23 QUESTION: Isn't that true?

24 QUESTION: I understood --

25 MR. SMITH: Well, let me go on. We then have

1 to say to ourselves -- we have to ask ourselves, what is
2 the property that the trustee can use, and the question
3 is, under Section 363(b), cited on -- you know, set out
4 on Page 52-A, it says, "The trustee, after notice in
5 hearing, may use, sell, or lease, other than in the
6 ordinary course of business, property of the estate."

7 So the question boils down to, what is -- if
8 this is not property of the estate, it is not subject to
9 a turnover order. And Section 541(a) finally defines
10 what property of the estate is, and it says --

11 QUESTION: Let me back you up a little bit,
12 Mr. Smith. If this party had done what they should have
13 done, this \$92,000 would have been in a separate
14 account, an agency or a trust account separate and apart
15 from all the other assets of the employer.

16 MR. SMITH: Precisely, and it would have been
17 paid over.

18 QUESTION: Well, at least it would have been
19 set aside if it hadn't been paid over.

20 MR. SMITH: Right.

21 QUESTION: Well, then, in this rehabilitation
22 concept of Chapter 11, could that \$92,000 have been used
23 for any of the purposes of restoring this business?

24 MR. SMITH: No. No. It belongs to the
25 government.

1 QUESTION: Of course not.

2 MR. SMITH: Of course not.

3 QUESTION: Well, then, it is in a separate
4 category --

5 MR. SMITH: Well, indeed --

6 QUESTION: -- and are you asserting that what
7 was left of the -- what was available is subject to a
8 constructive trust?

9 MR. SMITH: Well, that requires, you know,
10 questions of tracing that the record is opaque on, and I
11 am not suggesting that this property was in a
12 constructive trust. What I am suggesting, Your Honor,
13 is that this is not property of the estate. That is,
14 you know, that is the critical aspect.

15 QUESTION: But that is no different than a
16 mortgagee seizing the day before. I mean, you said
17 that you thought your argument was primarily based on
18 the unique position of the government, but this argument
19 you are making it seems to me just for open to all
20 secured creditors generally.

21 MR. SMITH: Well, we don't -- we are not
22 putting ourselves, Justice Rehnquist, in the same
23 category as all secured creditors generally.

24 QUESTION: Yes, but you are --

25 MR. SMITH: We are resting -- we are resting

1 on the exercise of our rights to levy.

2 QUESTION: But what you are saying, Mr. Smith,
3 is that property of the estate refers to the debtor's
4 interest in property and not to property in which the
5 debtor has an interest.

6 MR. SMITH: That's right.

7 QUESTION: And if that is your theory, it
8 makes reorganization impossible in any case, because
9 every creditor would be the same. It is impossible.

10 MR. SMITH: It makes -- let me suggest that it
11 makes reorganization -- it makes reorganization
12 impossible in a case in which the debtor, like in this
13 case, waits, you know, and does not pay tax obligations,
14 and then finally the Internal Revenue Service exercises
15 its statutory rights to levy, and then it goes into
16 Bankruptcy Court. I would suggest that that sequence of
17 events wouldn't possibly make reorganization
18 impossible. But the chronology in this case is
19 critical, because --

20 QUESTION: But your theory that you have just
21 been talking about would apply to all creditors. That
22 is the one argument that you make in your brief, and it
23 would seem to me like you backed off from that argument
24 in your reply brief.

25 MR. SMITH: The point is that the Court of

1 Appeals here began its analysis by saying that there was
2 this turnover authority under the old bankruptcy law,
3 and that somehow it was carried forward. We don't think
4 that is true, but that is not critical to our case,
5 because even if it were carried over, we don't think
6 that, you know, that the settled rule that permit --
7 that insulated the Internal Revenue Service from
8 turnover with respect to prepetition tax levied property
9 has been altered by the codification of the Bankruptcy
10 Code. We regard that rule as settled, and we regard the
11 -- I mean, it would be a drastic and radical departure
12 from old law for the --

13 QUESTION: Well, it is not very well settled
14 if you can't give me any cases under Chapter 10, on the
15 old law, if you can't even give me a case one way or the
16 other.

17 MR. SMITH: I think the point --

18 QUESTION: How settled is that?

19 MR. SMITH: I think it is settled because no
20 one ever challenged the authority. I think there would
21 never be any --

22 QUESTION: As far as I know, the Internal
23 Revenue Service never attempted it before.

24 MR. SMITH: Well, I can --

25 QUESTION: And you can't tell me that it did.

1 MR. SMITH: I can tell you that in
2 investigating the history of this case, the Internal
3 Revenue Service assured me that its right to do this had
4 never been challenged, and that it had done it on a --
5 it had done it on innumerable cases.

