

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-372

TITLE FRANCHISE TAX BOARD OF CALIFORNIA, Appellant
v. UNITED STATES POSTAL SERVICE

PLACE Washington, D. C.

DATE April 17, 1984

PAGES 1 thru 53



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IN THE SUPREME COURT OF THE UNITED STATES

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FRANCHISE TAX BOARD OF :
CALIFORNIA, :
:
Appellant :
:
v. : No. 83-372
:
UNITED STATES POSTAL SERVICE :
:
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Washington, D.C.

Tuesday, April 17, 1984

The above-entitled case came on for oral
argument before the Supreme Court of the United States
at 1:33 p.m.

APPEARANCES:

MRS. PATTI S. KITCHING, ESQ., Deputy Attorney General of
California, Los Angeles, California; on behalf of the
Appellant.

DAVID A. STRAUSS, ESQ., Office of the Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the Appellee.

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

MRS. PATTI S. KITCHING, ESQ.,
on behalf of the Appellant

3

DAVID A. STRAUSS, ESQ.,
on behalf of the Appellee

23

MRS. PATTI S. KITCHING, ESQ.,
on behalf of the Appellant -- rebuttal

51

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

2 CHIEF JUSTICE BURGER: Mrs. Kitching.

3 ORAL ARGUMENT OF MRS. PATTI S. KITCHING, ESQ.,

4 ON BEHALF OF THE APPELLANT

5 MRS. KITCHING: Mr. Chief Justice, and may it
6 please the Court:

7 We are here today because the Ninth Circuit
8 has created an anomaly. It has allowed one California
9 taxing agency to garnish property held by the Postal
10 Service on behalf of a third party, but has prohibited
11 another state taxing agency from using a similar
12 garnishment. This is even though both agencies use
13 analogous tax collection procedures.

14 In addition, seven circuits have found, and
15 the Postal Service concedes, that garnishment by
16 ordinary judgment creditors should be honored.

17 It must be emphasized that none of these
18 garnishments were on property belonging to the Postal
19 Service. The garnishments were on property held by the
20 Postal Service as a mere stakeholder.

21 The issue in this case, then, is whether the
22 Ninth Circuit should have allowed the Franchise Tax
23 Board to garnish the wages of Postal Service employees
24 who did not pay their California income tax.

25 California submits that there are two

1 controlling propositions in this case. The first is
2 that the sovereign immunity of the Postal Service has
3 been waived, at least to the extent that it must honor a
4 garnishment for delinquent taxes on wages of employees.

5 The second proposition is that the Ninth
6 Circuit erred when it found that an unrelated federal
7 statute dealing only with wage withholding preempted the
8 Franchise Tax Board statute and garnishment.

9 This case arose because various Postal Service
10 employees did not pay their California income tax.
11 These taxes are not in dispute. They were either
12 self-assessed or became final by assessment of the
13 Franchise Tax Board. In order to collect these taxes,
14 the Franchise Tax Board attempted to garnish the wages
15 of these employees, but the Postal Service refused to
16 honor the garnishment.

17 QUESTION: Ms. Kitching, is that the standard
18 procedure in California whereby the state collects
19 delinquent taxes? It doesn't go to court to get a
20 garnishment, but it just kind of has an assessment like
21 the IRS?

22 MRS. KITCHING: Yes, Your Honor. Our statutes
23 are very similar to those of the IRS. And in our state,
24 once an assessment has become final, the assessment has
25 the force of a judgment.

1 QUESTION: It's not just true of government
2 employees, but it's true of everybody.

3 MRS. KITCHING: This is true. As I will
4 discuss a little later in more detail, before our tax
5 assessment becomes final, the taxpayer is given a
6 multitude of remedies. The taxpayer can go through
7 several levels of administrative review before the
8 taxpayer has to pay the tax and before it comes final.
9 Once it --

10 QUESTION: Mrs. Kitching, what do you mean
11 when you say -- or did you say that it's the same thing
12 as judicial judgment, that it's treated likewise?

13 MRS. KITCHING: Absolutely.

14 QUESTION: The administrative --

15 MRS. KITCHING: Absolutely, Your Honor. Under
16 California law, the Franchise Tax Board is given --

17 QUESTION: What's this? By judicial decision?

18 MRS. KITCHING: It -- it's by both, Your
19 Honor. By the Code of Civil Procedure and also by
20 judicial decision. And as -- as this Court has found in
21 the Bull case, Bull v. United States, and GM Leasing,
22 the Internal Revenue Service statutes, which are similar
23 to those of the Franchise Tax Board, when the tax
24 assessment is final, it has the force of a judgment.

25 So we think we have ample authority to show

1 that our tax assessment --

2 QUESTION: Is it recorded like a judgment and
3 things like that, like a judicial --

4 MRS. KITCHING: Yes. We can file a lien, Your
5 Honor. We can file a lien and execute on the lien. We
6 can have the sheriff serve a warrant. We can levy on
7 the --

8 QUESTION: Well, file a lien, file a lien on
9 real estates, is that what you're talking about?

10 MRS. KITCHING: Yes, yes. It is given the
11 force of a judgment, Your Honor. It is. And -- and
12 that is similar to that of the Internal Revenue
13 Service. That is the procedure in tax matters. Because
14 the taxpayer is given quite a bit of opportunity to
15 present his facts and theories about whether the tax
16 assessment is due.

17 QUESTION: So what is the waiver of immunity
18 that you're relying on?

19 MRS. KITCHING: In this case, first of all,
20 there's Section 401 of the Postal Reorganization Act
21 which found that the Postal Service may sue and be
22 sued. And secondly, the Burr case interpreted a waiver
23 of sovereign immunity, a sue and be sued clause, to
24 include garnishment. And as this Court --

25 QUESTION: Well, garnishment in connection

1 with the judgment.

2 MRS. KITCHING: Yes, that's right, Your
3 Honor. And we believe we have the equivalent of a
4 judgment, and that we fit under the Burr case.

5 QUESTION: Do you think you're suing -- you're
6 suing -- you're suing the Postal Service?

7 MRS. KITCHING: Yes, we are. Just like a
8 judgment creditor would sue them if their garnishment
9 were not honored. Sue and be sued is a term of art, and
10 it means that sovereign immunity has been waived to a
11 certain degree. Burr determined that that degree
12 included garnishment, and the reasoning in the Burr case
13 pointed out that the government's liability has not been
14 expanded. They already owe the money to their employee,
15 and now a creditor is coming in and asking for the
16 money, and the liability of the government isn't
17 expanded. They had to pay it anyway.

18 QUESTION: The statute gives the right to sue
19 and be sued.

20 MRS. KITCHING: That's right.

21 QUESTION: So there's no question about that,
22 is there?

23 MRS. KITCHING: We don't believe there is.

24 QUESTION: I take it that when you refer to
25 garnishment, it included also a prejudgment garnishment

1 simply on the basis that a tax had been identified and
2 ascertained.

3 MRS. KITCHING: There are only two ways that a
4 tax could become final in California. First, it would
5 be self-assessed, of course, and then that -- that's no
6 question. And the only other way is after the tax
7 person or the taxpayer has had the opportunity to go
8 through administrative proceedings.

