

# Denial of Due Process: The Unrecognized Right to an Attorney for Jeopardy Assessed Taxpayers

Karen M. Streisfeld

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

## Recommended Citation

Karen M. Streisfeld, *Denial of Due Process: The Unrecognized Right to an Attorney for Jeopardy Assessed Taxpayers*, 75 Cornell L. Rev. 1425 (1990)  
Available at: <http://scholarship.law.cornell.edu/clr/vol75/iss6/5>

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

## THE DENIAL OF DUE PROCESS: THE UNRECOGNIZED RIGHT TO AN ATTORNEY FOR JEOPARDY ASSESSED TAXPAYERS

The sixteenth amendment to the Constitution granted Congress the right to impose and collect taxes on income.<sup>1</sup> As with any government action, however, the requirements of due process as provided in the fifth amendment<sup>2</sup> restrain the exercise of this power.

The Internal Revenue Code (the "Code") empowers the Internal Revenue Service (the "Service") to assess and seize a taxpayer's assets and attach liens encumbering his property without notice or a hearing<sup>3</sup> if the Service determines that collection of the funds "will be jeopardized by delay."<sup>4</sup> Should the taxpayer disagree with the

---

<sup>1</sup> U.S. CONST. amend XVI. The sixteenth amendment provides: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." Prior to the enactment of the sixteenth amendment, Congress's taxing power was limited by article 1, section 9, clause 4, which prevented any direct taxation unless in proportion to the census. In *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429 (initial decision), 158 U.S. 601 (decision on rehearing) (1895), the Supreme Court held unconstitutional the Income Tax Act of 1894. The Court characterized the Act, which had imposed a tax on income derived from real estate and from personal property without apportionment, as a direct tax, which article 1, section 9, clause 4 forbids. *Id.* Eighteen years later, the states ratified the sixteenth amendment, and Congress subsequently enacted the first income tax the same year. See JOHN E. NOWAK, RONALD D. ROTUNDA & J. NELSON YOUNG, CONSTITUTIONAL LAW 183 (3d ed. 1986). *Pollock* was explicitly overruled in 1988 in *South Carolina v. Baker*, 485 U.S. 505.

<sup>2</sup> The fifth amendment of the United States Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." *But see* *Brushaber v. Union Pac. R.R.*, 240 U.S. 1 (1916). In *Brushaber*, a taxpayer challenged the income tax on the basis of a denial of due process. The Court held that:

So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause.

*Id.* at 24. This Note, however, does not challenge the constitutionality of the income tax under the fifth amendment due process clause, but rather the manner in which Congress has implemented it.

<sup>3</sup> See *infra* text accompanying notes 20-31.

<sup>4</sup> I.R.C. § 6851, the Termination Assessment provision, allows the Service to terminate the taxpayer's taxable year and assess a deficiency for federal income tax "[i]f the Secretary finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act . . . tending to prejudice or to render wholly or partially ineffectual proceedings to collect the income tax for the current or the immediately preceding taxable year unless such proceeding be brought without delay . . ." I.R.C. § 6861 allows the Service to immediately assess income, estate, and gift taxes for a taxable year which has

assessment, he must sue the Service, which has already seized his assets, for a refund. This is often difficult, however, because in many cases the Service has left the taxpayer with no assets to pay an attorney.<sup>5</sup>

Taxpayers have argued that procedural due process requires that they have the assistance of counsel to litigate their claims against the government, and they have attempted to persuade the courts to release funds from the seized property for this purpose.<sup>6</sup> Courts have uniformly denied this request, holding that they cannot determine whether a party's constitutional rights have been violated until a post-trial study of the case.<sup>7</sup>

Traditionally, the cases that examine the constitutional right to counsel focus on whether due process demands that the federal government provide an indigent party with counsel free of charge. An important issue implicit in these traditional cases, however, is whether the right to counsel exists *at all* for these litigants,<sup>8</sup> regard-

---

ended, "[i]f the Secretary believes that the assessment or collection of a deficiency . . . will be jeopardized by delay . . ." I.R.C. § 6862 authorizes the Service to immediately assess any *tax other* than income, estate, and gift taxes for a taxable year which has ended "[i]f the Secretary believes that the collection . . . will be jeopardized by delay . . ." This Note addresses only § 6861 concerns: jeopardy assessment of income, estate, and gift taxes.

<sup>5</sup> See *Rosenblum v. United States*, 549 F.2d 1140, 1141 (8th Cir.) (After Service jeopardy assessed the taxpayers and then levied against moneys paid to taxpayers' attorney to represent taxpayers in the Tax Court, attorney sued the United States arguing that "the seizure by the IRS, including the seizure of the money paid to [the attorney], has deprived the taxpayers of their alleged constitutional right to be represented by competent tax counsel in the litigation . . . which litigation plaintiffs describe as being complicated and technical."), *cert. denied*, 434 U.S. 818 (1977); *Lloyd v. Patterson*, 242 F.2d 742, 743 (5th Cir. 1957) (jeopardy assessed taxpayer contended that unless permitted access to assessed funds, he would be unable to retain counsel); *United States v. Brodson*, 241 F.2d 107 (7th Cir.) (Defendant in criminal tax evasion case argued that the pendency of a civil jeopardy assessment case prevented him from obtaining the assistance of counsel, here, an accountant. The court found that future events may occur which would obviate the necessity of releasing funds; for example, an accountant may volunteer his aid, or a "friend may gratuitously furnish defendant with the services of an accountant." *Id.* at 109, *cert. denied*, 354 U.S. 911 (1957); *Shapiro v. Commissioner*, 73 T.C. 313 (1979), *appeal dismissed*, 632 F.2d 170 (2d Cir.), *appeal dismissed*, 633 F.2d 206 (2d Cir. 1980), *cert. denied*, 449 U.S. 1082 (1981); *Human Eng'g Inst. v. Commissioner*, 61 T.C. 61 (1973) (recognizing the "difficult position" of the taxpayer who must sue the same government who seized his total assets pursuant to a jeopardy assessment, yet feeling constrained by precedent to refuse the release of funds to pay an attorney). The court held that the due process issue must be decided post-trial. *Id.*