6 QUESTION: That hardly answers my question.

7 MR. SMITH: Well, I would simply suggest that
8 the absence of authority suggests that the -- that the
9 right was well settled. After all, the statutory
10 authority to levy, these are very old statutes, and
11 the --

12 QUESTION: Well, you wouldn't think that it
13 had been settled with respect to other secured creditors
14 under Chapter 10, would you?

15 MR. SMITH: Well, apparently, there is --

16 QUESTION: Would you?

17 MR. SMITH: No.

18 QUESTION: The rule is quite the contrary.

19 MR. SMITH: Well, there was some decisional
20 law to the contrary, but that really --

21 QUESTION: Then that is not well settled.

22 QUESTION: A lot more decisional law than
23 there was in the case of the IRS.

24 MR. SMITH: Well, indeed, but our point is
25 that the government occupies quite a different position

1 than an ordinary secured creditor. An ordinary secured
2 creditor simply has a security interest. Take a
3 mortgagee.

4 QUESTION: Mr. Smith, all of your tracing
5 through these statutory sections that you very helpfully
6 took us through a few minutes ago, there is nothing
7 peculiar to the government about any of that argument.
8 The only thing peculiar to the government is your heavy
9 reliance on the Phelps case.

10 MR. SMITH: Well, let me say this. But it is
11 more than the Phelps case, because Section 541 defines
12 property of the estate as all legal or equitable
13 interests of the debtor in property as of the
14 commencement of the case. Now, the question is, what
15 were the debtors' interests in this property as of the
16 commencement of the case, the day that it filed its
17 petition for reorganization, and under Section 6331(a)
18 the levy had already taken place and the provisions of
19 the Internal Revenue Code are absolutely clear that
20 under those circumstances the only -- the only property
21 interests that the debtor had in that property was the
22 right to receive notice of sale, was the right to
23 receive possible surplus.

24 QUESTION: Well, that is not much different
25 than the chattel mortgagee. Seizing chattel mortgagee.

1 MR. SMITH: Well, under --

2 QUESTION: Or chattel mortgagor, I should
3 say.

4 MR. SMITH: Well, now, I --

5 QUESTION: Right to receive notice of sale.
6 Right to receive surplus.

7 MR. SMITH: Well, ultimately that is true, but
8 I would suggest to the Court that the government is
9 different in the sense that Congress has armed the
10 government with statutory authority to conduct
11 administrative sales without any -- without any further
12 ado. A chattel mortgagee, I would suggest, has to get
13 the sheriff to come and seize the property. It can't
14 engage in self-help. These --

15 QUESTION: Well, take a conditional vendor
16 then, who can -- the sale --

17 MR. SMITH: Well, let me simply say this, that
18 the end result with respect to a secured creditor and
19 the government may be the same at the bottom line in the
20 sense that the debtor will be entitled to surplus, but
21 the point is that Congress has made a determination that
22 the Internal Revenue Service and its prerogatives are to
23 be treated differently, and I think the Court has
24 recognized that in Phelps, because what the Court said
25 there was that the service of a notice of seizure takes

1 the property -- takes the legal interest of the property
2 and puts it in the hands of the government.

3 The government then can sell it. A chattel
4 mortgagee or a real property mortgagee has to start a
5 foreclosure action. The government is not simply
6 limited in tax collection proceedings to starting a --
7 to commencing a suit to foreclose.

8 QUESTION: Well, neither a chattel mortgagee
9 nor a conditional vendor in most places has to start
10 suits to foreclose.

11 MR. SMITH: That's -- that may be the case,
12 but I am simply suggesting to the Court that in enacting
13 the Bankruptcy Code, there is just -- there is no
14 statutory language that supports the notion that in a
15 situation like this when the IRS has engaged in a free
16 petition levy, that such property is subject to
17 turnover. It is a drastic change from what we regard as
18 the settled rule for the contrary, as -- and we think
19 that Phelps recognizes that there was such a --

20 QUESTION: I suppose one argument that the
21 government might make that says that the tax claim is
22 different from other secured creditors is that -- at
23 least you submit that the government's interest under a
24 levy is determined by the code, whereas other secured
25 creditors' interests very likely would be determined

1 under state law.

2 MR. SMITH: Under state law. Exactly.

3 Exactly.

4 QUESTION: Did the corporation here ever
5 acquire any title to these tax moneys?

6 MR. SMITH: These tax moneys?

7 QUESTION: Yes, the money that was put into
8 these accounts, that he did not put into the accounts
9 but should have put into the accounts.