9 QUESTION: Well, I gather, Mrs. Kitching, your
10 whole argument, or do I correctly understand it, is that
11 you come within the sue and be sued waiver of sovereign
12 immunity because the assessment is treated like a
13 judicial judgment.

14 MRS. KITCHING: Yes, Your Honor.

15 QUESTION: That's your whole argument.

16 MRS. KITCHING: That is what we argue, Your
17 Honor. We don't think it expands the liability of the
18 Postal Service, and we believe that we should be given
19 at least equal respect to an ordinary judgment creditor
20 because we're a taxing agency trying to collect the
21 revenue for the State of California, and yet the Postal
22 Service will honor the levy of an ordinary judgment
23 creditor, and we think that's backwards.

24 QUESTION: Mrs. Kitching, do you plan to
25 address the jurisdictional question at all, whether this

1 is a proper appeal? I guess the court of appeals didn't
2 hold California's law preempted. It just interpreted
3 the federal legislation as not providing for a waiver.

4 Do you think, then, that it's a proper appeal?

5 MRS. KITCHING: Yes, we do. It -- it's
6 difficult to exactly understand the opinion of the Ninth
7 Circuit. We try to explain how they could have come to
8 their conclusion. As you know, the Ninth Circuit
9 apparently had no problem with waiver of sovereign
10 immunity. It makes it interesting, because that's the
11 primary argument of the Postal Service in this case; yet
12 the Ninth Circuit had no problem with that.

13 The Ninth Circuit, we feel, did find that our
14 statute was preempted as applied. We feel that they
15 decided that once we -- once we had signed this
16 agreement, that that agreement didn't allow us to use
17 our garnishment statute to -- to levy, and thereby they
18 -- they voided our statute --

19 QUESTION: Well, I guess one --

20 MRS. KITCHING: -- Pursuant --

21 QUESTION: -- Could read it the other way and
22 say that the court of appeals just said the federal
23 legislation didn't do what you said it did.

24 MRS. KITCHING: Except that they didn't find
25 any problem generally with the waiver of sovereign

1 immunity. We would have won that case just as the
2 Employee Development Department did, we feel, had not
3 they felt Section 5517 precluded our recovery.
4 Therefore, we feel they would have found a waiver of
5 sovereign immunity, but that this statute stood in our
6 way and voided our state statute.

7 QUESTION: Mrs. Kitching, why did California
8 not use the other way of having the government collect
9 the money for them?

10 MRS. KITCHING: California's remedies are
11 cumulative, just as the remedies of the Internal Revenue
12 Service are cumulative. It -- it is important to have a
13 prompt and efficient collection of tax, and this is a
14 very efficient way to collect tax. And we -- we have
15 other remedies, but we should be allowed to use all of
16 our remedies. The Internal Revenue Service can use all
17 of their remedies, and we should be able to use all of
18 ours. And sometimes taxpayers don't have other property
19 that we can file liens against, but perhaps they're
20 employed and we can levy on their wages. So there are
21 reasons when this would be the only way we could collect
22 the tax.

23 As I mentioned, there was a companion case.
24 The Employment Development Department also filed a
25 lawsuit because its garnishment was not honored. They

1 are responsible for collecting employment taxes, and
2 their procedures are similar to those of the Franchise
3 Tax Board.

4 The cases were consolidated, and the district
5 court found for the Postal Service. On appeal the cases
6 were also consolidated. As I said with regard to the
7 appeal of the Employment Development Department, the
8 Ninth Circuit found that the garnishment should be
9 honored. They found that the sue and be sued clause had
10 waived the sovereign immunity of the Postal Service.

11 Also as I said, the Ninth Circuit found,
12 however, that our garnishment was preempted under the
13 facts of this case and because we had signed the
14 agreement with the federal government.

15 In essence, the Ninth Circuit decided that a
16 statute, 5 U.S.C. Section 5517, which was enacted to
17 help the states collect their revenue from all federal
18 employees, should be interpreted to prohibit the State
19 of California from garnishing the salary of Postal
20 Service employees.

21 The dissenting judge found that the Franchise
22 Tax Board's garnishment should be honored. She found no
23 reason to believe that Congress would treat tax -- tax
24 debts any differently than it would treat other debts.
25 In fact, she concluded that the application of the

1 California collection procedures was the only result
2 which would further Congress' intent to treat the Postal
3 Service as a private employer.

4 We submit that the sovereign immunity of the
5 Postal Service has been waived with regard to our
6 garnishment. In 1970 --

7 QUESTION: Let me ask you a question right
8 there.

9 MRS. KITCHING: Yes.

10 QUESTION: The argument, I know, has proceeded
11 entirely on the question whether there's waiver of
12 sovereign immunity. But when you read Justice Douglas'
13 opinion in the Burr case, he seems to assume that the
14 Congress could have decided either to confer immunity or
15 not to confer immunity without even reaching the
16 question of labor.

17 Do you agree that -- that there would be
18 sovereign immunity here if Congress had said nothing at
19 all about this?

20 MRS. KITCHING: We mentioned that in our brief
21 because of that comment in the Burr case, and we thought
22 it was an important issue. We don't need to argue, I
23 don't think, in this case that there is no immunity. We
24 argue rather that --

25 QUESTION: Well, is there any law on the

1 question whether an agency such as this automatically
2 picks up the federal government's immunity or not?

3 MRS. KITCHING: I believe the Burr case is
4 authority that it does not automatically pick up the
5 immunity of the government.

6 QUESTION: So that at least -- do you argue or
7 don't you that there's no immunity to start with? I'm
8 not quite clear on your position.

9 MRS. KITCHING: We -- we raise that issue. We
10 are not premising -- we are not relying on that
11 argument. We think it's an issue in this case. We
12 don't feel we need to rely on that argument for us to
13 prevail. If there is no immunity --

14 QUESTION: It seems to me it's something we
15 ought to decide before we decide whether -- you don't
16 decide whether something's been waived unless you first
17 decide that it would have been there to be waived.

18 MRS. KITCHING: I agree with you, Your Honor.
19 I -- I have read many decisions. There have been many,
20 many decisions by courts. Seven circuits have decided
21 issues regarding the sovereign immunity of the Postal
22 Service, and I don't believe in any of those seven
23 decisions has one of the courts addressed that -- first
24 that question.

25 QUESTION: But even if -- even if there was no

1 immunity in the first place, the argument is that your
2 -- that the agreement between the Postal Service and the
3 state forbids collecting delinquent taxes.

4 MRS. KITCHING: That's what they argue, Your
5 Honcr.

6 QUESTION: Yes.

7 MRS. KITCHING: We don't agree with that.

8 QUESTION: Even the Burr opinion was -- used
9 the term waiver of sovereign immunity as well as the
10 expression Justice Stevens referred to about conferring
11 immunity.

12 MRS. KITCHING: Yes.

13 QUESTION: I mean it didn't speak just in one
14 voice on the subject, did it?

15 MRS. KITCHING: That's right. I believe the
16 Burr decision is a very favorable decision for our
17 position.

18 QUESTION: It's kind of ambiguous, because it
19 says no question is the power of Congress to waive the
20 governmental immunity is present. They say there's no
21 waiver issue in the case. That's what Justice Douglas
22 said on page 244.