<sup>6</sup> See *Lloyd*, 242 F.2d at 742; *Brodson*, 241 F.2d at 107; *Shapiro*, 73 T.C. at 313; *Human Eng'g Inst.*, 61 T.C. at 61.

<sup>7</sup> *Lloyd*, 242 F.2d at 744; *Brodson*, 241 F.2d at 110; *Shapiro*, 73 T.C. at 315; *Human Eng'g Inst.*, 61 T.C. at 67.

<sup>8</sup> Along similar lines, some have argued that the constitutional right to counsel should be extended to litigants in other types of civil disputes. See, e.g., Mark S. Blaskey, *University Students' Right to Retain Counsel for Disciplinary Proceedings*, 24 CAL. W.L. REV. 65 (1988) (proposing that inasmuch as university students subjected to a disciplinary hear-

less of who pays the attorney's fees. If the right to counsel does not exist in the circumstances of a particular case, then logically there is no right to appointed counsel either.

Part I of this Note examines the application of the Code's jeopardy assessment provision,<sup>9</sup> explains the history of the jeopardy assessment,<sup>10</sup> explores the remedies available to a taxpayer faced with a jeopardy assessment,<sup>11</sup> and reveals the insufficiency of these remedies.<sup>12</sup> Part II reviews the evolution of the constitutional right to counsel in the criminal context,<sup>13</sup> and its extension to some civil cases.<sup>14</sup> Part III analyzes jeopardy assessments in light of this emerging right to counsel in civil cases.

This Note concludes that a taxpayer should have the right to assistance of counsel if the government has seized his funds pursuant to a jeopardy assessment. However, this right should not require the government to provide the taxpayer with court-appointed counsel at the expense of other taxpayers. Rather, Congress should amend the Code to require that courts establish and administer escrow accounts holding the seized funds. Courts could thereby ensure that the funds remained available to the government should it ultimately prevail and at the same time provide for payment of reasonable attorney fees to protect the interests of the individual. Thus, the purpose of the jeopardy assessment would be fulfilled without depriving the taxpayer of the assistance of counsel.

## 1

### BACKGROUND

#### A. Assessment

Before the Service may collect taxes, it first must assess them<sup>15</sup> by noting in its records that taxes are owing and due. The Code authorizes the Service to assess taxes only under certain conditions. First, it may assess the amount which the taxpayer determined he

---

ing are placed into an environment similar to that of a criminal prosecution—charges are brought, and witnesses testify and are cross examined—they should have the right to obtain counsel to represent them); Note, *The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 WM. & MARY L. REV. 627 (1989) (authored by William L. Dick, Jr.) (1989) (suggesting that termination of parental status and paternity actions are cases requiring a right to counsel, at least in most instances).

<sup>9</sup> See *infra* text accompanying notes 15-31.

<sup>10</sup> See *infra* text accompanying notes 32-65.

<sup>11</sup> See *infra* text accompanying notes 66-81.

<sup>12</sup> See *infra* text accompanying notes 66-81.

<sup>13</sup> See *infra* text accompanying notes 82-102.

<sup>14</sup> See *infra* text accompanying notes 103-19.

<sup>15</sup> I.R.C. § 6502(a) provides: "Where the assessment of any tax imposed by this title has been made . . . such tax may be collected . . ."

owed and indicated on his tax return.<sup>16</sup> Second, it may assess any additional amount which the taxpayer would have shown as due and payable on his tax return but for a computational error.<sup>17</sup> Third, the Code provides for the judicial determination of a tax assessment in the event that the Service disagrees with the taxpayer's determination of his own tax liability.<sup>18</sup> This Note addresses the fourth method of assessment—that is, assessments made under the Code's jeopardy provisions, which collectively provide for the immediate assessment and collection of any tax deficiency upon the Service's determination that the need for such immediate action exists.

## B. Section 6861

Code section 6861 allows the Service to depart from its usual system of tax assessment and collection<sup>19</sup> to meet the demands of exigent circumstances: the Service may jeopardy assess taxes when it believes that collection of a deficiency would be "jeopardized by delay."<sup>20</sup> Because of the government's perceived need to act as quickly as possible to secure possession of the funds or other assets, most of the safeguards which protect non-jeopardy assessed taxpayers do not apply to the jeopardy taxpayer. First, the non-jeopardy taxpayer may voluntarily pay the deficiency asserted by the Service and then sue for a refund in a post-payment forum,<sup>21</sup> or he may

---

<sup>16</sup> *Id.* § 6201(a)(1).

<sup>17</sup> *Id.* § 6213(b)(1).

