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SUPREME COURT, U.S.  
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# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-498

TITLE UNITED STATES, Petitioner V. NATIONAL BANK OF COMMERCE

PLACE Washington, D. C.

DATE April 15, 1985

PAGES 1 thru 46



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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :  
Petitioner :  
v. : No. 84-498  
NATIONAL BANK OF COMMERCE :  
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Washington, D.C.  
Monday, April 15, 1985

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 1:00 o'clock p.m.

APPEARANCES:

ALBERT G. LAUBER, ESQ., Assistant to the Solicitor  
General, Department of Justice; on behalf of  
Petitioner.  
TERRY F. WYNNE, ESQ., Pine Bluff, Arkansas; on  
behalf of Respondent.

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C O N T E N T S

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on behalf of the Petitioner	3
TERRY F. WYNNE, ESQ.,	
on behalf of the Respondent	32

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 National Bank of  
4 Commerce. Mr. Lauber, you may proceed whenever you're  
5 ready.

6                    CRAI ARGUMENT OF ALEERT G. LAUBER, ESQ.

7                    ON BEHALF OF THE PETITIONER

8                    MR. LAUBER: Mr. Chief Justice, and may it  
9 please the Court:

10                   The question here involves the power of the  
11 Internal Revenue Service to levy on a joint bank account  
12 where only one of the co-depositors is indebted to the  
13 IRS for unpaid taxes. The delinquent taxpayer here is  
14 one Roy Reeves, who owes the IRS about \$800. Roy has a  
15 checking account and a savings account at the Respondent  
16 bank, titled jointly in his name and the name of Ruby  
17 and Neva Reeves, who we understand to be Roy's mother  
18 and wife.

19                   These bank accounts are typical of joint bank  
20 accounts in most jurisdictions. That is, each depositor  
21 is entitled to withdraw any amount up to the full  
22 outstanding balance from the account, without notice to  
23 his co-depositors. The bank likewise is required to  
24 honor any withdrawal request that Roy might make, again  
25 up to the full outstanding balance, absent written

1 instructions from the other depositors not to pay.

2 Arkansas law also provides that the bank's  
3 payment to any one depositor immunizes it from claims by  
4 the other depositors to the money thus paid out. In  
5 short, as the Court of Appeals correctly stated, at the  
6 time the bank received the notice of levy Roy could have  
7 withdrawn any amount he wished from these joint accounts  
8 and used it to pay his federal tax bill, and his  
9 co-depositors would have had no lawful claim against the  
10 bank.

11 QUESTION: No, but they'd have a complaint  
12 against him, wouldn't they?

13 MR. LAUBER: Well, they might have a complaint  
14 against him, and as I will explain shortly, they would  
15 have a very similar claim against the IRS. But that in  
16 our view does not negate the fact that Roy had a right  
17 to property that the IRS could levy on.

18 Our position is simply that whatever Roy could  
19 do with respect to the account unilaterally, the IRS can  
20 do by virtue of its levy power. And that we think  
21 follows from the well-established proposition that --

22 QUESTION: Supposing his wife had a big pile  
23 of cash at home. I suppose he could take it and pay his  
24 taxes with it. Could the IRS grab that cash?

25 MR. LAUBER: If his wife had a big pile of

1 cash?

2 QUESTION: In their desk drawer at home.

3 MR. LAUBER: Well, if the understanding  
4 between them was that he had free access to that money,  
5 yes, we say the IRS could levy upon it. But she could  
6 then come into court in a wrongful levy action and  
7 contend that he misappropriated her funds, but that  
8 would be a question as to ultimate ownership.

9 Here the right to property we're levying upon  
10 is the right to withdraw the money.

11 QUESTION: If she publicly acknowledged that  
12 he had the right, the same right that she had of access,  
13 would that affect your response?

14 MR. LAUBER: Well, we think that here the  
15 equivalent of that public acknowledgment is in effect,  
16 because under state law and the banking contracts  
17 involved Roy had the right to withdraw all that money  
18 without notifying his co-depositors.

19 QUESTION: So that's the equivalent of the  
20 other public acknowledgment?

21 MR. LAUBER: I think you could put it that  
22 way, yes. Since Roy had the right to get the money, we  
23 have the right to levy upon the money.

24 QUESTION: But under state law who owned that  
25 money?

1 MR. LAUBER: Well, the question of who owns  
2 the money in the ultimate sense is a matter of state  
3 law, and that would be determined after the levy in a  
4 post-seizure hearing, either an administrative hearing  
5 or a wrongful levy action.

6 QUESTION: Are you saying that the ownership  
7 is immaterial to the right of the Government by  
8 administrative levy to take it?

9 MR. LAUBER: Well, the question -- the  
10 resolution of all possible competing claims to the  
11 property is irrelevant at the levy stage of the  
12 proceeding.

13 QUESTION: As long as he's got some property  
14 interest.

15 MR. LAUBER: As long as he's got the right to  
16 pull that money out and write a check to the IRS for it,  
17 that's right, he has a right to property.

18 QUESTION: That's what you're levying on.

19 MR. LAUBER: That's what we're levying on, his  
20 right to withdraw the money and pay it to the IRS.

21 QUESTION: Mr. Lauber, if you're right and  
22 there are post-levy remedies available, I assume they're  
23 only available to the person who says you've taken my  
24 property, and that individual would have to initiate any  
25 judicial proceeding or request for administrative

1 review?

2 MR. LAUBER: Well, it depends. The wrongful  
3 levy action would be brought by a third party claimant.  
4 That's not available to the taxpayer.

5 QUESTION: No. But what I'm saying is there  
6 are other people here who claim they own part of this  
7 money.

8 MR. LAUBER: Right.

9 QUESTION: A mother and a sister, perhaps. It  
10 would be up to them to initiate any post-levy judicial  
11 action or request for administrative review.

12 MR. LAUBER: Exactly.

13 QUESTION: Now, how would they even have  
14 notice of it if there'd been a levy? I mean, what real  
15 protection is there for these people?

16 MR. LAUBER: As this Court noted in the  
17 Rodgers case a few terms ago, the Revenue Code does not  
18 require the IRS to notify potential third party  
19 claimants of a levy on the taxpayer's property, and in  
20 fact the IRS does not notify them because it typically  
21 can't know who they are. And the lower courts have held  
22 there's no constitutional duty of the IRS to notify such  
23 people.