10 MR. SMITH: Well, the corporation had title,
11 and ultimately, you know, there is no money now in the
12 account, where there are -- are inventory.

13 QUESTION: Well, let me go back to my other
14 question. If it had done what it should have done with
15 its trust money, it would have had a separate account,
16 would it not?

17 MR. SMITH: Indeed.

18 QUESTION: And the \$92,000 would be there.
19 Would the creditors be entitled to one penny of that?

20 MR. SMITH: No. Absolutely not.

21 QUESTION: You are arguing that equity
22 presumes that should be done?

23 MR. SMITH: Absolutely not, but our argument,
24 as I suggested to Mr. Justice Blackmun, you know, is
25 with respect to all taxes, because Section 6331 empowers

1 the Internal Revenue Service to levy on assets of the
2 delinquent taxpayer any time there is unpaid assets, and
3 here is a situation where these -- unpaid tax
4 liabilities. Here is a situation where these things
5 went unpaid for several years. The government finally
6 realized that it was not going to get paid unless it
7 took these involuntary measures, and it did that, and
8 the fact that the bankruptcy proceeding was commenced
9 thereafter to us is critical, because it suggests that
10 under the pertinent provisions, this property that was
11 seized, this inventory was not property of the estate.

12 I would like to save the remaining time for
13 rebuttal.

14 CHIEF JUSTICE BURGER: Mr. Relin.

15 ORAL ARGUMENT OF LLOYD H. RELIN, ESQ.,

16 ON BEHALF OF THE RESPONDENT

17 MR. RELIN: Mr. Chief Justice, and may it
18 please the Court, it is the view of the Respondent that
19 the decision reached by the Court of Appeals below was
20 not only based on sound statutory analysis, but that of
21 equal importance, it was grounded in common sense. On
22 the other hand, we believe the government's proposed
23 plain language interpretation of turnover under the
24 Bankruptcy Code --

25 QUESTION: Let me put to you the question I

1 put to your friend, Mr. Relin. If this corporation had
2 done what it should have done, put this money in a
3 separate account, there would have been \$92,000 in that
4 account at the time of the bankruptcy, would it not?

5 MR. RELIN: Yes, indeed.

6 QUESTION: Now, could it use any part of that
7 money for its corporate affairs?

8 MR. RELIN: It would not be property of the
9 estate.

10 QUESTION: It would be an embezzlement if they
11 did so, would it not?

12 MR. RELIN: Well, perhaps --

13 QUESTION: Perhaps?

14 MR. RELIN: -- but it certainly would be a
15 violation of trust, and --

16 QUESTION: Well, that is sometimes called
17 embezzlement

18 MR. RELIN: Yes.

19 (General laughter.)

20 QUESTION: -- when trustees take the money and
21 use it for their own affairs and then lose it,
22 especially if they lose it. Now, when did the right of
23 the creditors, the general creditors or the secured
24 creditors, ever attach to any part of that, as we find
25 it, a mythical fund, a fund that by his own default was

1 not created? When did they ever acquire any rights to
2 share in that \$92,000?

3 MR. RELIN: Your question, Mr. Chief Justice,
4 presumes that there was in fact such a fund in existence
5 at some point in time. In fact, withholding taxes --

6 QUESTION: Sometimes the law, especially on
7 the equity side, assumes what that was done what should
8 have been done.

9 MR. RELIN: That's true.

10 QUESTION: Now, that would be true if the
11 \$92,000 were there, wouldn't it?

12 MR. RELIN: No question about it. And we do
13 not mean to suggest in any way that it was inappropriate
14 that it was not there. Of course, the money should have
15 been accumulated and paid.

16 QUESTION: Why should the general creditors
17 profit by the embezzlement or at least the default, to
18 use a kinder word, of the debtor?

19 MR. RELIN: Well, I think the way the
20 statutory construction is of the Bankruptcy Code is that
21 if in fact a fund exists and can be traced, and the
22 sponsors of the legislation indicate that tracing should
23 be allowed a fairly liberal course --

24 QUESTION: The predicate for that statutory
25 provision is that the money belonged to the debtor, is

1 it not?

2 MR. RELIN: No, that the money does not belong
3 to the debtor if it can be traced, and the sponsors make
4 it clear that the government is to be given leeway by
5 the Court to attempt to do such a tracing, if at all
6 possible, but that was not attempted to be done here.
7 As a matter of fact, counsel has indicated that this tax
8 had accrued over a period of a couple of years. So
9 there was no fund in existence.