23 MRS. KITCHING: We -- we believe that that was
24 an issue. That would make our case easier, I believe,
25 but we don't think we have to solely rely on that. I

1 think we -- even if there was some kind of immunity, we
2 can argue that it was waived by the sue and be sued
3 clause.

4 In 1970, Congress created the Postal Service.
5 It was organized to operate in a businesslike, efficient
6 manner. At least four circuit courts of appeal have
7 found that it was launched into the commercial world.
8 This Court in *FHA v. Burr* found that a sue and be sued
9 clause is a waiver of sovereign immunity and permits
10 garnishment. We feel that the *Burr* case is controlling
11 and is authority for our position in this case.

12 Comparable to the decision in *Burr*, the
13 Franchise Tax Board is simply treating the Postal
14 Service as a stakeholder and requiring it to turn over
15 money otherwise payable to its employees. We do not
16 become involved with Postal Service functions or
17 property.

18 Recognizing that the Postal Service is a mere
19 stakeholder in this case, a decision for the Franchise
20 Tax Board cannot be relied upon by other administrative
21 agencies to burden the Postal Service.

22 Furthermore, if a decision sustaining the
23 Franchise Tax Board is going to create the
24 administrative burden that's portrayed by the Postal
25 Service, then why wasn't the comparable and adverse

1 Employment Development Department decision appealed from
2 the Ninth Circuit?

3 Even though the Postal Service is simply a
4 stakeholder, it alleges that California's income tax
5 garnishment should not be honored. It argues that the
6 sue and be sued clause only waives Postal Service
7 immunity with regard to judicial proceedings. This
8 argument does not recognize, however, the similarity of
9 tax assessment procedures to judicial proceedings. As I
10 stated, it was not necessary for California to obtain a
11 court judgment, because a tax assessment is given the
12 force of a judgment.

13 It should be given the force of a judgment
14 because the procedure conducted is much the same way as
15 a trial. I will go into a little more detail as to the
16 administrative procedure. I think it's important.

17 During the administrative procedure, the
18 taxpayer is allowed to fully develop his facts and legal
19 theories. He can not only present them to the Franchise
20 Tax Board, but he can present them to an independent
21 appellate administrative agency. In addition, he is
22 entitled to an oral agency before that other agency. It
23 is only after he has been afforded his due process
24 rights that the assessment can be final, and only then
25 does he have to pay.

1 This is a valid reason why our tax assessment
2 should be given the force of a judgment and why our tax
3 garnishment should be honored. By requiring the
4 Franchise Tax Board to obtain a judgment even after this
5 administrative process has been completed, the Postal
6 Service would require the repetition of the same process
7 in a judicial setting. This obviously does not comport
8 with the prompt collection of revenue.

9 Our final assessment, as I stated, also has
10 authority to be given the force of a judgment under the
11 decisions of this Court. In *Bull v. United States* and
12 *GM Leasing* -- *GM Leasing* was decided in 1976 by a
13 unanimous Court -- this Court affirmed the principle
14 that a tax assessment has the force of a judgment. The
15 principle was necessary, as this Court explained,
16 because the existence of government depends upon the
17 expedient collection of its revenue.

18 Even though the foregoing principles have been
19 recognized by this Court, the Postal Service refused to
20 give the Franchise Tax Board garnishment at least the
21 same respect to that of an ordinary judgment creditor.

22 It must be emphasized again that the Postal
23 Service is merely a stakeholder in these garnishment
24 proceedings. During these proceedings it is not being
25 asked to turn over its own funds; it is simply being

1 asked to turn over funds owing to employee taxpayers who
2 have refused to pay their valid state taxes.

3 The Postal Service will not remit these funds
4 to the Franchise Tax Board; yet it must make such
5 remittances to the Internal Revenue Service, in the
6 Ninth Circuit to the Employment Development Department,
7 and to ordinary judgment creditors.

8 It is significant to note that the rights of
9 these judgment creditors were only recognized after
10 repetitious and unsuccessful litigation by the Postal
11 Service in seven circuit courts of appeals.

12 The Postal Service makes a secondary argument
13 with regard to the waiver of sovereign immunity and
14 attempts to support it with Section 5520 of 5 U.S.C.
15 That section authorizes the withholding of local income
16 taxes from federal employees.

17 The Postal Service alleges there would have
18 been no need to specifically include the Postal Service
19 in Section 5520 if sovereign immunity had been waived.
20 This is incorrect. The legislative history makes it
21 clear the Postal Service did not want to be included in
22 Section 5520. It proposed separate legislation whereby
23 each Postal Service employee could decide whether or not
24 he wanted to have local taxes withheld.

25 Congress was informed that the history of the

1 Postal Service employees was one of delinquency in the
2 payment of their local taxes. Subsequently, the Postal
3 Service's recommendation of voluntary compliance was
4 completely rejected. Thus, the Postal Service was
5 specifically included in order to remove all doubt that
6 it was required to comply with local withholding. This
7 inclusion has nothing to do with sovereign immunity.

8 QUESTION: Well, it didn't -- it certainly has
9 got something to do in the sense that it didn't
10 authorize the collection of delinquent taxes.

11 MRS. KITCHING: That's the -- the Section
12 5517, and I'm -- 5517 goes to the collection of state
13 taxes, and 5520 --

14 QUESTION: Yes.

15 MRS. KITCHING: -- Went to the collection of
16 local taxes. And as I just said, Section 5517
17 authorizes the federal government to withhold current
18 state taxes from the salaries of federal employees.

19 In 1974, California and the Department of the
20 Treasury signed an agreement under Section 5517 which
21 implemented current withholding from federal employees.
22 Section 5517 agreements do not provide authority for a
23 state to require an amount to be taken from a federal
24 employee's wages in payment of a delinquent tax
25 liability. California has not attempted to use this

1 agreement for such purposes; rather, our authority to
2 garnish Postal Service employees' wages emanates from
3 Section 401 and the Burr decision.

4 The Ninth Circuit confused the concept of
5 current withholding with the collection of a delinquent
6 tax and incorrectly held that these concepts involve the
7 same subject matter. In their opinion, the agreement
8 covered both areas. They did not understand what the
9 term "withholding" meant, and that it was a term of
10 art. They incorrectly determined that any amount taken
11 from a Postal Service employee's wages, either for
12 current taxes or delinquent taxes, was withholding.
13 Because of this confusion, I will briefly illustrate the
14 difference.

15 Probably everyone in this room has an amount
16 withheld from each salary payment to satisfy this year's
17 tax liability. Hopefully, the total amount withheld
18 over the year will be sufficient to meet the annual
19 obligation. This procedure is known as current
20 withholding.

21 The collection of delinquent taxes concerns a
22 different subject matter. If someone fails to satisfy a
23 final tax liability in a timely way, the unpaid amount
24 is delinquent. That is when summary tax collection
25 procedures, like wage garnishment, take place.

1 In this example, Section 5517 covers only the
2 first part, current withholding. It cannot and has not
3 been used by California as authority for the second, the
4 collection of delinquent taxes. This conclusion is
5 supported by the legislative history which makes clear
6 that Congress enacted Section 5517 to cooperate with the
7 states in the administration of their tax laws.
8 Congress could not have intended that when California
9 signed the withholding agreement it forfeited its
10 authority to collect delinquent taxes from the wages of
11 Postal Service employees.