24 But nevertheless, in real life they would find  
25 out. First of all, state law, state banking law or

1 state banking regulations might well require the bank to  
2 notify depositors, co-depositors, of a levy on the  
3 account. Even absent a requirement of state law, most  
4 banks I would think in following customary business good  
5 practice would notify co-depositors.

6 QUESTION: They'd find out rather dramatically  
7 when they tried to draw a check on the account.

8 MR. LAUBER: Well, that's the ultimate thing,  
9 is these people, one presumes they know. You don't  
10 lightly open a joint bank account with somebody.  
11 Presumably it's either your spouse or your friend or  
12 someone, and you'll find out about it. You write a  
13 check and it bounces, or you have the statement showing  
14 it.

15 QUESTION: All of the claims I gather could  
16 have been resolved if the Government, instead of an  
17 administrative levy under 6331, had brought a judicial  
18 suit under 7403, would it not?

19 MR. LAUBER: Well, that's correct.

20 QUESTION: I mean, the Government -- if you  
21 had done that, all parties with claims would have been  
22 made part of the suit.

23 MR. LAUBER: If we had sought to foreclose our  
24 tax lien on the joint account --

25 QUESTION: Tell me, how long has this

1 administrative levy procedure been followed by IRS?

2 MR. LAUBER: Since the Revenue Code was  
3 enacted, and it was in existence even before the income  
4 tax law.

5 QUESTION: Well, is Bittker wrong when he says  
6 as late as 1961 that resort to the administrative levy  
7 was rare? You've given us some statistics in the brief  
8 indicating the volume of the administrative levy today,  
9 but what was it 10, 20 years ago?

10 MR. LAUBER: As I understand it, the IRS has  
11 routinely used levies as the primary collection device  
12 for many years, because it's always been the most  
13 efficient way to collect taxes, particularly when you  
14 have a bank.

15 QUESTION: You think Bittker's just wrong  
16 factually when he said that?

17 MR. LAUBER: Well, I'd hate to say that. But  
18 without --

19 QUESTION: That's what he says. You have to,  
20 don't you?

21 MR. LAUBER: If that's what he says, I'd have  
22 to say he's --

23 QUESTION: I know it was true 20 years ago.

24 MR. LAUBER: In any event, now things have  
25 changed. Typically today --

1 QUESTION: Well, I'm just curious. If it was  
2 rare and you didn't resort to it, I take it most rescrpt  
3 must have been to 7403. What suddenly changed the  
4 practice?

5 MR. LAUBER: Well, Justice Brennan, again, I  
6 don't -- it has always been my understanding that levies  
7 have been since time immemorial the primary collection  
8 device. I think that the number of them have increased  
9 recently because now it's all done by computer. The  
10 computer generates the notice of levy to the bank.

11 QUESTION: It gets all messed up, too, doesn't  
12 it?

13 MR. LAUBER: It's like in Philadelphia.

14 But I think now the IRS serves literally  
15 millions of levies every year, and about a third of them  
16 go to banks.

17 QUESTION: Mr. Shapiro, if I understand your  
18 argument, the other two parties who have an interest in  
19 this joint account, the mother and sister, would have to  
20 bring sort of an action against the United States to  
21 recover whatever amounts of the account they own. Is  
22 there a statute that authorizes them?

23 MR. LAUBER: Well, they have an administrative  
24 remedy and a judicial remedy. They can file a claim  
25 with the IRS demanding return of the property.

1 QUESTION: There is an administrative remedy?

2 MR. LAUBER: Yes, there is. In Section 63 --

3 QUESTION: That may be in your brief.

4 MR. LAUBER: -- 43(b) of the Code. And if the  
5 IRS doesn't grant relief that way, then they go to court  
6 in a wrongful levy action against the Government.

7 But let me point out --

8 QUESTION: Which is authorized by statute?

9 MR. LAUBER: By statute. That was the  
10 provision Congress made for determining these ownership  
11 claims.

12 Let me point out the similarity of that remedy  
13 to what they would have if Roy himself had just  
14 withdrawn the money. Say Roy wrote a check for the  
15 whole balance in the account, as he was entitled to do,  
16 and he used it to pay for his groceries or his gambling  
17 debts or his tax bill.

18 Had he done that, Ruby and Neva would have had  
19 to file a claim in state court for return of the money,  
20 contending that Roy wrongfully spent money that was  
21 theirs. But the Revenue Code gives them an identical  
22 remedy in the levy context, except that it runs not  
23 against Roy, but against the IRS, which steps into Roy's  
24 shoes.

25 They can file a claim with the IRS or go to

1 court to get the money back. So they're no worse off at  
2 all. They simply have a different defendant in their  
3 action for return of the funds in question.

4 QUESTION: Do they have to prove the levy was  
5 wrongful?

6 MR. LAUBER: It is our position, and I think  
7 most courts have so held, that the plaintiff in a  
8 wrongful levy action, like any plaintiff in any civil  
9 action, has the burden of showing that the levy was  
10 wrongful.

11 QUESTION: And your contention is that this  
12 was not a wrongful levy even if they owned the money,  
13 isn't that right?

14 MR. LAUBER: Well, our contention would be  
15 that in that action, that if on the face of the account  
16 Roy had the power to withdraw all the money and pay it  
17 to the IRS --

18 QUESTION: Therefore the levy was not  
19 wrongful.

20 MR. LAUBER: Right.

21 QUESTION: Even if they owned the money.

22 MR. LAUBER: It would be up to them to prove  
23 some facts --

24 QUESTION: It wouldn't do them any good to  
25 prove it, is what I'm trying to suggest, because if the

1       levy is not wrongful they have no remedy against you.

2               MR. LAUBER: No, if they can show that the  
3       property was not Roy's property, but rather their  
4       property, that would make the levy wrongful.

5               QUESTION: Even though he had authority to  
6       withdraw it?

7               MR. LAUBER: Yes. That would have to be their  
8       contention, that even though he had the authority to  
9       withdraw the money, they had some understanding between  
10      themselves that it was really their money.