10 As a matter of fact, the only cash or fund in
11 existence was \$15,000, not \$20,000, that was on deposit
12 in a bank account, and that had in fact been levied upon
13 by the government prior to the levy on the tangible
14 property, which, incidentally, was primarily
15 construction equipment and vehicles, by and large, and
16 the company had owned those for a substantial period of
17 years. So there is no direct relation between the
18 unpaid tax liabilities and the property itself that was
19 seized.

20 QUESTION: Mr. Relin, did the government's
21 levy count the filing of the petition for
22 reorganization?

23 MR. RELIN: Well, it did, Justice Blackmun, at
24 least on the day that it was filed. However, the fact
25 that we were able to file it within one day occurred

1 because it had already been planned, but simply not put
2 into execution. The government pre-empted us in that
3 regard.

4 The government's plain language interpretation
5 assumes or argues that turnover applies only to interest
6 rather than to the items of property which are subject
7 to such interest and a basis --

8 QUESTION: May I ask just one question before
9 you get into your argument?

10 MR. RELIN: Yes, Justice Stevens.

11 QUESTION: The assets in dispute, as I
12 understand it, are primarily physical assets.

13 MR. RELIN: That's correct.

14 QUESTION: And you have a statement in your
15 brief they had a going concern value of \$162,000 or
16 something of that --

17 MR. RELIN: The court did so find.

18 QUESTION: That is what I wanted to know.
19 There was a finding to that effect.

20 MR. RELIN: Oh, yes. There was an evidentiary
21 hearing with testimony as to values.

22 QUESTION: Which is, of course, in excess of
23 the government's claim.

24 MR. RELIN: Only by \$70,000.

25 QUESTION: Yes.

1 MR. RELIN: Yes. The argument that turnover
2 only applies to possessory interest or to interests in
3 property rather than property would mean that the
4 trustee would be entitled to obtain turnover under
5 Section 542(a) of the possessory interest in property
6 which he already has, assuming he does have such an
7 interest, but not the item of property itself if that
8 item happened to be held by someone else.

9 Clearly, such an interpretation of the statute
10 is absurd and could not be seriously advanced by the
11 government in this case.

12 QUESTION: Then it would apply to all
13 creditors.

14 MR. RELIN: Absolutely. As you indicated in
15 your questioning, Justice White, and we do agree that
16 these sections are of general application to all cases
17 in bankruptcy. The word "turnover" implies in most
18 instances a physical act with respect to a particular
19 item of property. Therefore, it seems logical that
20 Section 542(a) must deal with the item of property
21 itself, not merely with interests of various parties in
22 that item of property.

23 However, the government says that the remedy
24 of turnover is not available unless the debtor would
25 have had the right of possession absent the pendency of

1 the bankruptcy proceeding. In other words, the
2 government believes that Section 542(a) has no
3 independent remedial function, but merely codifies the
4 power of the court to compel a third party to turn over
5 to the trustee property which the third party is not
6 otherwise legally entitled to retain, even absent the
7 pendency of the bankruptcy proceeding.

8 Under the Bankruptcy Act, such a turnover
9 power existed as a judicially created adjunct to the
10 Bankruptcy Court's summary jurisdiction, but it was not
11 available for use against a creditor adversely in
12 possession under a claim of right except in
13 reorganizations, as I will subsequently discuss.

14 On the other hand, under the Bankruptcy Code,
15 it would appear that the turnover power extends to
16 property adversely held at the time of the filing of the
17 petition. Such an interpretation is supported by the
18 legislative history, where property of the estate is
19 interpreted according to the House and the Senate
20 reports as including "property recovered by the trustee
21 under Section 542, if the property recovered was merely
22 out of the possession of the debtor, yet remained
23 property of the debtor."

24 QUESTION: Mr. Relin, do you understand the
25 Second Circuit to have taken the position that you have

1 just now been describing of this generally expanded
2 availability of the turnover order even for property in
3 possession of an adverse creditor?

4 MR. RELIN: I understand them to have taken
5 that position with respect to a reorganization. I don't
6 think they --

7 QUESTION: That they reserved as to ordinary?

8 MR. RELIN: Yes, and I don't think it's
9 necessary to reach that because, of course, we are
10 dealing with a reorganization case here, but I think
11 because the section itself, 542(a), is one of the
12 sections of general application, then, Justice
13 Rehnquist, I believe that such an interpretation would
14 be possible.

15 QUESTION: That is really a fairly important
16 and rather broad question under the new Bankruptcy Act,
17 isn't it?

18 MR. RELIN: It absolutely is, and I don't
19 really purport to give an overall response to that,
20 although it may be --

21 QUESTION: What do you think the law was under
22 Chapter 10, the old Chapter 10, with just an ordinary
23 secured creditor who has taken possession immediately
24 prior to the filing of the petition? Isn't that subject
25 to summary turnover?