12 QUESTION: Didn't one of the legislative
13 reports, either House or Senate, say affirmatively that
14 this was to try to cooperate fully with the states in --

15 MRS. KITCHING: Absolutely, Your Honor. And
16 the collection of taxes by levying on wages and the
17 collection of delinquent taxes is such an important
18 function to the state that it's inconceivable to us that
19 Congress would say in order to have the federal
20 government collect your withholding, the current taxes
21 due now for this year, you must give up the right to
22 collect delinquent taxes from the wages of those same
23 employees.

24 That is inconceivable that Congress would do
25 that to the states, if Congress was attempting to

1 cooperate with the states --

2 QUESTION: Well, it's not inconceivable that
3 Congress thought that they weren't permitted, that the
4 state was not permitted to collect delinquent taxes by
5 -- by garnishment.

6 MRS. KITCHING: Well, we don't -- we -- the
7 agreement that --

8 QUESTION: Congress may well have, maybe
9 perhaps mistakenly, thought that the sue and be sued
10 clause didn't have the reach that you say it does.

11 MRS. KITCHING: We don't think that Congress
12 had any of that in mind when it enacted 5517.

13 QUESTION: I'm sure you don't. I'm sure you
14 don't.

15 MRS. KITCHING: And at that time it was meant
16 to be a gift to the states as to all federal employees,
17 and the Postal Reorganization Act came almost 20 years
18 later. And in that act the Congress decided that the
19 Postal Service could sue and be sued.

20 Now, we think it's inconceivable that Congress
21 would -- would only allow us to participate in the
22 withholding if we gave up the right to collect the
23 delinquent taxes from the wages of the -- of these
24 taxpayers. We don't see any history for that. The
25 agreements don't say that. It only says that we can't

1 use that agreement to collect the delinquent taxes.

2 We are not using that agreement to collect the
3 delinquent taxes. We're using the waiver of sovereign
4 immunity and the Burr case.

5 I would like to reserve the rest of my time
6 for rebuttal.

7 CHIEF JUSTICE BURGER: Very well.

8 Mr. Strauss.

9 ORAL ARGUMENT OF DAVID A. STRAUSS, ESQ.,

10 ON BEHALF OF THE APPELLEE

11 MR. STRAUSS: Thank you, Mr. Chief Justice,
12 and may it please the Court:

13 The linchpin of my friend's argument seems to
14 be that the California state administrative tax levy has
15 the force of a judgment or is the equivalent of a
16 judgment.

17 Now, I don't think that's true, but more to
18 the point, I don't think it's fruitful to try to discuss
19 in the abstract whether the California administrative
20 levy has the force of a judgment. The question is what
21 Congress intended, and specifically, what Congress
22 intended when it enacted a routine sue and be sued
23 clause as part of the Postal Reorganization Act. The
24 question is whether when Congress did this it intended
25 to subject the Postal Service to these administrative

1 levies.

2 Now, in our view, when Congress said that the
3 Postal Service could be sued, that's what it meant. It
4 meant that the Postal Service could be subject to a
5 lawsuit in court, not that the Postal Service could be
6 subject to an administrative order issued without any
7 judicial proceeding whatever.

8 This Court has always interpreted sue and be
9 sued clauses according to their literal meaning. A sue
10 and be sued clause authorizes a lawsuit. A sue and be
11 sued clause does not say and it does not mean that
12 sovereign immunity has simply become inapplicable to a
13 federal agency's affairs.

14 Now, I think that what's happened is because
15 sue and be sued clauses are so common and familiar, the
16 Franchise Tax Board has succumbed to the temptation to
17 forget that it is, after all, language in a statute, and
18 it's to be interpreted in the first instance at least
19 according to its plain meaning. That is, as I said, how
20 the Court has interpreted sue and be sued clauses and
21 when Congress was including --

22 QUESTION: Well, what's -- what may -- why is
23 it the plain meaning of the statute that the Postal
24 Service may be garnished pursuant to a court judgment?

25 MR. STRAUSS: Well, in FHA against Burr this

1 Court said that garnishment, postjudgment garnishment is
2 an incident of a suit.

3 QUESTION: Well, that may be, but the Postal
4 Service isn't being sued.

5 MR. STRAUSS: Well, that argument was made in
6 FHA against Burr, too, and the Court's answer was that
7 the garnishor --

8 QUESTION: So the clause really means more
9 than being sued or sued.

10 MR. STRAUSS: No. The Court's answer was that
11 the garnishor was standing in the shoes of the employee.

12 QUESTION: All right. So what if the
13 California law says final administrative assessments
14 have the force of a judgment? They're unchallengeable.
15 They're just like a judgment. And then you garnish the
16 Postal Service in connection with this judgment.

17 MR. STRAUSS: As long as it is not part of a
18 lawsuit, and there is no contention here that it is part
19 of a suit.

20 QUESTION: Well, part of the state law says
21 it's the equivalent of a lawsuit in the judgment.

22 MR. STRAUSS: Well, state law can't alter the
23 meaning of the federal law. I don't deny that there may
24 be cases in which it's hard to tell what's an
25 administrative proceeding and what's a suit, but this is

1 plainly not such a case. After --

2 QUESTION: Is -- is your basic reason for that
3 that your concept of sue and be sued clause means a
4 garnishment issuing out of a process of a court?

5 MR. STRAUSS: That's right. In connection
6 with a lawsuit.

7 QUESTION: So that if these -- if the
8 administrator here instead of garnishing on the
9 assessment went to court and got a state court judgment,
10 there could be a garnishment.

11 MR. STRAUSS: Yes. Absolutely. Absolutely.
12 If the Franchise Tax Board were to reduce its tax
13 delinquencies to judgments --

14 QUESTION: Even though the -- even though the
15 state law says don't do it because you already have a
16 judgment.

17 MR. STRAUSS: I don't know that the state law
18 says don't do it. My understanding is that state law --

19 QUESTION: Well, it doesn't say don't do it,
20 but it says that you already have the judgment.

21 QUESTION: But they did say it.

22 MR. STRAUSS: No. There's no -- this is not
23 -- this is not -- one of the ways in which this is not a
24 judgment is that after it is issued, someone else can
25 institute a suit to challenge it. The judicial

1 proceedings in the California courts begin after this
2 order has been issued and they be done by someone else
3 other than the Franchise Tax Board.

4 This order has no connection to a suit, to a
5 court, to a judicial process, to judicial proceedings.
6 It's not reviewed by a judge. It's not issued by a
7 judge. It doesn't enforce a court's judgment.

8 QUESTION: What can happen after this
9 assessment becomes what's called a judgment under state
10 law? What can happen after that?

11 MR. STRAUSS: I -- I don't know that there's
12 any place in the state statutes where it is called a
13 judgment. After it's --

14 QUESTION: Well, I know, but let's assume --
15 anyway, there's a final assessment, is that it? And
16 your colleague on the other side says that's the
17 equivalent of a judgment under our -- under our law.
18 What can happen to it after that?