<sup>18</sup> The Code empowers the Service to send to the taxpayer a "notice of deficiency," which indicates, essentially, the amount of tax imposed by the Service which exceeds the amount the taxpayer showed on his return as owing. *Id.* §§ 6211, 6212(a). The notice of deficiency informs the taxpayer of the Service's determination of his taxes and gives the taxpayer 90 days within which to dispute the asserted tax liability. If the taxpayer disputes this deficiency, he may file a petition in the Tax Court for the redetermination of his tax liability, and thereby prevent the Service from assessing the deficiency until the judiciary makes a final determination. *Id.* § 6213(a). If the taxpayer does not file a petition with the Tax Court within ninety days, the Service may assess the deficiency and collect the tax. *Id.*

<sup>19</sup> See *supra* note 18 for a brief explanation of the standard method of assessment and collection.

<sup>20</sup> I.R.C. § 6861. Collection might be considered to be "jeopardized by delay," for example, "if a taxpayer attempts to leave the U.S. or to remove his property from the U.S. while there is any dispute concerning his tax liability for a past year, IRS may make a jeopardy assessment." Fed. Tax Coordinator 2d (Res. Inst. Am.) para. T-3601 (Oct. 29, 1987).

In addition, there is a presumption that collection will be jeopardized by delay if an individual in possession of cash in an amount greater than \$10,000 denies ownership of it, and does not claim that it belongs to another individual who does acknowledge ownership. I.R.C. § 6867(a).

<sup>21</sup> In a non-jeopardy situation, if the taxpayer and the Service do not settle, the taxpayer receives his "ticket to the Tax Court"—the 90-day notice of deficiency—before the assessment and before the Service may begin collection. If the taxpayer chooses to pay the asserted tax liability before litigation, the taxpayer may sue for a refund in either

choose to delay assessment and payment of taxes by litigating the determination of his tax liability in the Tax Court.<sup>22</sup> The jeopardy taxpayer has no such choice: he cannot litigate prior to assessment and payment because the government has already forced him to "pay" by seizing his assets. Second, to assess the jeopardy taxpayer, the Service need only assert the "reasonable belief" that the government's ability to collect the money or property will be jeopardized by delay.<sup>23</sup> In contrast to the non-jeopardy situation, the Secretary of the Treasury or his delegate has sole discretion to make this determination,<sup>24</sup> without any preassessment judicial approval.<sup>25</sup> Finally, after the Service makes an assessment in a non-jeopardy situation, it must send the taxpayer a notice of levy (or seizure) and then wait ten days before resorting to self-help remedies and seizing the taxpayer's assets.<sup>26</sup> This protection does not apply to the jeopardy assessed taxpayer,<sup>27</sup> whose funds and other assets may be seized even before he receives a notice of deficiency.<sup>28</sup> Although the Service must send the taxpayer a written statement that includes the information it relied on in making the jeopardy assessment, the Service need not send this notice until five days *after* it makes the assessment.<sup>29</sup> The Service will virtually always seize a jeopardy assessed taxpayer's property before it is compelled to send the notice, because any notice to the jeopardy taxpayer before collection would defeat the purpose of the jeopardy provision. That is, if a taxpayer were inclined to leave the country to avoid paying his taxes, he would likely do so immediately upon receiving notice of an impending seizure of his assets.<sup>30</sup> Thus, the Service seizes the jeopardy assessed taxpayer's property before giving him any notice and without any prior judicial determination.<sup>31</sup>

---

the United States Claims Court (formerly the Court of Claims) or the federal district court that has jurisdiction over him.

<sup>22</sup> See *infra* text accompanying notes 35-36.

<sup>23</sup> *Transport Mfg. & Equip. Co. v. Trainor*, 382 F.2d 793 (8th Cir. 1967); see also I.R.C. § 7429, which permits the United States district courts to review a jeopardy assessment to determine whether it is "reasonable under the circumstances." For a discussion of I.R.C. § 7429, see *infra* notes 77-80 and accompanying text.

<sup>24</sup> *Transport Mfg.*, 382 F.2d at 799.

<sup>25</sup> In addition to the absence of preassessment judicial approval, no meaningful statutory guidelines exist for determining when collection will be jeopardized by delay. Therein lies a great risk of abuse. Charles H. Gustafson, *Judicial Review of Jeopardy Tax Collection: Sentence First, Verdict Afterwards*, 26 CASE W. RES. 315, 316 (1976).

<sup>26</sup> I.R.C. § 6331(a).

<sup>27</sup> *Id.* § 6331(d)(3).

<sup>28</sup> *Id.* § 6861(b). For the jeopardy assessed taxpayer, the Service does not have to send a notice of deficiency until 60 days after making the assessment. *Id.*

<sup>29</sup> *Id.* § 7429(a)(1); Treas. Reg. § 301.7429-1 (1990).

<sup>30</sup> See Note, *Assessing Internal Revenue Service Jeopardy Procedures: Recent Legislative and Judicial Reforms*, 26 CLEV. ST. L. REV. 413, 418 (1977) (authored by Margaret M. Armen).

<sup>31</sup> There is judicial review to determine whether the "reasonable belief" was in-

### C. History of the Jeopardy Assessment

#### 1. *Legislative History: The Origin of the Statute*<sup>32</sup>

Before the enactment of the first jeopardy provision in 1924,<sup>33</sup> federal law required an individual to pay whatever tax the Bureau of Internal Revenue (now the Internal Revenue Service) alleged to be due, before he was provided with a forum in which to litigate the actual amount of debt. Thus, the pay-first method of tax collection was originally the exclusive procedure for all taxpayers.<sup>34</sup>

The Revenue Act of 1924 created both the jeopardy provision<sup>35</sup> and the Board of Tax Appeals (now the United States Tax Court), as a forum for prepayment disputes. Congress recognized that "[t]he right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment."<sup>36</sup> However, Congress limited the use of the Board of Tax Appeals to non-jeopardy taxpayers.<sup>37</sup> Before the creation of the Board of Tax Appeals, any taxpayer lacking sufficient capital to pay a large assessment would have had to borrow money to pay the assessment before litigating the true amount of the debt. The taxpayer who could not satisfy the assessment could expect to have the government seize his assets to pay the tax. In some cases this meant the taxpayer would incur serious hardship, such as the loss of a business. If a court ultimately rejected the amount of the assessment, the taxpayer may have been financially ruined even though he never owed any taxes.