11              QUESTION: If they proved that would they  
12      prevail?

13              MR. LAUBER: If they could prove that the  
14      money he had the right to withdraw was in fact theirs,  
15      they would prevail on the wrongful levy action.

16              QUESTION: Against the Government?

17              MR. LAUBER: Against the Government. But  
18      that's what they'd have to prove against him if he  
19      withdrew the money.

20              QUESTION: Well, the way -- I suppose the way  
21      they would prove it is saying that, if we sued him in a  
22      state court, we would win.

23              MR. LAUBER: Exactly right.

24              QUESTION: Your position here is that the  
25      administrative levy allows the Government to levy on

1 property which it could not retain in some instances  
2 defending a wrongful levy action?

3 MR. LAUBER: That's right. It's not that we  
4 know we can't retain it, but there's a possibility that  
5 there may be other claims to the property, either known  
6 or unknown, which might prevent us from ultimately  
7 holding onto the property. It's a provisional measure.

8 QUESTION: You think the law permits you to  
9 become a stakeholder of the property against the will of  
10 anybody who has an interest in it?

11 MR. LAUBER: Well, this Court has said as  
12 much. The Court has said time and time again that the  
13 need for swift collection of the federal revenues means  
14 that property rights must yield provisionally to  
15 governmental need. And the point is, the IRS must levy  
16 on the property, get the funds secured and the revenues  
17 protected, and then people can fight out about who  
18 really owns it.

19 But in the meantime, the Government has the  
20 funds in hand so that they cannot be depleted by the  
21 taxpayer or his fellow depositors.

22 QUESTION: In this case was the amount of the  
23 levy the exact amount that was in the bank, as usual?

24 MR. LAUBER: It was somewhat less. I think  
25 the total on deposit was \$1500 and we levied on \$857,

1 which was Rcy's tax liability. So we didn't get all of  
2 it.

3 QUESTION: You didn't get all of it this  
4 time?

5 MR. LAUBER: Just a little over half.

6 QUESTION: When you say the Government has the  
7 funds in hand, does the Government take the money at  
8 that time and pay it into the treasury, so that the  
9 winner in a wrongful levy action has to file a claim  
10 against the Government, or does the Government actually  
11 hold the money in the bank?

12 MR. LAUBER: I believe the practice is for the  
13 bank to pay over the money to the IRS, and what the IRS  
14 does with it, frankly, I'm not sure. But it would be  
15 incumbent on the third party claimant to file a claim  
16 first with the IRS to get the money back. And they can  
17 simply issue it.

18 They don't have to go and get an  
19 appropriation. They can just issue the money back. If  
20 they find the levy was wrongful, i.e., not on the  
21 taxpayer's property, they can simply refund that or  
22 credit it to the third party claimant.

23 QUESTION: But doesn't that money go right  
24 straight in the treasury, right straight? Doesn't even  
25 slow down at IRS?

1 (Laughter.)

2 MR. LAUBER: Well, it does in the sense that  
3 if it's in a bank account of the local IRS office it is  
4 notionally in the treasury. But it doesn't like get  
5 mailed to Washington. The funds are there to be paid  
6 out by the local district director if he determines,  
7 upon a claim by the third party --

8 QUESTION: Well, all I know is that in a  
9 similar case up on the Second Circuit they told a  
10 certain judge that he didn't know where the money was.  
11 The IRS man said that.

12 MR. LAUBER: Well, that is not inconceivable  
13 to me.

14 QUESTION: Is that normal?

15 MR. LAUBER: But the point is, if the third  
16 party claimant comes in with a claim for the money and  
17 can show that this money didn't belong to the taxpayer,  
18 he will get the money back immediately, with interest if  
19 appropriate.

20 Our position in this case reflects the  
21 well-established proposition that the IRS in a levy  
22 proceeding steps into the shoes of the delinquent  
23 taxpayer. That is, the IRS can do whatever with respect  
24 to the account that the taxpayer himself could do.  
25 Here, because Roy had the power --

1 QUESTION: Can it do what the taxpayer could  
2 not do lawfully?

3 MR. LAUBER: But he could do it lawfully,  
4 because he had the right --

5 QUESTION: If the money belonged to the  
6 co-depositor, he could lawfully appropriate it to his  
7 own use and pay one of his own bills?

8 MR. LAUBER: But all the law gives them would  
9 be a claim in state court against him.

10 QUESTION: You'd consider that lawful conduct  
11 if someone does that?

12 MR. LAUBER: If he has the right --

13 QUESTION: You and I have a joint account, and  
14 the money in it happens to be yours because I haven't  
15 made a deposit for a couple of years. Can I lawfully  
16 withdraw that and spend it to pay my own bills? I can  
17 lawfully withdraw it, but can I use it to pay my own  
18 bills?

19 MR. LAUBER: I think you'd probably have --  
20 it's our position that you can. You may have to fight  
21 it out under state law whether you violate some  
22 understanding with your co-depositor, but you certainly  
23 have a claim to do that.

24 You have a right to withdraw the money. No  
25 one can stop you from withdrawing that money from the

1 account and spending it, and all the co-depositors have  
2 left is a claim against you to show that that was  
3 improper, that it was their property, not your  
4 property.

5 QUESTION: The bank discharges its liability  
6 by issuing the money to the drawer, doesn't it?

7 MR. LAUBER: Exactly right. And state law  
8 provides that once the bank pays the withdrawer, here  
9 Roy, they are immune from claims by the other depositors  
10 to the funds paid out accordingly. And therefore, the  
11 bank's most logical course of action is to pay out in  
12 response to the levy and simply have its duties at an  
13 end, and then the third party claimants can fight out in  
14 a wrongful levy action or a claim for credit as to who  
15 ultimately owns the property.

16 But the point is, because Roy had the right to  
17 withdraw the money from the account and pay it to the  
18 IRS as the Court of Appeals found, we have a right to  
19 levy on the money and require the bank to pay us  
20 directly, rather than paying Roy.

21 QUESTION: May I just ask one other question.  
22 You have said that the person who may turn out to own  
23 the money, other than the taxpayer, has a wrongful levy  
24 action against the Government, even though you acted  
25 within the statute.