19 MR. STRAUSS: Well, my understanding is it's
20 served on the employer, and it's the employer --

21 QUESTION: Well, I know, but how about the
22 taxpayer?

23 MR. STRAUSS: Well, the taxpayer, if the
24 employer honors it, the taxpayer --

25 QUESTION: Well, what about the taxpayer?

1 Forget about the garnishment for a minute.

2 MR. STRAUSS: Okay. The taxpayer --

3 QUESTION: There's a final assessment. What
4 can the taxpayer do about it besides paying?

5 MR. STRAUSS: The taxpayer has to challenge it
6 administratively, and if the administrative challenge
7 does not succeed, the taxpayer has to institute a suit.
8 The suit then works its way up through the California
9 courts and to this Court if there's a federal issue.

10 QUESTION: So the tax assessment is not final
11 in the sense that the taxpayer can never challenge it.

12 MR. STRAUSS: Oh, certainly not, certainly
13 not. The taxpayer goes to court to challenge it. I
14 mean in a sense, to put the point bluntly, this is no
15 more like a judgment than any tort. It's an action
16 taken by one person against another that can give rise
17 to a lawsuit if the person who is -- who is at loss as a
18 result of the action chooses to challenge it.
19 Otherwise, it has no connection to a lawsuit.

20 QUESTION: Of course, if the taxpayer -- if
21 the taxpayer-employee of the Postal Service gets
22 garnished, like California wants to do, and they take
23 the money out of his pay, and then he challenges the
24 tax, he's going to get his money back. It's just that
25 he's having to pay in advance.

1 MR. STRAUSS: That's right, if he successfully
2 challenges the tax.

3 It's not just that. It's that the Postal
4 Service will have to divert its funds from the objects
5 for which Congress designated now, the payment of this
6 employee, in advance until the matter is resolved. And
7 I should also --

8 QUESTION: Well, now, what do you mean? You
9 mean the Postal Service, even though it's holding funds
10 under a garnishment, nevertheless would feel obligated,
11 holding this week's salary under a writ of garnishment,
12 would feel obligated to pay the salary to the employee?

13 MR. STRAUSS: Oh, no. It wouldn't feel
14 obligated to pay the salary to the employee, but it
15 would -- the basis of the doctrine in this area is that
16 it disrupts Congress' design for a federal agency to
17 have to pay funds to the creditor instead of to the
18 employee.

19 QUESTION: Well, but the sue and be sued
20 clause certainly covers that if the garnishment issued
21 out of court.

22 MR. STRAUSS: That's right. If the
23 garnishment is issued postjudgment, that's right.
24 That's right.

25 QUESTION: But if this were a judgment, it

1 would be collected from the Post Office?

2 MR. STRAUSS: Yes. From the Postal Service,
3 yes.

4 QUESTION: California could do it?

5 MR. STRAUSS: Oh, yes. Oh, yes. Absolutely.
6 If the Franchise Tax --

7 QUESTION: So the only problem here is the
8 word "judgment?"

9 MR. STRAUSS: The problem is that California
10 hasn't sued us.

11 QUESTION: Is that the one thing, the word
12 "judgment?"

13 MR. STRAUSS: The problem is the word
14 "judgment" or the word "sue."

15 QUESTION: That's all that's involved. And
16 California says this is a judgment. If California
17 passes a statute that says that this is now labeled a
18 judgment, then you're cut cold.

19 MR. STRAUSS: Oh, no, no. Certainly not,
20 Justice Marshall. California --

21 QUESTION: Well, I thought you said that.

22 MR. STRAUSS: California -- the critical word
23 is the word "sue." That's the word in the statute, the
24 word "sue" and "sued."

25 QUESTION: Well, suppose California said this

1 is a suit?

2 MR. STRAUSS: Well, if California were to make
3 it a suit --

4 QUESTION: They'd have to do more, then.

5 MR. STRAUSS: They could, yes.

6 QUESTION: They'd have to go to court.

7 MR. STRAUSS: Yes, they would have to go to
8 court. That's right.

9 QUESTION: Well, suppose they go to court?
10 Suppose they named us as the tax court?

11 MR. STRAUSS: If they were to set up a court --

12 QUESTION: A tax court?

13 MR. STRAUSS: If they were to set up a court,
14 even a tax court --

15 QUESTION: And the tax court issued a judgment.

16 MR. STRAUSS: And the tax court issued a
17 judgment --

18 QUESTION: You would honor it.

19 MR. STRAUSS: We would honor it.

20 Now, that goes to the point that was brought
21 out --

22 QUESTION: But we're not -- we're not engaged
23 in semantics at all.

24 MR. STRAUSS: Well, it's not just semantics.
25 This distinction between state administrative agencies

1 and courts, while obviously there are borderline cases,
2 there are, whenever you have a distinction, it's
3 sometimes clear. And this is an instance in which it's
4 clear. It's also a distinction, I should point out,
5 that's drawn by Congress in 28 U.S.C. 2283; they have
6 the Injunction Act. It's a distinction for purposes of
7 many exhaustion doctrines which say you have to exhaust
8 state administrative remedies but not state judicial
9 remedies.

10 QUESTION: Mr. Strauss, are there any cases in
11 which this Court has held that a federal agency is not
12 immune from judicial process but is immune from some
13 kind of administrative process?

14 MR. STRAUSS: I don't know that this issue has
15 ever come up.

16 QUESTION: Is there a doctrine -- what is the
17 scope of the doctrine of sovereign immunity? It's
18 immunity from suit, isn't it?

19 MR. STRAUSS: It's immunity from suit and
20 state process.

21 QUESTION: Well, where do you -- what case
22 talks about immunity from anything other than suit?

23 MR. STRAUSS: Well, I don't know that a state
24 has ever attempted to enforce its administrative process
25 against federal agencies, presumably because it was

1 clear that it couldn't. But it does seem to me that --

2 QUESTION: Well, there's no authority for the
3 proposition that it couldn't, is there?

4 MR. STRAUSS: Well, there's no authority for
5 the proposition that it couldn't or that it could. It
6 does seem to me that if a state decided --

7 QUESTION: Well, the Keifer -- the Keifer case
8 really says the first question is has Congress created
9 an immunity when it created this agency.

10 MR. STRAUSS: Well, that's -

11 QUESTION: That's what Justice Frankfurter
12 said is the issue.

13 MR. STRAUSS: Well, I think that's -- that's
14 right in the case of agencies like those involved in
15 Keifer. I think what Justice Frankfurter was doing
16 there was taking that agency, and he said this -- this
17 looks exactly like these other 40 agencies to which
18 Congress has attached sue and be sued clauses. So
19 unless there is some reason to think otherwise, we are
20 going to assume that Congress meant --

21 QUESTION: Well, he even went farther, as I
22 read the opinion, and said that when there was a silence
23 with respect to the Smithsonian Institute, that there
24 was no implied immunity.

25 MR. STRAUSS: Well, that it was historically

1 accepted that the Smithsonian Institute --

2 QUESTION: Without a sue and be sued clause.

3 MR. STRAUSS: That -- that -- that is true,
4 because it, too, was structured like these agencies.
5 The Postal Service, however, is not structured in the
6 least bit like those agencies. There is a great deal of
7 -- of discussion in the Appellant's brief designed to
8 show that the Postal Service is really just like a
9 private corporation.