The overhaul of the assessment process included a substantial extension of the amount of time between the initial issuance of a deficiency notice and the ultimate payment by the taxpayer.<sup>38</sup> Congress created the jeopardy assessment to protect the government's interests during this extended time frame.<sup>39</sup> The new jeopardy as-

---

deed reasonable, and as to the reasonableness of the amount, if any, of the assessment. See *infra* notes 79-80 and accompanying text.

<sup>32</sup> See Note, *supra* note 30, at 418, for additional discussion of the legislative history.

<sup>33</sup> Revenue Act of 1924, ch. 234, § 274(d), 43 Stat. 297.

<sup>34</sup> The first income tax was enacted in 1913, but the first prepayment forum did not exist until 1924.

<sup>35</sup> Revenue Act of 1924, ch. 234, § 274(d), 43 Stat. 297.

<sup>36</sup> H.R. REP. NO. 179, 68th Cong., 1st Sess., at 7 (1924).

<sup>37</sup> Revenue Act of 1924, ch. 234, § 900(a), 43 Stat. 336.

<sup>38</sup> Before the 1924 Act, the government could collect deficiencies in as few as 40 days after the mailing of the notice of deficiency. Revenue Act of 1924, ch. 136, § 250(d), 42 Stat. 265, 266 (repealed 1924). The 1924 Act provided for a 60-day period (now extended to 90 days) in which the taxpayer could appeal to the Board of Tax Appeals before paying. Naturally, the ultimate decision of the Board of Tax Appeals would not come until months or years after the taxpayer initiated the appeal. Note, *supra* note 30, at 418 n.37.

<sup>39</sup> Note, *supra* note 30, at 418.

assessment would help ensure that a taxpayer would not leave the jurisdiction or render himself judgment-proof, before paying his taxes.<sup>40</sup>

2. *Constitutional Issues: The Jeopardy Assessment Per Se Does Not Violate Due Process*<sup>41</sup>

The jeopardy assessment is an extremely harsh and unusual provision—one that seems to run contrary to the protections of the due process clause at the core of our judicial system. Nevertheless, courts have upheld its constitutionality.

In *Phillips v. Commissioner*,<sup>42</sup> the Coombe Garment Company had distributed its assets to its stockholders prior to dissolution.<sup>43</sup> The Bureau of Internal Revenue (the "Bureau") subsequently assessed the defunct company but collected only a small portion of the taxes.<sup>44</sup> In addition, the Bureau assessed Phillips on the theory that he was liable as a stockholder-transferee of the corporate funds owed the government.<sup>45</sup> Phillips protested that the government violated his due process rights, because the Bureau made the assessment without first litigating the underlying issue of whether transferee liability could exist on the facts of that case.<sup>46</sup>

The Supreme Court held that although the government made the assessment without a hearing, summary assessment procedures satisfy due process requirements as long as the taxpayer has an opportunity for "eventual judicial review."<sup>47</sup> In reaching this determination, Justice Brandeis, writing for the Court, distinguished property rights from rights to life and liberty<sup>48</sup> and cited other instances where government necessity outweighed property rights: the forced destruction of property to protect public health, the summary seizure of property during wartime, and the acquisition of

<sup>40</sup> *Id.*

<sup>41</sup> See *supra* note 2. See also Note, *supra* note 30, at 420-27 (discussing cases that establish the constitutionality of jeopardy provisions).

<sup>42</sup> 283 U.S. 589 (1931).

<sup>43</sup> *Id.* at 591.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 591-92. Distributees of assets of a dissolved corporation were liable to discharge unpaid corporate taxes. The transferred liability could be enforced in the same manner as that of any other delinquent taxpayer. Revenue Act of 1926, ch. 27, § 280, 44 Stat. 61 (codified as amended at I.R.C. § 6901 (1988)). For a discussion of transferee liability for delinquent taxes, see *Phillips*, 283 U.S. at 592-94 nn.2-4.

<sup>46</sup> *Phillips*, 283 U.S. at 593.

<sup>47</sup> *Id.* at 597 (citing *Springer v. United States*, 102 U.S. (12 Otto) 586 (1880); *Scottish Union & Nat'l Ins. Co. v. Bowland*, 196 U.S. 611 (1905)). Although prior cases examined the constitutionality of summary proceedings in tax cases, see *Phillips*, 283 U.S. at 595 n.5, *Phillips* is generally considered the case that settled the issue. Note, *supra* note 30, at 423 n.69.