1           Is there any case so holding, that the third  
2 party can recover on a wrongful levy theory what you are  
3 saying here is a proper procedure for the Government to  
4 follow?

5           MR. LAUBER: Justice Stevens, every case would  
6 be of that type. What one must keep in mind is the  
7 distinction between a levy, which is a provisional  
8 remedy -- all the levy does is say, you have a right to  
9 the property, we are levying on the property pending  
10 further determination.

11           QUESTION: Well, we put it in the bank now.

12           MR. LAUBER: Okay, the funds have been  
13 escrowed, in effect. And that doesn't determine any  
14 rights to the property, to ownership of the property.  
15 The fact that the IRS levies on it doesn't mean that it  
16 will get to keep the money.

17           That depends on whether another claimant can  
18 come in and prove under state law that they really owned  
19 that portion of the money.

20           QUESTION: My question is are there any joint  
21 bank account cases in which the co-owner of the account,  
22 on facts as we assume to exist here, has been able to  
23 recover the money from the Government on a wrongful levy  
24 theory?

25           MR. LAUBER: I'm not aware -- this is not

1 litigated very often because until the decision below  
2 nobody ever dreamed of, no bank ever dreamed of  
3 declining to honor a levy on a joint bank account.

4 QUESTION: Maybe no IRS person ever dreamed of  
5 making such a levy, either.

6 MR. LAUBER: No. We have, the IRS has figures  
7 that we levy on about 200,000 joint bank accounts every  
8 year.

9 QUESTION: Well, but what is the source of  
10 that information? You put that in your brief, but  
11 that's not in the record in this case, is it?

12 MR. LAUBER: No. We got that from IRS files.

13 QUESTION: Yes, but how do we know how  
14 reliable that is and whether they're all cases just like  
15 this? This is rather unusual, to come up with this much  
16 detailed evidence, that you rely on very heavily, not a  
17 word in the record about it.

18 MR. LAUBER: Well --

19 QUESTION: And treatises that say the contrary  
20 prior to 1981.

21 MR. LAUBER: There is no -- the figures we  
22 have given are derived from IRS files, and our office  
23 traditionally consults our clients in litigation, and  
24 typically in the petition for certiorari, to show how  
25 important the case is administratively, we do put

1 evidence about the number of cases pending, the number  
2 of cases raising the issue, to show how important the  
3 case is.

4 QUESTION: That's all a matter of public  
5 record. None of this is a matter of public record that  
6 I'm aware of.

7 MR. LAUBER: Well, I'm not sure of that. I  
8 think probably there is publicly available information  
9 about the number of levies the IRS issues every year.  
10 They couldn't tell you who the people were because of  
11 privacy.

12 QUESTION: How many of them are joint accounts  
13 and how many of them are joint accounts where they're  
14 not joint taxpayers; there are all sorts of varieties of  
15 facts.

16 MR. LAUBER: Well, I don't know if that's  
17 publicly available or not, or whether it could be  
18 reached through, the statistics could be reached by an  
19 FOIA request or something like that.

20 QUESTION: You say you can't recall any  
21 specific case. I understood you to say, responding to  
22 my earlier question, that there was a statute that  
23 authorized in this case the mother and sister to bring  
24 some sort of administrative procedure to recover their  
25 property.

1 MR. LAUBER: There is. That's Section 7426.

2 QUESTION: 7426.

3 MR. LAUBER: Of the Revenue Code, which  
4 provides a wrongful levy action in district court for a  
5 third party who contends that the Government has seized  
6 property of his for another's taxes. Section 6343(b)  
7 provides the administrative relief.

8 What Justice Stevens asked me was whether I  
9 could give him cases where people had actually invoked  
10 this remedy in court and succeeded. The only case I'm  
11 aware of, because as I said it hasn't come up a great  
12 deal because people didn't litigate about this until the  
13 decision below, is a district court case called Douglas  
14 v. United States. We cite it in our brief.

15 That was a situation where the mother, a  
16 mother and her son had a joint bank account and the IRS  
17 levied on the account to satisfy the son's liability,  
18 and the mother brought a wrongful levy action, I think  
19 some three years later, and her case was dismissed  
20 because she failed to comply with the statute of  
21 limitations on a wrongful levy action.

22 And so she did not succeed, but she could very  
23 well have had she brought her suit in a timely fashion  
24 as Congress provided.

25 QUESTION: The statute requires her to prove

1 two things, as I read it: one, that she had an interest  
2 in the property; and two, that the levy was wrongful.  
3 They're separate requirements, separated by an "and".

4 MR. LAUBER: Well, though in reality it's the  
5 same thing, because the way you show the levy was  
6 wrongful was to show that the levy was made upon  
7 property that did not belong to the taxpayer. And the  
8 way you show that is by showing that the property really  
9 belonged to you.

10 QUESTION: But that's your version of it.  
11 What Justice Stevens is reading suggests that it's a  
12 twofold requirement.

13 MR. LAUBER: Well, a levy I guess could be  
14 wrongful for other reasons than that it was made on  
15 property other than the taxpayer's property. The tax  
16 assessment could be invalid, the underlying assessment  
17 could be invalid, and there could be other defenses like  
18 that.

19 But among the ways you can prove a levy is  
20 wrongful is to show that it is not on the taxpayer's  
21 property. And in a joint account it's a zero sum game;  
22 it's either his property or your property. There's  
23 nobody else in the picture.

24 QUESTION: Many levies that turn out  
25 ultimately to be wrongful under your view of the statute

1 were nonetheless proper when administratively made.

2 MR. LAUBER: Right, because we were levying on  
3 the right to property which may have been subject to  
4 other competing claims by other people.

5 QUESTION: It just seems so circular as you  
6 phrase it in that way. If somebody, if the third party  
7 claimant has to prove that it's wrongful and the way you  
8 prove it is that that person in fact owned the money,  
9 then I don't understand why the statute doesn't tell you  
10 in the first place that the Government can't get it.

11 Section 6331 says that the administrative levy  
12 can be made upon property and rights to property  
13 belonging to the taxpayer. And if it didn't belong to  
14 him, then how do you have the authority?

15 MR. LAUBER: It belongs to him because he has  
16 the right, subject to possible claims by other people,  
17 to withdraw that money and pay it to the IRS.