10 That was not Congress' idea at all. Congress
11 specifically rejected a proposal to make the Postal
12 Service a corporate body, and instead put it in the
13 executive branch of the government. And the Postal
14 Service has a dozen protections that any private
15 corporation would love to have and several handicaps
16 that would cause any private corporation to fold up.

17 I think, as I said, the critical question is
18 whether California has sued, whether it has gone to
19 court. That's the language that this court's opinions
20 have used in interpreting sue and be sued clauses. The
21 Court said that a sue and be sued clause makes an agency
22 amenable to judicial process. It said that a suit for
23 purposes of the clause is a proceeding in a court of
24 justice or litigation between parties in a court of
25 justice or the proceeding by which the decision of a

1 court is sought.

2 QUESTION: May I ask one other question, Mr.
3 Strauss. Supposing the California procedure -- and I
4 don't know whether it did -- required the taxpayer to
5 pay the tax if he wanted to challenge an assessment.
6 Would that make any difference? In other words, that
7 there -- that he had to part with his money before he
8 could question the assessment. Then the money that
9 would be collected from the government would have to be
10 paid before he could raise any question about it.

11 Would that make any difference in your
12 argument?

13 MR. STRAUSS: I don't think that would make
14 any difference, Justice Stevens.

15 QUESTION: Okay.

16 MR. STRAUSS: That's our position.

17 The one other point that I think is important
18 is that in this case in addition to the plain language
19 of the statute, language interpreted by this Court to
20 mean suits, we have unusually strong, if somewhat
21 unconventional, evidence that the very congressional
22 committees that drafted the Postal Reorganization Act
23 and put the sue and be sued clause into it would have
24 been very surprised to learn that they had rendered the
25 Postal Service subject to orders like the Franchise Tax

1 Board.

2 Shortly after the Postal Reorganization Act
3 took effect, municipal tax collectors from several major
4 cities came to Congress and complained that local income
5 tax delinquencies of federal employees had become a
6 serious problem. And as my friend pointed out, Postal
7 Service employees were frequently the subject of this
8 discussion, apparently because they're very large in
9 number, they're present in every city, and the turnover
10 in Postal Service jobs is very rapid, and that makes
11 collection more difficult.

12 Now, these local tax collectors sought
13 legislation from Congress that would permit the
14 withholding of local income taxes from the wages and
15 salaries of federal employees.

16 Now, as I said, this proposed legislation was
17 considered by the same committees that had recently
18 drafted the Postal Reorganization Act. It was the Post
19 Office and Civil Service Committees of both Houses.

20 Now, the Board concedes in its brief that if
21 its interpretation of the sue and be sued clause were
22 correct, the local tax collectors did not need any
23 additional legislation to deal with the Postal Service.
24 They could just have issued administrative orders to the
25 Postal Service, as they would have to any other employer.

1 QUESTION: Well, is that quite that clear? I
2 think there's something to your opponent's distinction
3 between withholding and levy under assessment.

4 MR. STRAUSS: Well, the California statutes
5 provide that withholding taxes can be collected in
6 precisely the same way; in fact, under the very same
7 statutory provision.

8 QUESTION: But withholding -- are you talking
9 about withholding taxes that the employer owes or taxes
10 that should have been withheld from an employee?

11 MR. STRAUSS: Well, withholding taxes that the
12 employer should have withheld from the employee.

13 QUESTION: Yeah. I don't think that's quite
14 the same.

15 MR. STRAUSS: Well, if -- if -- I mean this is
16 not -- I think this point, Justice Rehnquist, is not in
17 dispute; that if the sue and be sued clause means what
18 the Franchise Tax Board says it mean, that this
19 legislation sought by the local tax collectors and
20 subsequently passed, the Section 5520 of Title 5, is, in
21 their words, superfluous?

22 QUESTION: Why? I don't understand that.
23 Just -- you're talking about just withholding current
24 taxes. Without this legislation, I don't suppose the
25 Post Office Department would have any authority

1 whatsoever to withhold from an employee's pay state
2 taxes.

3 MR. STRAUSS: It would have the same authority
4 that it has now to withhold delinquent taxes from the
5 employees.

6 QUESTION: Which would be after an assessment
7 levied --

8 QUESTION: Yes, exactly.

9 QUESTION: -- By the Franchise Tax Board.

10 QUESTION: Exactly.

11 QUESTION: And withholding taxes aren't
12 collected by assessment levies.

13 MR. STRAUSS: No, but there's -- no -- nothing
14 in the sue and be sued clause that suggests there's a
15 difference between an assessment levy and a withholding
16 tax levy. It's an administrative levy designed to
17 facilitate the collection of taxes.

18 QUESTION: But ordinarily, withholding taxes
19 simply aren't collected by levy. They may be collected
20 under the threat of levy, but they're simply collected
21 by the employer agreeing, perhaps under threat of levy,
22 to withhold from the employee's paycheck.

23 MR. STRAUSS: Well, I assume they're collected
24 because --

25 QUESTION: The employee -- you're just

1 bootstrapping. Unless the employer has the authority to
2 withhold something from the employee's wages, there's
3 not going to be any delinquent withholding taxes.

4 MR. STRAUSS: There's not going to be any
5 delinquent withholding taxes. There may be delinquent
6 taxes.

7 QUESTION: Exactly. And so there won't be any
8 delinquent withholding taxes to be collected by a levy.
9 So this statute was essential to have the employer
10 deduct from the wages every month a portion of the
11 employee's estimated tax.

12 MR. STRAUSS: Well, I agree that it was
13 essential, Justice White, but only because of our
14 interpretation of the sue and be sued clause. If the
15 Franchise Tax Board's interpretation of that clause is
16 correct, then the taxing authority --

17 QUESTION: I don't -- I don't see how the sue
18 and be sued clause could possibly authorize the employer
19 from withholding wages. If the employee went to the
20 employer and says how come you're withholding money from
21 me; pay me my whole -- and he says well, I just -- I
22 just want to cooperate with the state.

23 MR. STRAUSS: He would say, presumably --

24 QUESTION: He would lose. He would lose. The
25 employer would lose.

1 MR. STRAUSS: He would say I have this order
2 from the state taxing authority.

3 QUESTION: The employer -- state taxes, or he
4 can't give you -- can't -- can't issue an order to them
5 saying withhold taxes.

6 MR. STRAUSS: I don't -- I don't know why not,
7 if state process allows it, as state process would.
8 There is no federal bar -- there would be no federal bar
9 to the taxing authority issuing an order, an
10 administrative order to the Postal Service saying pay us
11 X amount of taxes out of the employee's pay. And
12 whether these are anticipated or delinquent liabilities
13 certainly doesn't reflect anything in federal law.

14 CHIEF JUSTICE BURGER: I don't know whether
15 Virginia is a more favored state, but in Virginia,
16 residents of Virginia who work for the federal
17 government have their Virginia tax taken out of their
18 federal salary.