1 MR. RELIN: Yes. There was a fairly extensive
2 developed body of law.

3 QUESTION: And if it wasn't subject to summary
4 turnover, it might have been subject to turnover in a
5 plenary suit?

6 MR. RELIN: It certainly might have been.
7 The --

8 QUESTION: I thought the trustee in the old
9 Chapter 10 could collect those kinds of assets.

10 MR. RELIN: Absolutely could, and there is no
11 question that the developed law that --

12 QUESTION: And do you know of any cases
13 dealing specifically with property held -- prior to a
14 Chapter 10 reorganization held by the government under a
15 levy?

16 MR. RELIN: Absolutely not.

17 QUESTION: There just weren't any?

18 MR. RELIN: No, there never were, and I would
19 like to correct you, Justice White, in one minor
20 respect, if I might.

21 QUESTION: Yes, you certainly may.

22 MR. RELIN: Phelps was a liquidation case. It
23 was not a Chapter 11 case. The only Chapter 11 case
24 that I am aware of whatsoever was the case of Pittsburgh
25 Penguin Partners.

1 QUESTION: Well, it was a case -- was it
2 started out a Chapter 10 case?

3 MR. RELIN: Phelps?

4 QUESTION: Yes.

5 MR. RELIN: No.

6 QUESTION: It started out a straight
7 bankruptcy case.

8 MR. RELIN: It was not only straight, but it
9 was an involuntary bankruptcy.

10 QUESTION: Well, that is even -- that is a
11 fortiori then from a Chapter 11. I mean, an ordinary
12 bankruptcy, if some secured creditor had taken
13 possession, the trustee could never get it back.

14 MR. RELIN: Yes. In a straight bankruptcy --

15 QUESTION: Which it was.

16 MR. RELIN: -- or in Chapter 11. Which it
17 was.

18 QUESTION: Which Phelps was.

19 MR. RELIN: Absolutely was, and that certainly
20 is our position with regard to Phelps.

21 I think that in order to understand the
22 significance of Section 542, it is necessary to bear in
23 mind Section 543 as well as Section 542, because they
24 are companion sections. The case law which had
25 developed under the Act had distinguished between equity

1 receivers holding property for creditors generally and
2 for closure receivers holding property for a particular
3 creditor. Although both types of receivers were
4 required to turn over such property in a Chapter 10
5 reorganization, only equity receivers were required to
6 turn over to a straight bankruptcy liquidation trustee.

7 Section 543 of the Bankruptcy Code applicable
8 to custodians by its terms clearly seems to encompass
9 both equity and foreclosure receivers.

10 QUESTION: Where is 543 set out in the briefs,
11 if you know right off?

12 MR. RELIN: Well, it would be, I am fairly
13 certain, in the government's appendix.

14 QUESTION: It is in Judge Friendly's opinion
15 in the footnote on Page 6-A.

16 QUESTION: Page 54-A.

17 QUESTION: It is on 6-A. It is not in the
18 other materials.

19 MR. RELIN: Now, the essence of 543 seems to
20 be that there must be turnover by any party holding
21 property which was once the debtor's or proceeds of that
22 property if the party holding the party or the proceeds
23 holds it for the benefit of some other party, and it
24 doesn't matter whether that other party is just one
25 creditor or all creditors of the debtor.

1 Section 542(a), on the other hand, provides
2 for turnover from parties other than custodians. If
3 both traditional equity and foreclosure receivers are
4 custodians, obviously, Section 542(a) applies to someone
5 else. In our opinion, and in the opinion of the Court
6 of Appeals, that someone else includes a creditor who is
7 in self-possession of assets of the debtor's property.

8 Under the Bankruptcy Act, Section 257, in
9 corporate reorganizations, and Section 507, in real
10 property arrangements --

11 QUESTION: Excuse me. Before you go on --

12 MR. RELIN: Yes.

13 QUESTION: -- 542(a) after the -- other than
14 custodian in possession language, is followed by what
15 appears to be limitation of property that the trustee
16 may use.

17 MR. RELIN: Yes, may use, sell, or lease under
18 Section 363.

19 QUESTION: Now, if, as I had suggested in my
20 earlier question, this company had done what they should
21 have done legally, put it in a separate account
22 identified as withholding tax, then would that have been
23 property that the trustee may use?

24 MR. RELIN: Not that property, but the
25 property that was seized here by the government,

1 absolutely. Just because we are dealing with a certain
2 dollar amount for one category and a tax of \$92,000 does
3 not mean equipment that had been purchased years earlier
4 by the debtor would do that.