18 QUESTION: But that depends entirely on  
19 looking at the question as to against whom did the  
20 taxpayer have the right. The bank certainly had the  
21 right to pay it over, but the taxpayer didn't have a  
22 right to take all the money as against his mother and  
23 sister or wife and mother or whoever it was.

24 MR. LAUBER: Well, he may or may not,  
25 depending on what they can prove. And the point is, the

1 scheme Congress set up is that the IRS will levy  
2 provisionally on a right to property even if there is  
3 some dispute about who really owns it. That way the  
4 funds are secured.

5 Then there will be a post-seizure hearing --

6 QUESTION: Well, the problem is that the  
7 statute, the statute, Mr. Lauber, is not written as  
8 though it's a provisional remedy. It says you can levy  
9 if it's property or right to property belonging to the  
10 taxpayer.

11 MR. LAUBER: Well, the way we interpret those  
12 words -- maybe it would be useful to go back to this  
13 Court's decision in United States v. Bess, where that  
14 involved a levy on the cash surrender value of a life  
15 insurance policy. And the Court clearly held that the  
16 right to compel payment of a sum to one is a right to  
17 property, and therefore, because the insured during his  
18 life could have compelled the insurance company to pay  
19 him the cash surrender value, we could levy on that.

20 Now, I should point out that in that situation  
21 other people could very well be prejudiced, because if  
22 we levied on the cash surrender value and got all the  
23 cash out the policy would be at an end. The  
24 beneficiaries of the life insurance policy would get no  
25 proceeds if that person thereafter died. So the fact

1 that there may be other third parties who have a claim  
2 to the money -- there it was an inchoate or contingent  
3 claim --

4 QUESTION: But isn't that an unenforceable  
5 expectancy, if you're just designated as a beneficiary  
6 of a life insurance policy, whereas here what the third  
7 party says is, I own it. It's not an expectancy.

8 MR. LAUBER: But the reason Congress decided  
9 that it was better to defer these ownership disputes to  
10 a later stage is because the IRS would have a very  
11 difficult time proving in every levy proceeding who  
12 owned the ultimate -- who are the ultimate owners of the  
13 property.

14 Who owns the money in a joint bank account may  
15 depend on who put the money in, who took it out, whether  
16 it's used to pay for the husband's shoes or the wife's  
17 dresses. The IRS could never prove that.

18 QUESTION: And when in doubt, seize it.

19 MR. LAUBER: Well, there is a certain  
20 presumption to that effect as well.

21 But the point is that the people who have the  
22 ability to show who owns it is the taxpayer. The IRS  
23 cannot know what deals co-depositors have made.

24 QUESTION: Under your theory, it's really two  
25 different property analyses. The property that you levy

1 on at the time of the administrative levy is not the  
2 same property that you're talking about in the  
3 wrongful --

4 MR. LAUBER: Well, that may be a good way of  
5 putting it. We're levying on a right to property.

6 QUESTION: But then how can that sort of a  
7 levy ever be termed wrongful, because there's no  
8 question that the man had the right to withdraw? You  
9 don't need a proceeding later to decide that.

10 MR. LAUBER: But although it could be that,  
11 although the person has a right to property, he may not  
12 have full ownership of the property in the ultimate  
13 sense, other people can show they have competing claims  
14 to it.

15 QUESTION: It would be perfectly logical to  
16 reach the result you're asking if the only remedy the  
17 third party claimant had was a remedy against the  
18 taxpayer himself for someone misusing it. But when you  
19 conceive that there's a remedy against the Government  
20 for wrongful levy, that's where it seems to get sort of  
21 circular.

22 MR. LAUBER: Well, it's not really circular.  
23 It's just the point at which you have a full-blown  
24 hearing about who owns what, and what Congress has  
25 determined is that the levy secures the property and

1 that there's a post-seizure hearing initiated by the  
2 third party claimant to flush out all the state law  
3 issues about who the ultimate owner is.

4 QUESTION: What if the taxpayer writes a check  
5 to the IRS and pays his bill, his tax bill, out of the  
6 joint property, and it exhausts the account? Then does  
7 the third party have any kind of a remedy against you or  
8 what? You've cashed the check and applied it to his tax  
9 bill. Does the third party then come in and say: Look,  
10 this fellow paid his -- wrote a check and paid his bill  
11 out of the joint account, but we want it back because it  
12 didn't all belong to him?

13 MR. LAUBER: I think there there would be no  
14 remedy against the Government. It would be against  
15 Roy.

16 QUESTION: So you think the reason they have a  
17 remedy under the levy, in the levy situation, is because  
18 Congress says they have?

19 MR. LAUBER: And because IRS has now taken the  
20 money. That's why the remedy is against --

21 QUESTION: Well, they've taken the money, but  
22 you may have applied it to his tax, and why is it any  
23 different situation than when he wrote a check and  
24 delivered it to you? It's because Congress apparently  
25 has provided a remedy for a wrongful levy.

1           MR. LAUBER: Well, I think you're right. I  
2 think it would be logical to think that, even after a  
3 wrongful, apparently wrongful levy, the third party  
4 might still possibly be able to sue the co-depositor  
5 taxpayer in state court on a theory that he was the  
6 beneficiary of this payment because it was credited  
7 against his tax bill.

8           QUESTION: What makes you think that the  
9 taxpayer has the right to withdraw this money?

10          MR. LAUBER: Well, the Arkansas statutes,  
11 banking statutes, give each co-depositor the right to  
12 withdraw money from the account.

13          QUESTION: Well, I know, but --

14          MR. LAUBER: And the bank must pay, absent  
15 notification --

16          QUESTION: But you wouldn't -- you also  
17 concede, though, that that right doesn't give him a  
18 right against his co-depositor, his co-owner of the  
19 account?

20          MR. LAUBER: That's right. He has a right vis  
21 a vis the bank to withdraw all the money.

22          QUESTION: So he has breached his duty to his  
23 co-depositors.

24          MR. LAUBER: He may or may not have, depending  
25 on what --

1 QUESTION: Well, let's assume he has. Let's  
2 assume he has. Then he had no right, no right to  
3 withdraw the money. The bank is off the hook, that's  
4 true, but that's the only reason for the provision in  
5 the Arkansas law.