19 MR. STRAUSS: Oh, yes. That's -- that's
20 pursuant to legislation, 5517. That's right. Those
21 statutes are now on the books. My point is that at the
22 time that the local tax collectors asked for that
23 legislation, they came to Congress right in the wake of
24 the Postal Reorganization Act, asked that legislation
25 with respect to the Postal Service, and were not told

1 why do you need this legislation; we gave you what you
2 needed in the sue and be sued clause. You already have
3 it with respect to --

4 QUESTION: Well, I take it the position of
5 California is that you are sued.

6 MR. STRAUSS: Well, you're sued now or --

7 QUESTION: In this case here.

8 MR. STRAUSS: Well, in this case that's --
9 that's a complexity that -- that I think, you know, is
10 -- needs to be understood, Justice Marshall. We don't
11 claim --

12 QUESTION: -- Will be defended.

13 MR. STRAUSS: Well, if they win this suit,
14 Justice Marshall, then they won't have to sue us. Then
15 we will be obligated to honor the administrative
16 levies. We don't claim that this suit is barred by
17 sovereign immunity. We claim that we win this suit on
18 the merits because we didn't have to honor the
19 administrative levy.

20 QUESTION: Mr. Strauss, should our
21 interpretation of the sue and be sued clause in Section
22 401 be affected in any way by our understanding of
23 Congress' intent in trying to set up an independent
24 agency with the Postal Service? Should the structure
25 and intent of Congress help us in determining the scope

1 of the sue and be sued clause?

2 Now, while it isn't set up totally as an
3 independent business, as you've already said, Congress
4 attempted to move in that direction and give the Postal
5 Service more businesslike attributes and make it a more
6 independent agency. And it seems to me one of those
7 attributes might well be that it should be subject to
8 administrative withholdings in the nature of a
9 garnishment such as this. Is that possible?

10 MR. STRAUSS: Well, I don't think there's any
11 reason to think that's true, Justice O'Connor. What
12 Congress -- it's true that Congress did change the
13 organization of the Postal Service in some ways, but it,
14 did also put in a sue and be sued clause. And it's the
15 construction of that clause that's really at issue.

16 Now, I should say that I suspect when the
17 drafters of the act put in the sue and be sued clause,
18 they did not -- probably did not envision that they were
19 opening up the Postal Service to whole waves of new
20 kinds of litigation. They probably thought they were
21 doing very little. There is no explicit consideration
22 of the clause in the legislative history, and from all
23 appearances they treated it as a piece of --

24 QUESTION: Well, I don't know that whole waves
25 of litigation is an accurate description. This seems

1 like a pretty normal state activity to want to collect
2 its taxes and to treat the administrative garnishment
3 much like a judicial garnishment.

4 MR. STRAUSS: Well, it is -- it is a
5 qualitatively different form of process from that to
6 which federal agencies are subject. There is no dispute
7 that if they tried -- if the Franchise Tax Board tried
8 to serve one of these levies on any other federal agency
9 that the agency would not have to honor it. There is, I
10 take it, no dispute that if the Franchise Tax Board had
11 sued this levy on the Post Office Department before
12 1971, the Post Office would not have had to honor it.
13 So the only question is whether Congress withdrew that.

14 When Congress passed the sue and be sued
15 clause, I should point out it also made the provisions
16 of the Federal Tort Claims Act a very heavily -- a very
17 heavy qualification on any waiver of immunity from suit
18 applicable to the Postal Service. So the net effect on
19 the Postal Service is very little.

20 In the common run of contract and tort cases,
21 all the sue and be sued clause did was to make a
22 plaintiff name the Postal Service instead of the United
23 States as a defendant.

24 QUESTION: Are there a fair number of agencies
25 with sue and be sued clauses who are not protected, as

1 you suggest, by the Federal Tort Claims Act?

2 MR. STRAUSS: I don't know, Justice
3 Rehnquist. I don't know the answer to that question.

4 QUESTION: May I ask if -- if you win this
5 case and the California legislature passed a statute and
6 said that before serving any levies on or tax
7 assessments on the U.S. Postal Service, you shall go
8 over to the nearest judge and get it signed by a judge,
9 and then you may serve it, would that cure the problem?

10 MR. STRAUSS: That's -- that begins to get
11 into this -- into this borderline area that comes up in
12 these other instances in which the Court has to
13 distinguish between state administrative agencies and
14 state judicial bodies, like Lynch against Hasl.

15 QUESTION: Well, it wouldn't take much more
16 than that, in any event, would it?

17 MR. STRAUSS: Well, at some point the
18 intervention of a judicial officer would make this a
19 judicial proceeding, that's right.

20 QUESTION: And how -- how does it matter to
21 the United States whether that intervention takes place
22 or not?

23 MR. STRAUSS: Well, I think there are two
24 answers to that, Justice Stevens. When the Post Office
25 -- the Postal Service itself is the party in interest,

1 when the state, or for that matter it's just
2 adventitious that this case involves a state, when a
3 private party is trying to invoke state administrative
4 process to obtain Postal Service assets because he has a
5 dispute with the Postal Service.

6 If he proceeds against the Postal Service in
7 state court, the Postal Service can remove the
8 proceeding. Congress saw to it that the Postal Service
9 would have the right to get out of state court and into
10 federal court when it wanted to. If he proceeds against
11 it in a state administrative agency, the Postal Service
12 can't remove it.

13 When the -- when the Postal Service is not the
14 real party in interest, when it's, as this case, the
15 Postal Service is holding funds --

16 QUESTION: Well, let me limit my question to
17 cases in which an official authority, an official
18 representative of the State of California is proceeding
19 against the government agent. Can it then make any
20 difference whether you get the intervention of the
21 judicial officer or not?

22 MR. STRAUSS: I think it can, at least for
23 purposes of removal.

24 QUESTION: You mean if there -- I don't know
25 what you'd remove if they serve you with an assessment.

1 You're not -- the Postal Service doesn't have any
2 interest in contesting the amount of the assessment,
3 would it?

4 MR. STRAUSS: Oh, no. That's why I confined
5 my answer to cases in which the Postal Service is the
6 real party in interest.

7 QUESTION: Oh, I see. I see.

8 MR. STRAUSS: In cases like this, the -- the
9 interest is different and in a way greater. I think
10 from the point of view of the employee who is subject to
11 this levy, it makes a great deal of difference whether
12 he has been sued and has been to court and has had a
13 chance to have his defenses heard and has a final
14 judgment entered against him and --

15 QUESTION: Well, but under Burr a sue and be
16 sued clause allows garnishment prior to judgment.

17 MR. STRAUSS: Well, under Pretty the sue and
18 be sued clause allows attachment of a federal agency
19 when you have a dispute with the federal agency. The
20 Court has not yet held that prejudgment wage garnishment
21 --

22 QUESTION: Well, but certainly Burr has dicta
23 in it. So I mean you're not -- in answer to Justice
24 Stevens, you're -- you're not talking basically about a
25 situation in either case where there's been a final

1 adjudication of the right.

2 MR. STRAUSS: Well, if -- if -- if the case
3 involves prejudgment wage garnishment, Justice
4 Rehnquist, that's right that there's been no final
5 adjudication, of course. But there are two things to be
6 said about that. Prejudgment wage garnishment, I
7 gather, is practically no longer used because it's so
8 difficult to conform to procedural requirements.

9 And second, I think it does make a difference
10 if the employee is already in court, and he's involved
11 in a judicial proceeding, and his rights and liabilities
12 are going to be determined, and he doesn't have to
13 initiate a suit.