<sup>48</sup> *Phillips*, 283 U.S. at 595; see also Note, *supra* note 30, at 422-23.

property by eminent domain.<sup>49</sup> In this case, the Court held, the “need of the government promptly to secure its revenues” outweighs the individual’s due process rights.<sup>50</sup>

In the circumstances of *Phillips*, a non-jeopardy situation, the “eventual judicial review” upon which the Court relied to decide the case was available to Phillips *before*<sup>51</sup> as well as after<sup>52</sup> payment. Thus, the Court did not actually examine the constitutionality of a governmental seizure of funds prior to judicial review.<sup>53</sup> Although it did note that no prepayment remedy existed for a jeopardy assessed taxpayer,<sup>54</sup> the Court neither rejected jeopardy assessments and pre-hearing seizures as unconstitutional, nor included them in *Phillips*’s approval of summary procedures with judicial review.<sup>55</sup> Nevertheless, courts generally cite *Phillips* to support the proposition that jeopardy assessments *per se* do not violate due process.<sup>56</sup>

More recently, in *Fuentes v. Shevin*,<sup>57</sup> the Supreme Court set forth three factors common to those cases in which the Court held a prehearing seizure constitutional. First, “the seizure [must be] directly necessary to secure an important governmental or general public interest.”<sup>58</sup> Second, “a special need for very prompt action” must exist.<sup>59</sup> Third, a government official must determine “under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.”<sup>60</sup>

Arguably, all three factors exist in a jeopardy tax case. First, tax collection clearly is an important governmental interest.<sup>61</sup> Second,

---

<sup>49</sup> *Phillips*, 283 U.S. at 597.

<sup>50</sup> *Id.* at 596-97.

<sup>51</sup> *Id.* at 598.

<sup>52</sup> *Id.* at 597.

<sup>53</sup> See Larry J. Roberts, *Laing Down a Challenge: The Future of Due Process and Tax Collections*, 11 *Gonz. L. Rev.* 369, 385 (1976).

<sup>54</sup> See *Phillips*, 283 U.S. 589.

<sup>55</sup> See *id.* at 589.

<sup>56</sup> See, e.g., *Human Eng’g Inst. v. Commissioner*, 61 T.C. 61, 65 (1973). But see *Commissioner v. Shapiro*, 424 U.S. 614, 631 (1976) (recognizing that the *Phillips* holding is narrower than the concept that jeopardy assessments are constitutional). See also Roberts, *supra* note 53, at 385 (recognizing that *Phillips* is often incorrectly cited for the proposition that jeopardy assessments are constitutional); Note, *supra* note 30, at 425.

<sup>57</sup> 407 U.S. 67 (1972).

<sup>58</sup> *Id.* at 91.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See *infra* text accompanying note 161. The governmental interest in a jeopardy tax case is significantly less compelling than its interest in many of the other cases in which the Court allowed summary seizure of property. See, e.g., *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (protecting public from misbranded drugs); *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29 (1928) (protecting public from a bank failure); *United States v. Pfitsch*, 256 U.S. 540 (1921) (aiding in the war effort); *North Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908) (protecting public from contaminated food).

in *Calero-Toledo v. Pearson Yacht Leasing Co.*,<sup>62</sup> the Court held that a "need for prompt action" exists when "preseizure notice and hearing might frustrate the interests served by the statutes . . ."<sup>63</sup> Similarly, in a jeopardy situation, a "special need for prompt action" exists because notice to the taxpayer surely would frustrate the goal of the statute. If he were aware of the Service's imminent assessment and seizure, the taxpayer would likely hide his assets to avoid payment of the tax.<sup>64</sup> Finally, a government actor determines that a jeopardy assessment is necessary and just. Thus, although *Phillips* did not directly address the constitutionality of jeopardy assessments,<sup>65</sup> the Supreme Court's reasoning in *Fuentes* and *Calero-Toledo* suggests that if it addressed the issue today, the Court would likely hold jeopardy assessments constitutional.

#### D. The Failure of Remedies for the Taxpayer Rendered Indigent by Jeopardy Assessment

Several avenues of relief from the hardships associated with jeopardy assessment are generally available to jeopardy assessed taxpayers. None of these remedies, however, is sufficient to obviate the need for an attorney. First, the taxpayer may stay collection by posting a bond equal to the amount of the assessment.<sup>66</sup> This remedy is not useful to the taxpayer whose assets have been seized by the government because he will probably be unable to obtain such a bond without security.<sup>67</sup> One court described the bond provision as "mere mockery."<sup>68</sup>

Second, the Service offers two possible sources of administrative relief: it may abate the jeopardy assessment on its own initiative<sup>69</sup> or the taxpayer may seek administrative review.<sup>70</sup> The Code authorizes the Service to abate the assessment if the Secretary of the Treasury or his delegate "finds that jeopardy does not exist."<sup>71</sup> If the taxpayer requests that the Service review his assessment, the

---

<sup>62</sup> 416 U.S. 663 (1974). *Calero-Toledo* involved the seizure of a yacht after police found marijuana on board. Because the yacht could easily be removed from the jurisdiction or destroyed, the Court found that the circumstances warranted a prehearing seizure.

<sup>63</sup> *Id.* at 679.

<sup>64</sup> See *supra* text accompanying note 30.

<sup>65</sup> See *supra* text accompanying notes 54-55.

<sup>66</sup> I.R.C. § 6863(a).

<sup>67</sup> Roberts, *supra* note 53, at 382. In addition, Roberts points out that the Service generally will not jeopardy assess a taxpayer whose assets far exceed the amount of the assessment. Thus, the bond remedy is meaningless in virtually all jeopardy cases. See Comment, *Jeopardy Assessment: The Sovereign's Stranglehold*, 55 GEO. L.J. 701, 705 (1967).

<sup>68</sup> *Kimmel v. Tomlinson*, 151 F. Supp. 901, 902 (S.D. Fla. 1957).