6 But he really had no right to all that  
7 property at that time. If he did, the third party could  
8 never recover.

9 MR. LAUBER: Well, but he had a right vis a  
10 vis the bank to get the money in his hands.

11 QUESTION: All right, he had the right against  
12 the bank. Yes, he had the right against the bank.

13 MR. LAUBER: There are a number of Court of  
14 Appeals cases involving banks' claimed setoff, where the  
15 bank claimed it had a right to set off its claim against  
16 the account, and the courts held that as long as the guy  
17 could withdraw the money the bank had to pay it out, and  
18 the bank could then assert its setoff claim in a  
19 wrongful levy action later on.

20 QUESTION: Well, what if he writes a check,  
21 what if he writes a check on the account for his tax,  
22 and the co-depositor finds out about it and goes to  
23 court for an injunction and the bank is ordered not to  
24 pay it, not to honor the check, because he had no right  
25 to --

1 MR. LAUBER: Then I would agree we couldn't  
2 levy. If his right to withdraw was restricted, either  
3 by a court injunction or by some annotation on the  
4 signature card --

5 QUESTION: Well, what it's restricted by is if  
6 somebody else has an interest in the account.

7 MR. LAUBER: Well, they have achieved --

8 QUESTION: He doesn't own all the account, or  
9 any of it maybe.

10 MR. LAUBER: Well, but what restricts his  
11 right to withdraw the money vis a vis the bank is an  
12 injunction barring the bank from paying the money out to  
13 him.

14 QUESTION: Mr. Lauber, didn't the Court of  
15 Appeals hold in effect that Arkansas law did not give  
16 the taxpayer a right to withdraw the money, that it gave  
17 the bank a defense if it paid it out, that's all?

18 MR. LAUBER: But our position is that Arkansas  
19 law doesn't govern whether what Roy had is a right to  
20 property within the meaning of the relevant Revenue Code  
21 provisions. And those words appear in the federal  
22 statute, and our position is, under this Court's  
23 decision in Bess and other cases, the right to compel a  
24 bank to pay you money is a right to property that we can  
25 levy on.

1 And if other people have claims, they can come  
2 in later and they'll fight it out.

3 Thank you.

4 CHIEF JUSTICE BURGER: Mr. Wynne.

5 ORAL ARGUMENT OF TERRY F. WYNNE, ESQ.

6 ON BEHALF OF RESPONDENT

7 MR. WYNNE: Mr. Chief Justice and may it  
8 please the Court:

9 The issue is slightly different from that  
10 which the Government has posed to the Court. The issue  
11 is whether the National Bank of Commerce is personally  
12 liable to the IRS for refusing to honor the notice of  
13 levy served upon it. And to determine whether NBC is  
14 personally liable or not we have to do a two-step  
15 review.

16 The National Bank of Commerce would have to  
17 honor a levy if it were in possession of property or  
18 rights to district court belonging to Mr. Reeves.

19 QUESTION: Mr. Wynne, do you think if the bank  
20 had just gone ahead and paid the check to the IRS when  
21 the levy was made, that the bank would have had a  
22 defense as against its depositor, the taxpayer, and his  
23 wife and mother?

24 MR. WYNNE: I do not have any Arkansas case  
25 law or statutory law that protects the bank.

1 QUESTION: Well, you have that statute that  
2 says the bank is protected.

3 MR. WYNNE: But only from payments made to  
4 co-depositors. If it honors withdrawal requests of any  
5 depositors, it is protected from liability to  
6 co-depositors. But the IRS is not a co-depositor on  
7 this account, and in that sense the National Bank of  
8 Commerce has no assurance from any state authority that  
9 it would not be exposed to that liability.

10 So we do a twofold inquiry to determine if  
11 National Bank of Commerce can be personally liable.  
12 First we determine whether it's in possession of  
13 property or rights to property belonging to Mr. Reeves,  
14 and we look to state law to determine that. And the  
15 answer to that first inquiry is, no, we're not in  
16 possession of any such property or rights to property.

17 QUESTION: What if, as one of the questions  
18 put, the taxpayer here had written a check on the  
19 account or got a draft from the bank out of the account  
20 and paid it to the treasury. Would the other two joint  
21 owners, joint tenants, have any claim against IRS?

22 MR. WYNNE: They wouldn't have any claim under  
23 the particular statutes for a wrongful levy of any  
24 nature.

25 QUESTION: Would they have any kind of a

1 claim?

2 MR. WYNNE: I don't -- of course, I can't  
3 speak for the negotiable instruments laws that might be  
4 applicable to the check itself, but that is a potential  
5 conversion of those funds, and conceivably then the  
6 co-depositors could pursue their remedy against both the  
7 taxpayer and the IRS.

8 Beyond the question of whether Mr. Reeves owns  
9 property or has a right to property, to impose personal  
10 liability we've got to determine the value of that  
11 property. So even if you accept the Government's  
12 argument that this right to withdraw, better called a  
13 power to withdraw because it's not necessarily a right  
14 if it's the co-depositor's own money, but if he does  
15 have a power to make withdrawals which would be honored  
16 by the bank, what's that worth? What's its value?  
17 That's got to be determined to impose liability on the  
18 National Bank of Commerce.

19 The first place to look to answer the first  
20 question I posed is, of course, the state law, and we  
21 look at first the --

22 QUESTION: Well, just one moment. On the Bank  
23 of Commerce, could this man draw all of it?

24 MR. WYNNE: The National Bank of Commerce was  
25 required by statute to honor withdrawals made by him.

1 QUESTION: He could have withdrawn the whole  
2 thing himself?

3 MR. WYNNE: Yes, he could.

4 QUESTION: At any time, and that rule of the  
5 law, either way it was the same? State law or the rule  
6 of the bank were both the same?

7 MR. WYNNE: That's right. We would honor any  
8 withdrawal request from Mr. Reeves to the full balance  
9 of the account.