14 QUESTION: But in response to that, you
15 earlier told me it didn't matter if he had to pay the
16 judgment -- pay the assessment in order to challenge
17 it. You'd still take the same position.

18 MR. STRAUSS: Well, if the state law required
19 that the employee would have to pay the assessment, yes,
20 I think as far as the Postal Service was concerned, we
21 would still say that like other federal agencies, we
22 don't have to honor this assessment at all. I don't
23 know where that would leave the employee under state law.

24 QUESTION: Mr. Strauss, describe to me what
25 California would have to do to make this law compatible

1 with your views of a judicial decision.

2 MR. STRAUSS: It would have --

3 QUESTION: You have the tax board, and the tax
4 court finds a delinquency in the payment of state income
5 taxes.

6 MR. STRAUSS: That's right.

7 QUESTION: At that point would the statute
8 have to provide that -- that the state would have to go
9 to court to enforce the delinquency?

10 MR. STRAUSS: The statute wouldn't have to
11 provide that in order to collect from the Postal Service.

12 QUESTION: Well, -- well, if -- if -- if the
13 state went to court, would it sue the Postal Service?

14 MR. STRAUSS: It would sue -- I don't know
15 what the form of the suit would be. I suppose the form
16 of the suit would be against the taxpayer.

17 QUESTION: The taxpayer.

18 MR. STRAUSS: But what the Court said in Burr

19 --

20 QUESTION: So that the tax -- the tax board
21 has already found that the taxpayer owes them money and
22 had, as I understand it from the Attorney General, a due
23 process hearing and lost. Are you suggesting that
24 California now would have to provide an additional
25 procedure in which there would be a trial before a judge?

1 MR. STRAUSS: My understanding, Justice
2 Powell, is that they don't have to provide any adversary
3 -- I think they may as a matter of state law, but they
4 don't have to provide any adversary hearing at all.

5 QUESTION: They don't now under California
6 law, but I'm trying to ascertain what California would
7 have to do to comply with what you said it must do
8 before it can garnishee the salary owed by the Postal
9 Service.

10 MR. STRAUSS: They would have to go to court,
11 Justice Powell. They would have to sue. And our reason
12 for that is that that's what the statute says. It
13 authorizes the Postal Service to be sued, and the Court
14 has said --

15 QUESTION: Even though the administrative
16 agency provided all of the due process that a court
17 would provide?

18 MR. STRAUSS: Well, if an -- if it were a
19 court and not an administrative agency, and as I've
20 said, there are borderline cases. But this is a --

21 QUESTION: Well, there are regulatory
22 commissions in every state in the United States as well
23 as in the government that have both judicial and
24 administrative legislative powers.

25 MR. STRAUSS: That's right. There is no

1 contention, as I understand, that they are, in fact, a
2 court, and so they would have to go to court and sue.

3 QUESTION: They would.

4 MR. STRAUSS: Yes. And that's --

5 QUESTION: They wouldn't have to go to
6 judgment to get to this point. I suppose 90 percent of
7 all the garnishments in the United States are
8 prejudgment. The garnishment is served on the same day
9 as the first process. So as a practical matter, if they
10 did it that way in California, started the suit, served
11 the garnishment, it would wash out because they would
12 probably have no defense in the vast majority of the
13 cases.

14 MR. STRAUSS: My impression, Mr. Chief
15 Justice, is that prejudgment wage garnishments are not
16 widely used any more because of *Snydak* and other
17 decisions imposing strict procedural requirements on
18 them, and that they're not a very popular remedy.

19 QUESTION: That doesn't comport with studies
20 on the subject.

21 MR. STRAUSS: Well, as I said --

22 QUESTION: They were reduced after *Snydak*, but
23 they're still overwhelmingly prejudgments.

24 MR. STRAUSS: Well, that was my impression
25 from -- from the government's experience with

1 garnishment orders.

2 But the question is whether Congress could
3 have distinguished, the Congress, whether it makes sense
4 to attribute to Congress a distinction between
5 garnishments issued incident to or pursuant to or an
6 execution of a lawsuit or an order to give a court
7 jurisdiction. And orders that are not garnishments,
8 that are not connected to a court or to judicial process
9 at all. And in view of this Court's -- since the
10 question in the case is the interpretation of a sue and
11 be sued clause, and since the Court has consistently
12 said that sue and be sued clauses have to do with
13 judicial process and judicial proceedings, I think the
14 best understanding of Congress' intent is that it did
15 intend to subject the Postal Service only to orders
16 connected to court proceedings or judicial proceedings
17 and not to unadjudicated administrative orders.

18 If the Court has no further questions, thank
19 you.

20 ORAL ARGUMENT OF MRS. PATTI S. KITCHING, ESQ.,

21 ON BEHALF OF THE APPELLANT -- REBUTTAL

22 MRS. KITCHING: Mr. Chief Justice, and may it
23 please the Court:

24 CHIEF JUSTICE BURGER: Ms. Kitching.

25 MRS. KITCHING: The Postal Service apparently

1 does not feel confident of the preemption argue, since
2 they devoted only about two pages in their brief to that
3 argument, and has not addressed that argument today.
4 Therefore, we feel basically that they are arguing the
5 sovereign immunity.

6 As I said before, the Franchise Tax Board
7 feels it comes directly under the Burr case and that it
8 is not expanding any liability of the Postal Service.
9 The Postal Service would not have to divert any of its
10 own funds. The funds do not belong to the Postal
11 Service. They belong to the employee.

12 The Solicitor General has admitted that the
13 collection of taxes from Postal Service employees has
14 become very difficult, and we submit that the Postal
15 Service should cooperate with the State of California in
16 collecting these taxes. Instead of being helpful,
17 however, the Postal Service attempts to raise the shield
18 of sovereign immunity to protect delinquent taxpayers.

19 QUESTION: Well, while you're on policy, why
20 don't you have the postal authority to deduct it, to
21 withhold it?

22 MRS. KITCHING: Pardon me?

23 QUESTION: Why don't you have the postal
24 authority to withhold the taxes from the employee?

25 MRS. KITCHING: Your Honor, the problem is --

1 QUESTION: You can do that with a piece of
2 paper.

3 MRS. KITCHING: That's right, Your Honor. We
4 can have a certain amount withheld. However, employees
5 can earn money from other sources and end up with a
6 delinquency even though they had some money withheld.
7 So that's not the only way to collect the tax, and
8 sometimes it isn't enough.

9 QUESTION: Well, you don't expect the postal
10 authority to collect the money that they work on outside
11 jobs, do you?

12 MRS. KITCHING: No, we don't. But I'm
13 explaining that's why the taxpayer would have an
14 additional tax liability that it would be necessary to
15 collect through garnishment.

16 Thank you, Your Honors.

17 CHIEF JUSTICE BURGER: Thank you, counsel.

18 (Whereupon, at 2:27 p.m., the case in the
19 above-entitled matter was submitted.)
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CERTIFICATION

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

#83-372 - FRANCHISE TAX BOARD OF CALIFORNIA, Appellant v.

UNITED STATES POSTAL SERVICE

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

Kenneth G. Harman

(REPORTER)

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