<sup>69</sup> I.R.C. § 6861(g).

<sup>70</sup> *Id.* § 7429(a)(2).

<sup>71</sup> *Id.* § 6861(g).

Secretary must determine (1) whether the making of the assessment was "reasonable under the circumstances,"<sup>72</sup> and (2) whether the amount assessed is "appropriate under the circumstances."<sup>73</sup> Neither of these alternatives offers much comfort to the taxpayer, however, because it is the district director of the Service who determines the existence, reasonableness, and appropriateness of the assessment in the first place.<sup>74</sup>

Third, the taxpayer may invoke Code section 6863(b)(3)(A), which provides that property seized under section 6861 may not be sold until the Tax Court reaches a final decision, or the time for filing a petition in the Tax Court has expired.<sup>75</sup> At least one commentator considers this Code section an important remedy,<sup>76</sup> but its utility is limited. Although it will prevent the sale of property at a loss, it will not help a taxpayer pay for an attorney.

Prior to 1976, the Anti-Injunction Act<sup>77</sup> prevented taxpayers from obtaining any judicial relief from an assessment.<sup>78</sup> Congress

---

<sup>72</sup> *Id.* § 7429(a)(3)(A).

<sup>73</sup> *Id.* § 7429(a)(3)(B).

<sup>74</sup> Roberts, *supra* note 53, at 382-83. Roberts further points out that it may be especially difficult to persuade the District Director to abate the jeopardy assessment when the decision to assess had a nonrevenue motive, such as criminal law enforcement.

<sup>75</sup> For further discussion of this safeguard, see *id.* at 383.

<sup>76</sup> See *id.* Roberts posits that this stay of sale may be valuable to the taxpayer, if for instance the Service has seized property of great sentimental value such as jewelry or a personal automobile. *Id.*

<sup>77</sup> I.R.C. § 7421(a) provides: "[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court . . ." For an account of the legislative history of this section of the statute, see Comment, *supra* note 67, at 708 n.51.

<sup>78</sup> Courts applied the Anti-Injunction Act in nearly an absolute manner, even as they slowly created exceptions. In *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932), the Supreme Court found that if the Service successfully collected a year and a half's back taxes from a corporation, the company would be ruined. The Court retreated from its previous literal interpretation of the Anti-Injunction Act and held that under the exceptional circumstances present in *Miller*, an injunction would issue. The Court thus established the rule: "[I]n cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector." *Id.* at 509; see Comment, *supra* note 67, at 710. Nonetheless, in the hundreds of cases where jeopardy assessed taxpayers sought judicial relief, courts rarely found "exceptional circumstances." *Id.* at 712; *cf. id.* at 715 (dim hope for equitable relief under the *Standard Nut* rationale).

In *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), the Court limited the circumstances in which an injunction would issue to cases where the taxpayer could prove two things: first, that the assessment will work irreparable harm; and second, that under no circumstances would the government prevail. *Id.* at 6-7.

Fourteen years later, the Supreme Court extended the taxpayer's rights under the Anti-Injunction Act in *Commissioner v. Shapiro*, 424 U.S. 614 (1976). Shapiro argued that in order to meet the burden of showing that under no circumstances would the government prevail, he had to have possession of the government's information which stated on what basis the assessment was made. *Id.* at 626-27. The Court agreed, and

then enacted Code section 7429, which permits review of a jeopardy assessment by the federal district courts<sup>79</sup> to determine whether an assessment is "reasonable under the circumstances."<sup>80</sup> Previously, the Service had free reign to act unreasonably, because the judicial system did not monitor and constrain its activities.<sup>81</sup> This statute represents an important step in the direction of protecting jeopardy assessed taxpayers' rights, but it still does not provide for adequate legal assistance. Given the complexity of the Code, it is difficult for a jeopardy assessed taxpayer to refute the Service's assertion that the assessment is reasonable, or to convince a court that the amount is inappropriate, without the expertise of an attorney. The taxpayer whose funds have been seized and who cannot afford an attorney is left with a difficult decision if he cannot sustain his burden or refute the government's evidence at this stage: he must either settle with the Service or litigate the underlying tax issues without the assistance of counsel.

## II

### THE RIGHT TO COUNSEL

#### A. Criminal Defendants: The Right To Be Heard Includes the Right To Be Heard by Counsel

The sixth amendment to the United States Constitution provides that all federal *criminal* defendants have the right to counsel.<sup>82</sup> The Supreme Court did not recognize this right for defendants of state prosecutions until 1932, when it decided the seminal case of *Powell v. Alabama*.<sup>83</sup> Thus began a thirty-year expansion of the right

---

held that the government must supply this information to the taxpayer. This holding was incorporated into I.R.C. § 7429(a)(1).

<sup>79</sup> Thus, judicial review of jeopardy assessments is now an exception to the Anti-Injunction Act. See I.R.C. § 7421(a).

<sup>80</sup> *Id.* § 7429(b)(2)(A) & (B). The burden is on the Service to show that a jeopardy assessment is reasonable under the circumstances. *Id.* § 7429(g)(1). One court defined the standard of proof required by the government as something more than "not arbitrary and capricious" and something less than "supported by substantial evidence." *Loretto v. United States*, 440 F. Supp. 1168, 1172 (E.D. Pa. 1977). This standard has been adopted by numerous other courts. See, e.g., *Evans v. United States*, 672 F. Supp. 1118 (S.D. Ind. 1987); *Schmidt v. United States*, 662 F. Supp. 900 (D. Minn. 1987).