10 QUESTION: You'd honor it from any one of the  
11 three, would you not?

12 MR. WYNNE: That's correct.

13 QUESTION: They have each absolute control  
14 over the total?

15 MR. WYNNE: Vis a vis the bank.

16 QUESTION: How about each other?

17 MR. WYNNE: To the extent of being able to  
18 withdraw all the moneys from the account, each of them  
19 did have that power to make the withdrawal request. But  
20 to the extent of retaining the sums once they got the  
21 money in their possession, we don't know that.

22 QUESTION: It's the first one that gets there  
23 would get it.

24 MR. WYNNE: The first one that got there would  
25 get it.

1 QUESTION: And the other two had no rights  
2 after that?

3 MR. WYNNE: They would have the rights to  
4 conversion and their ownership rights under Arkansas  
5 law, but they would not have any action against the bank  
6 because the statute authorizes the bank to make the  
7 payments and protects the bank if it does.

8 Now, that of course is clearly -- that  
9 approach to the analysis of the joint account was  
10 clearly set forth by the Arkansas Supreme Court in Black  
11 versus Black, where it determined that these joint  
12 account statutes were passed for the bank's protection  
13 and did not create any title or any ownership. So the  
14 simple fact that Mr. Reeves is named on this joint  
15 account under Arkansas law creates in him no property  
16 right.

17 QUESTION: Mr. Wynne, maybe I missed  
18 something. Why did you say that these statutes were  
19 passed for the bank's protection?

20 MR. WYNNE: Reading that from black versus  
21 black, by the Arkansas Supreme Court, in which the court  
22 specifically said that these statutes invest no title,  
23 but were passed to protect the bank honoring the  
24 withdrawal request from the one co-depositor.

25 QUESTION: Couldn't they have been passed for

1 the convenience of the depositors?

2 MR. WYNNE: They could have been passed for  
3 that reason. They could have been passed for several  
4 other reasons. But I have only the Arkansas Supreme  
5 Court's decision to rely on.

6 QUESTION: Is that statement exclusive or  
7 inclusive?

8 MR. WYNNE: I think it's exclusive of the  
9 question of whether the joint statute, joint account  
10 statute, created any title or ownership, as it  
11 specifically excludes title or ownership. But it is not  
12 exclusive of anything beyond that particular exclusion.

13 Black v. Black specifically addressed the  
14 question of whether money in a joint account -- the fact  
15 that money was in a joint account determined any  
16 ownership interests, that one fact alone. And in Black  
17 v. Black the supreme court said it does not. You have  
18 to look beyond the face of the account to determine the  
19 agreement of the parties, where the deposits came from,  
20 and those sorts of facts.

21 And that was also recognized by the district  
22 court and the Eighth Circuit in its opinion.

23 Those are the only things we do know at this  
24 point, is that Roy Reeves is named along with Ruby and  
25 Neva on two joint accounts, a savings account and a

1 checking account. We know that under Arkansas law NEC  
2 would be required to honor withdrawal requests made by  
3 him. We don't know anything more.

4 That was the analysis that the Eighth Circuit  
5 used in looking at whether there was a state-created  
6 property right which is required by the decisions of  
7 this Court, and the Eighth Circuit correctly concluded  
8 that there has been no establishment of any state  
9 property right. The Government has failed to provide us  
10 enough evidence or information to determine whether  
11 there exists any property or right to property, and  
12 that's their burden.

13 The Eighth Circuit then correctly found itself  
14 to be in accord with Stock Yards Bank, which was a very  
15 similar situation dealing with savings bonds instead of  
16 a joint bank account. But in Stock Yards Bank the  
17 savings bonds were held in joint names of husband and  
18 wife, and the federal regulations applicable to them  
19 said that invests no title, that you have to look to the  
20 agreement of the parties. It's identical to Arkansas  
21 law in that concept.

22 And in Stock Yards Bank the Sixth Circuit  
23 found that the simple fact of joint title did not  
24 determine any property interests or rights to property.  
25 So we have two circuits in accord at this point.

1 As the Eighth Circuit noted, its decision is  
2 not going to be in conflict with any other circuits, and  
3 it specifically reviewed decisions of the Second, Fifth,  
4 and Ninth Circuits, which the Government, by the way,  
5 submits are in conflict.

6 But the Second Circuit case of U.S. versus  
7 Sterling National was an offset case. The bank claimed  
8 not to be required to honor the levy because it had a  
9 right of offset or set-off against the account  
10 deposits. There was no question as to the ownership of  
11 the deposit itself. The tax debtor owned all of the  
12 deposits.

13 Similarly, in the Fifth Circuit --

14 QUESTION: Mr. Wynne, could I ask you a  
15 factual question. Maybe this is outside the record, but  
16 there have been apparently millions of these levies over  
17 the past several years, and I guess your bank is a big  
18 enough bank to have gotten a lot of them. Has your bank  
19 changed its policy recently and just decided not to  
20 honor the obligations to the Government?

21 MR. WYNNE: Our bank is a relatively small  
22 bank, but since 1959 we've taken this posture. My  
23 partner Mr. Matthews rendered that opinion based on  
24 Stock Yards Bank at that time.

25 Our bank only gets three to four levies of a

1 joint nature per year. We get additional levies, but  
2 normally it's clear how the title is held or the tax  
3 liability is joint.

4 QUESTION: And the bank has always taken the  
5 position that they won't honor a levy like this?

6 MR. WYNNE: That's correct.

7 Now, the only pertinent cases that I've been  
8 able to review or that the Government has produced in  
9 similar situations where the Government or IRS was  
10 attempting to levy on joint accounts, the Government  
11 either accepted or was required to bear a burden of  
12 showing more than the joint account title. And the  
13 cases specifically cited by the Government are U.S.  
14 versus Equitable Trust, District Court of Maryland --  
15 the Government produced the agreement of the parties and  
16 produced deposit records, produced testimony of  
17 witnesses to establish the ownership of the money in the  
18 joint accounts.

19 And this is what we say is the Government's  
20 burden in this case. It's got to demonstrate whose  
21 money is in this bank before we're required to honor  
22 this levy. It's a burden that we can't accept, nor can  
23 we carry, because we have no way of knowing.

24 QUESTION: Well, in effect you're saying that  
25 the administrative levy proceeding just won't be allowed

1 in this situation, because a levy I suppose always acts  
2 ex parte, until you can have a hearing at any rate?