5 QUESTION: What about bank accounts? What
6 about taxing --

7 MR. RELIN: Well, there is an indication in
8 the legislative history that perhaps the courts should
9 assume that the last money in bank accounts is in fact
10 trust funds.

11 QUESTION: Is impressed with a constructive
12 trust.

13 MR. RELIN: Yes, that is really a constructive
14 trust argument, or resulting trust, perhaps, in a
15 traditional sense, but not in the case of tangible
16 property. In any event, both 257 and Section 507 of the
17 Act require turnover by a trustee under a trust deed or
18 a mortgagee under a mortgage. Both creditors were
19 creditors who were in self-possession of the debtor's
20 property.

21 QUESTION: If the trustee -- if the government
22 could show that some of this \$92,000 was used to
23 purchase the physical, tangible assets that were seized,
24 would the constructive or resulting trust follow?

25 MR. RELIN: Absolutely. I don't think that

1 there's a real dispute about that, Your Honor. They may
2 trace as far as they possibly can and --

3 QUESTION: But that hasn't been undertaken.

4 MR. RELIN: Not in this case. It is our
5 belief that the cases that have developed under Chapter
6 10 and under Chapter 12 and primarily, of course, the
7 case of Reconstruction Finance Corporation, on which the
8 Second Circuit placed great reliance, that those cases
9 have been carried forward into the Bankruptcy Code, and
10 those cases would not appear in Section 543. We believe
11 they were carried forward into Section 542(a).

12 The reason for this can be seen from the
13 historical analysis that we have set out in our brief,
14 and which the Court of Appeals followed. There was
15 considerable testimony adduced in the House and also in
16 the Senate where many parties testifying expressed
17 concern that the original custodial provision, turnover
18 from a custodian under the earlier drafts of the
19 Bankruptcy Code did not provide for turnover by a
20 creditor in self-possession of the debtor's assets.

21 Following that testimony, the redrafted House
22 bill, H.R. 6, was introduced which contained Section
23 542(a) in its present form. And we believe that this
24 was done for the purpose of incorporating the decisional
25 rule of law that had developed in many cases, not just

1 Reconstruction Finance, but In Re Prudence Bonds, Grand
2 Boulevard Investment, Third Avenue Transit, Colonial
3 Realty, and so on.

4 QUESTION: Mr. Relin, to your knowledge, was
5 Judge Magruder's opinion in Reconstruction Finance the
6 only Court of Appeals opinion treating the particular
7 issue that it did under the old bankruptcy law?

8 MR. RELIN: Well, that particular issue was
9 dealt with in various other cases in other categories,
10 although I think, as far as I know, Reconstruction
11 Finance was the only case that actually dealt with
12 inventory, which was the seized assets in that
13 particular case.

14 We believe that by keying Section 542(a) to
15 the sale, use, or lease of property under Section 363,
16 Congress intended to enable a trustee or reorganizing
17 debtor to acquire possession of needed property in which
18 the interest of the estate is not inconsequential, so
19 long as the interests of the party in possession of the
20 property can be judicially determined to be adequately
21 protected.

22 Section 363(e) mandates an adequate protection
23 hearing upon the request of the affected creditor, and
24 in the case of the proposed turnover of cash collateral,
25 Section 363 mandates such a hearing. In either case,

1 the trustee has the burden of proving the protection
2 offered is adequate.

3 Turnover is required under Section 542(a) of
4 property that the trustee can use, sell, or lease -- it
5 is a disjunctive that is used -- under Section 363.
6 Although the government has concentrated its analysis on
7 Subsections (b) and (c), Subsection (f)(5) of Section
8 363 permits a trustee to sell property either in the
9 ordinary course of business or out of the ordinary
10 course of business free and clear of the interest of any
11 other entity in the property if "such entity could be
12 compelled in a legal or equitable proceeding to accept a
13 money satisfaction of such interest."

14 Clearly, this is the case with respect to the
15 interest of the IRS in all of the property that it
16 seized from Whiting, as the government has no interest
17 in the property except to get paid. Therefore, as
18 Whiting could sell the property under Section 363 at
19 (5), it is entitled to turn over under Section 542(a).

20 Conceding that Section 542 might require
21 turnover by a private creditor in possession of assets,
22 the government nonetheless attempts to exclude itself
23 from the application of that rule. In essence, the
24 government's argument takes the following pattern.
25 There existed pre-Bankruptcy Code prior decisional law

1 governing the effect of pre-bankruptcy tax levies.