The taxpayer must show that the amount assessed is inappropriate. I.R.C. § 7429(g)(2).

<sup>81</sup> See, e.g., *Anthony J. Petrone*, 18 T.C. Mem. 787 (1959) (Service assessed a tax of \$1,718,238 and penalties totalling \$1,552,767 against a taxpayer whose net worth was conceded to be \$38,819); see also *Jeopardy and Termination Assessments and Administrative Summonses: Hearing Before the Subcomm. on Administration of the Internal Revenue Code of the Comm. on Finance*, 94th Cong., 1st Sess. 65 [hereinafter *Hearing Before the Subcomm. on Administration of the I.R.C.*].

<sup>82</sup> The sixth amendment guarantees that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

<sup>83</sup> 287 U.S. 45 (1932). In *Powell*, the petitioners were illiterate black men convicted

to counsel as applied to the states. An examination of several cases<sup>84</sup> reveals that many of the policy reasons underlying the right to counsel in the criminal context also favor extending the right to counsel to the jeopardy assessed taxpayer.<sup>85</sup>

The *Powell* Court extended to defendants of state criminal prosecutions in capital cases the guarantee of counsel not by incorporating the sixth amendment into the fourteenth,<sup>86</sup> but rather by deeming the guarantee a fundamental element of due process. The Court held that "it is the duty of the Court . . . to assign counsel for [the defendant] as a necessary requisite of due process of law . . . ."<sup>87</sup> In reaching its determination, the Court reasoned that a hearing was among the prerequisites to a court's rendering of an enforceable judgment. As such, a hearing constitutes an essential element of due process, guaranteed by the Constitution.<sup>88</sup> Significantly, the Court also maintained that the right to an effective hearing must include the aid of counsel.<sup>89</sup> The Court recognized that a layperson simply does not have the expertise to manipulate legal concepts, the knowledge to monitor the procedural aspects of the hearing, or the ability to present his own case.<sup>90</sup>

The *Powell* Court stated that:

If in any case, *civil or criminal*, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.<sup>91</sup>

---

and sentenced to death for the rape of two white girls. The trial judge stated that during arraignment he had "appointed all the members of the bar" as counsel, and that he "anticipated that the members of the bar would continue to help the defendants if no counsel appeared." *Id.* at 49. The morning of trial, Mr. Roddy, an attorney, appeared "as a friend of the people who where interested," *id.* at 57 and offered to assist appointed counsel. Mr. Roddy stated "that he had not been given an opportunity to prepare the case [and] that he was not familiar with the procedure in Alabama." *Id.* A member of the local bar then offered to assist Mr. Roddy and "help do anything I can do." *Id.* This was the extent of the representation received by the defendants.

<sup>84</sup> For a more exhaustive review of the "right to counsel" cases, see Robert S. Catz & Nancy Lee Firak, *The Right to Appointed Counsel in Quasi-Criminal Cases: Towards an Effective Assistance of Counsel Standard*, 19 HARV. C.R.-C.L. L. REV. 397, 400-06 (1984).

<sup>85</sup> *Cf. id.* at 401 ("Review of this line of cases discloses that the same concerns necessitating the expansion of the right to counsel in the criminal context apply with equal force to quasi-criminal litigation.").

<sup>86</sup> Subsequently, however, the Court did incorporate the sixth amendment's guarantee of counsel in criminal prosecutions into the fourteenth amendment. See *Gideon v. Wainwright*, 372 U.S. 335 (1963); Catz & Firak, *supra* note 84, at 404.

<sup>87</sup> *Powell*, 287 U.S. at 71.

<sup>88</sup> *Id.* at 68.

<sup>89</sup> See *id.* at 68-69 ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.").

<sup>90</sup> *Id.* at 69.

<sup>91</sup> *Id.* (emphasis added).

Thus, the *Powell* Court emphasized that if an individual faces a tribunal without counsel he will be denied due process. The Court held, therefore, that an indigent defendant in a capital case has the right to appointed counsel. The Court declined to speculate as to whether the right to appointed counsel extends to defendants in non-capital cases.<sup>92</sup>

Ten years later, in *Betts v. Brady*,<sup>93</sup> the Supreme Court adopted a case-by-case method of determining whether due process demanded the appointment of counsel. It held that courts must make this determination based on "an appraisal of the totality of facts" in the particular case, and should only appoint counsel under special circumstances.<sup>94</sup> Over the next twenty years, the Court broadened this "special circumstances" category and made room for more and more fact patterns.<sup>95</sup>

Finally, in 1963, the landmark case of *Gideon v. Wainwright*<sup>96</sup> presented the Court with facts nearly identical to those in *Betts*,<sup>97</sup> and the Court took the opportunity to overrule the *Betts* case-by-case test and the standard it created.<sup>98</sup> In justifying its decision, the Court emphasized the *pro se* defendant's powerlessness against the vast resources of the state and the important role of attorneys in the adversary system.<sup>99</sup> Justice Black, writing for the Court, affirmed the "noble ideal" of the "fair trial,"<sup>100</sup> and deemed the right to counsel for a criminal defendant "fundamental and essential."<sup>101</sup> The same reasoning applies to the jeopardy assessed taxpayer. He is no match for the government, which has the resources to take his money without process and then employ effective counsel to litigate the matter.<sup>102</sup> Counsel is as essential to a fair trial for a jeopardy

<sup>92</sup> *Id.* at 71.