3 MR. WYNNE: That's right, the levy procedure  
4 is just not -- it's ill suited for this. Perhaps a  
5 Section 7403 lien foreclosure proceeding or an equity  
6 procedure is much better suited for purposes of --

7 QUESTION: Has your bank been involved with  
8 many 7403 proceedings?

9 MR. WYNNE: Never had one, Your Honor.

10 QUESTION: Never had one. Do you know of  
11 any?

12 MR. WYNNE: Do I know of any that have  
13 occurred?

14 QUESTION: Yes.

15 MR. WYNNE: Anywhere?

16 QUESTION: Yes.

17 MR. WYNNE: Tyson versus U.S. as I understand  
18 it was a 7403.

19 QUESTION: I can't imagine why the Government  
20 would ever resort to 7403 if they're right about the  
21 availability of the administrative levy. It's too  
22 easy.

23 MR. WYNNE: It is. It's very easy for them.  
24 But as noted in the Stock Yards Bank case and as noted  
25 in this Court's decision in Rodgers, the levy procedure

1 is just not very well adapted to determining property  
2 interests, and our case is a perfect example of that.  
3 We've got an Arkansas law that says this demonstrates no  
4 title.

5 QUESTION: I take it the bank would have to be  
6 a party to a 7403, would it not?

7 MR. WYNNE: I believe so.

8 QUESTION: Mr. Wynne, with all this in the  
9 background, why does your bank indulge in or permit  
10 joint accounts at all?

11 MR. WYNNE: Well, they call themselves a full  
12 service bank, and we have requests from our depositors  
13 and we're making the services available.

14 QUESTION: Because your competition does?

15 MR. WYNNE: Competition. That's the  
16 competitive market, of course. We continue to make  
17 these available.

18 QUESTION: Because the customers want it,  
19 really?

20 MR. WYNNE: That's right, that's right. They  
21 want it for the convenience of having a husband and wife  
22 each draw checks, or perhaps this was a mother, son, and  
23 daughter-in-law, that convenience.

24 But that convenience doesn't tell us  
25 ownership, and it therefore doesn't tell us what's

1 subject to levy and it doesn't tell us what National  
2 Bank of Commerce should have given them, if anything.  
3 And accordingly, it shouldn't put National Bank of  
4 Commerce in a liability posture.

5 QUESTION: But if a check came along signed by  
6 Roy, is it, not for taxes but just drawing everything,  
7 your bank would pay it out without any question as to  
8 whether Neva or Ruby owned it?

9 MR. WYNNE: That's correct. That would be our  
10 statutory obligation, to make that payment on his  
11 withdrawal request.

12 QUESTION: Would it be any different if it was  
13 a check payable to the IRS?

14 MR. WYNNE: It'd make none at all. That would  
15 then be the classic situation described in the Arkansas  
16 statute, a withdrawal request or a check written by a  
17 co-depositor.

18 QUESTION: But you draw the distinction  
19 between what the Chief Justice has just indicated and  
20 the levy?

21 MR. WYNNE: I do. The IRS, while it may stand  
22 in the shoes of a tax debtor, is not the tax debtor.  
23 And for purposes of Arkansas law we are only insulated  
24 from any liability if we honor the request of a  
25 depositor. We don't think that we would be insulated

1 from a levy payment to the IRS.

2 More importantly, let me focus again on this  
3 case, which is a personal liability action, as opposed  
4 to a levy, as far as a levy enforcement procedure. The  
5 burden again is proof that we were in possession of  
6 property or rights to property belonging to the tax  
7 debtor, and there's absolutely no proof of that.

8 QUESTION: If you had honored this check, your  
9 bank had honored this check, would the other two  
10 non-taxpayers have any action under Arkansas law against  
11 the bank?

12 MR. WYNNE: We feel that they would because it  
13 would be a breach of the contractual agreement between  
14 depositors and the bank. They place that --

15 QUESTION: I thought you said earlier that  
16 you'd honor any check that came through.

17 MR. WYNNE: Well, I misunderstood your  
18 question, Mr. Chief Justice.

19 QUESTION: My question now is, having -- as  
20 you've said a few minutes ago, the bank had honored a  
21 check payable to IRS for exactly the same dollar amounts  
22 as are involved here. Then would the other two joint  
23 owners, joint tenants, have a claim against the bank  
24 under Arkansas law?

25 MR. WYNNE: No. If Roy Reeves had written a

1 check payable to the IRS for his tax debt --

2 QUESTION: Because each of the three had  
3 authorized every one of the three to do precisely that.

4 MR. WYNNE: That's correct.

5 Well, let me re-comment on that. We don't  
6 know whether they had authorized him to write checks and  
7 pay the IRS. We simply know that --

8 QUESTION: Well, you know that they authorized  
9 the bank to honor any check that any one of them signed,  
10 do you not?

11 MR. WYNNE: Well, we simply know that he is  
12 named on this joint account, and the statute allows the  
13 bank to recognize those. But we don't know whether Neva  
14 and Ruby have told Roy, you can draw checks on this  
15 account, or not.

16 QUESTION: But your point, I gather, is that  
17 Arkansas bank law obligates the bank to honor any check  
18 drawn by a depositor on the account, but there's no  
19 obligation under Arkansas law to pay anything out on the  
20 basis of an administrative levy to the IRS because it's  
21 not a depositor on the account.

22 MR. WYNNE: That's exactly right, that's  
23 exactly right.

24 If the Court has no further questions, I've  
25 concluded.

1 QUESTION: Does the record contain the  
2 agreement of deposit? People normally sign a card  
3 setting forth the conditions of the deposit. Does the  
4 record contain that?

5 MR. WYNNE: It does not.

6 Thank you.

7 MR. WYNNE: No, your time has expired, I  
8 guess.

9 Thank you, gentlemen. The case is submitted.

10 (Whereupon, at 1:49 p.m., the argument in the  
11 above-entitled case was submitted.)

12 \* \* \*

CERTIFICATION.

erson Reporting Company, Inc., hereby certifies that the  
ached pages represents an accurate transcription of  
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84-498 - UNITED STATES, Petitioner V. NATIONAL BANK OF COMMERCE

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E that these attached pages constitutes the original  
nscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

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