2 Nothing in the Congressional history
3 specifically indicates that Congress intended to change
4 that prior law. Therefore, Congress did not change the
5 prior law.

6 The government's syllogism fails, however, of
7 its own accord, because it is based on a false major
8 premise. According to the government's argument,
9 pre-Bankruptcy Code decisional law held that the
10 government was not required to surrender to the trustee
11 for inclusion in the bankruptcy estate property seized
12 prior to bankruptcy to satisfy delinquent taxes. That
13 is the wording in the government's reply brief.

14 But there is no case cited by the government
15 as prior law under the Bankruptcy Act which held that
16 the government could not be compelled to turn over to a
17 reorganization trustee tangible property seized in a
18 pre-petition tax levy which had not been sold at the
19 time of the petition. With the sole exception of the
20 Pittsburgh Penguin Partners case, all of the prior law
21 cases concerned the government's seizure of intangible
22 property and its right to retain that property against a
23 liquidation trustee.

24 Pittsburgh Penguin Partners, however, which
25 was a Chapter 11 case, is not even prior law as it was

1 decided by the Third Circuit in 1979, one year after the
2 Bankruptcy Code had been enacted. Moreover, the
3 decisions in American Acceptance Corporation versus
4 Glendora and In Re Chantler Baking Company, both cited
5 by them as part of this prior law, were published on
6 March 30, 1977, and July 18, 1977, respectively, several
7 months after the introduction of H.R. 6 on January 4,
8 1977, which already contained Section 542(a) in its
9 present form.

10 Recognizing as it must that all of the prior
11 cases arose in liquidations where the existence of a
12 bona fide adverse claim to the property defeated summary
13 jurisdiction of the Bankruptcy Court and would have done
14 so for a private creditor in adverse possession as well
15 as for the government, the government seeks to extend
16 the ratio decidendi of the liquidation cases to broader
17 application by arguing that the prior cases really held
18 that a tax levy in and of itself effected a transfer of
19 ownership to the government of the property levied upon.

20 But in actuality, the only cases which would
21 be prior law that dealt with that particular subject are
22 only three cited by the government, United States versus
23 Eiland, a Fourth Circuit 1955 case, United States versus
24 Sullivan, a Third Circuit 1964 case, and this Court's
25 decision in Phelps versus United States.

1 Eiland concerned a prepetition levy on an
2 account receivable which belonged to the bankrupt. The
3 court analogized the levy to a private creditor's
4 attachment and garnishment, and held that the effect of
5 the federal taxing statutes was to create a statutory
6 attachment and garnishment resulting in a "virtual
7 transfer" to the government of the right to receive
8 payment of the debt. Clearly, the court would have held
9 the same way for a private attaching creditor.

10 United States versus Sullivan concerned a
11 prepetition levy on two insurance companies to obtain
12 the benefits under the policies of a living tax
13 delinquent policyholder. Although the court on the
14 authority of Eiland states that a validly invoked
15 seizure is "tantamount to a transfer of ownership," and
16 those words have been carried on in the subsequent
17 decisions dealing with this issue under the Bankruptcy
18 Code, the court nonetheless goes on in Sullivan to hold
19 just the opposite.

20 It held that by the mere act of levying, the
21 government was not entitled to have the insurance
22 policies cancelled for their cash values, as the levy
23 did not dress the government with all of the rights of
24 the policyholder. In so holding, the court stated, "But
25 implicit in the statute, the Internal Revenue Code, is

1 the principle that the Commissioner acts pursuant to the
2 collection process in the capacity of lienor as
3 distinguished from owner. Moreover, nowhere in the code
4 is there a provision granting to the Commissioner power
5 over property interests of delinquents comparable to
6 that given the trustee in bankruptcy."

7 The last case that is left is Phelps, and we
8 have already discussed that to some extent. Most
9 significantly, and the only thing I would like to
10 comment on Phelps to the Court at this time, is that it
11 is difficult for me to understand the government's
12 overreliance on Phelps when one considers that the
13 holding most likely would have been the same, in favor
14 of a secured creditor who had taken steps to recover the
15 funds at issue from the assignee for benefit of
16 creditors had the funds been the proceeds of the sale of
17 assets, subject to the creditor's security interest,
18 rather than proceeds of the sale of assets subject to
19 the government's unfiled tax lien.

20 QUESTION: Certainly that would have been the
21 case if the non-tax secured creditor had seized physical
22 assets and were holding them pursuant to a lien.

23 MR. RELIN: Yes. Exactly. And the rationale
24 in Phelps is identical. Although the language may
25 appear somewhat overbroad taken out of context, in

1 context, it makes absolute good sense.

2 All in all, then, it is our opinion that prior
3 decisional law did not establish a rule that property
4 seized by prepetitioned tax levy was never subject to
5 post-bankruptcy turnover. Rather, the cases simply held
6 that the government did not have to turn over seized
7 assets in circumstances where a private creditor
8 exercising equivalent lien rights would not have had to
9 do so.

10 The true intent of Congress with respect to
11 the treatment of the Internal Revenue Service as a
12 creditor under the Bankruptcy Code can best be seen by
13 the provisions of Section 106(c)(1), which in waiving
14 the government's sovereign immunity makes it clear that
15 any provision of the Code applicable to an entity such
16 as Section 542(a), which specifically applies to
17 entities, applies to "governmental units."

18 As the IRS is by far the federal governmental
19 unit most frequently involved in bankruptcy cases, it is
20 clear that Congress intended the IRS to be included in
21 Section 542(a) turnovers, not excluded, as the
22 government here suggests.

23 In conclusion, we would respectfully submit
24 that a statute should be construed so as to achieve its
25 purpose, that a reform act, such as the Bankruptcy

1 Reform Act of 1978, should be permitted wherever
2 possible to simplify and modernize the law of bankruptcy
3 in conformity with the developing law in the field, and
4 that effect should be given to the avowed intent of the
5 legislative sponsors to enact legislation that
6 "encourages business reorganizations by a streamlined
7 new commercial reorganization chapter that will protect
8 the investing public, protect jobs, and help save
9 troubled businesses."

10 We believe that the position taken by the
11 government in this case is regressive and in conflict
12 with the intent of Congress in enacting the Bankruptcy
13 Code. We respectfully submit that a decision in this
14 case in favor of the government will thwart the
15 independent functioning of the bankruptcy system in
16 reorganization cases by constituting the IRS a censor of
17 prospective Chapter 11 cases in which it might be
18 involved as a creditor, with the power to virtually veto
19 reorganization by seizing assets before petitions can be
20 filed. It will encourage the IRS to seize first and
21 negotiate later. Bankruptcy Courts will be powerless to
22 preserve the assets of debtors under their jurisdiction
23 against forced liquidation even if the value of the
24 assets at fair market exceeds the tax debt many times
25 over. Such a result, we believe, could not have been

1 intended by Congress. We trust it will not be permitted
2 by this Court. Thank you.

3 CHIEF JUSTICE BURGER: Do you have anything
4 further, Mr. Smith?

5 ORAL ARGUMENT OF STUART A. SMITH, ESQ.,
6 ON BEHALF OF THE PETITIONER - REBUTTAL

7 MR. SMITH: Yes, I do. I think that the
8 scheme of the law that Respondent has described and the
9 Court of Appeals has held was simply not enacted by
10 Congress when it codified the Bankruptcy Code in 1978.
11 Our critical point here is that this property was not
12 property of the estate.

13 Section 541, the precise words that Congress
14 used, talked about all legal or equitable interests of
15 the debtor in property as of the commencement of the
16 case. The legislative history is absolutely clear that
17 the sponsors determine that this provision was not to
18 expand the debtor's rights in property as of the
19 commencement of the case.

20 The question before the Court is, what were
21 the debtor's rights in this property as of the
22 commencement of the case. To that -- property rights
23 are not defined under the Bankruptcy Code, but are
24 defined either under state law or in this case under the
25 Internal Revenue Code, and to that, I submit, the Court

1 must refer to Section 6331(a), et cetera, the levy
2 provisions, and it is absolutely clear that under those
3 situations the debtor -- under that situation the debtor
4 had very limited rights under this to this property.

5 He could receive notice of seizure. He could
6 receive surplus property, et cetera, et cetera. He
7 could not use, sell, or lease this property within the
8 meaning of Section 363(b) of the Bankruptcy Code. There
9 -- his right, simply, to get the property back, he had
10 to pay the tax, and if he didn't do that, the IRS,
11 without any further ado, without resort to any judicial
12 proceeding, could sell the property. The fact that this
13 may thwart the rehabilitation of the debtor is a sorry
14 circumstance in this case, but it proceeds on the basis
15 of the explicit statutory words enacted by Congress in
16 the legislative history.

17 What the Court of Appeals has done here is to
18 prescribe a rule that was neither enacted by Congress
19 with respect to secured creditors but at all events
20 hardly enacted with respect to the Internal Revenue
21 Service's statutory collection authority.

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

24 (Whereupon, at 2:11 o'clock p.m., the case in
25 the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-215 - UNITED STATES, Petitioner v. WHITING POOLS, INC.

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BY

Pine Hunsaid

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