<sup>93</sup> 316 U.S. 455 (1942). *Betts* was indicted under Maryland law for robbery. His request for the assistance of counsel was denied pursuant to the county's practice of providing counsel only for indigent defendants charged with rape or murder.

<sup>94</sup> *Id.* at 462. In *Betts*, the defendant was a forty-three-year-old man "of ordinary intelligence" who had previously been involved in a criminal trial. The Court held that there were no "special circumstances" that would require the appointment of counsel. *Id.* at 472.

<sup>95</sup> *Catz & Firak, supra* note 84, at 403. For a list of cases in which the Court extended the aegis of "special circumstances" to the defendant, see *id.* at 403 n.25.

<sup>96</sup> 372 U.S. 335 (1963). In *Gideon*, as in *Betts*, the defendant was charged with a felony under state law. The defendant requested that the judge appoint counsel to represent him but the judge denied the request on the grounds that the state would only appoint counsel in a capital case. *Id.* at 336-37.

<sup>97</sup> *Id.* at 339.

<sup>98</sup> *Id.* at 345.

<sup>99</sup> *Id.* at 344; see also *Catz & Firak, supra* note 84, at 404.

<sup>100</sup> *Gideon*, 372 U.S. at 344.

<sup>101</sup> *Id.* Justice Black continued: "This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." *Id.*

<sup>102</sup> See *infra* notes 171-73 and accompanying text.

assessed taxpayer as it is to the criminal defendant.

## B. Recognition of Due Process Requirements: The Emerging Right to Counsel in Non-Criminal Cases

### 1. *The Initial Case: In re Gault*<sup>103</sup>

Prior to 1967, no court had recognized the right to counsel in non-criminal cases. In *In re Gault*, the Supreme Court promulgated such a right for the first time, using procedural due process as the foundation.<sup>104</sup> The Court faced the issue of whether a child had the constitutional right to appointed counsel to represent him in a delinquency hearing, where he was subject to be placed in a juvenile state institution.<sup>105</sup> In reaching its decision, the Court found that notwithstanding the label "civil," "[t]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings and to ascertain whether he has a defense and to prepare and submit it."<sup>106</sup> This was a likely case to be the first in which the Court extended the right to counsel toward a civil litigant because the threatened loss of physical liberty closely resembled that in a criminal proceeding.<sup>107</sup>

Although the Court found significant the possible loss of the defendant's physical liberty, it did leave "open the possibility that cases not involving loss of physical liberty may still involve interests sufficient to trigger a right to appointed counsel under the fourteenth amendment."<sup>108</sup> In addition, *Gault* clearly dispensed with the notion that the label "civil" is incompatible with the right to an attorney.

---

<sup>103</sup> 387 U.S. 1 (1967).

<sup>104</sup> Note, *Constitutional Rights and Civil Forfeiture Actions*, 88 COLUM. L. REV. 390, 401 n.65 (1988) (authored by Jay A. Rosenberg); see *Gault*, 387 U.S. 1.

<sup>105</sup> See *Gault*, 387 U.S. 1. Historically, juvenile courts were intended to provide a nonadversarial forum which disregarded punitive motives, and facilitated determinations of what was in the best interests of the child. *Id.* at 14-16. The Court found, however, that in practice the hearing very much resembled a criminal trial, the essential difference being that procedural due process safeguards available to the criminal defendant were ignored for the juvenile. *Id.* at 29.

<sup>106</sup> *Id.* at 36; see Catz & Firak, *supra* note 84, at 410-11.

<sup>107</sup> Catz and Firak point out that the juvenile delinquency proceeding involved "many of the characteristics of a criminal prosecution." Catz & Firak, *supra* note 84, at 410.

<sup>108</sup> Note, *supra* note 104, at 401 n.65 (citing Jackson, *Lassiter v. Department of Social Services: The Due Process Right to Appointed Counsel Left Hanging Uneasily in the Matthews v. Eldridge Balance*, 8 N. KY. L. REV. 513, 519 (1981)).

## 2. *The Case-By-Case Method Revisited: Gagnon v. Scarpelli*

*Gagnon v. Scarpelli*<sup>109</sup> introduced to the civil arena the *Betts* case-by-case method of determining whether due process requires the assistance of counsel.<sup>110</sup> After the Wisconsin Department of Public Welfare revoked his probation,<sup>111</sup> Scarpelli argued that the state denied him due process because it had not provided him with an attorney.<sup>112</sup> The Court held that the due process clause applied, but that courts must determine the need for counsel for parole revocations based on the facts of each case.<sup>113</sup>

In applying the case-by-case approach to non-criminal cases, the Court reasoned that in many instances there will be no need for counsel in a revocation hearing because it differs so from a criminal prosecution.<sup>114</sup> The Court distinguished a revocation hearing from a criminal prosecution on several grounds. First, in a revocation hearing, a parole officer represents the state.<sup>115</sup> Unlike an opposing attorney, a parole officer is not necessarily the probationer's adversary, and his attitude should reflect the rehabilitative focus of the probation system.<sup>116</sup> Second, no formal rules of evidence apply in a revocation hearing which could confuse the probationer and pre-

<sup>109</sup> 411 U.S. 778 (1973).

<sup>110</sup> *Id.* The "case-by-case approach" originally adopted in *Betts v. Brady*, see *supra* notes 93-94 and accompanying text, was overruled and replaced with a *per se* rule in *Gideon v. Wainwright*, see *supra* notes 96-98 and accompanying text.

<sup>111</sup> *Scarpelli*, 411 U.S. at 779-80. The Court in *Morrissey v. Brewer*, 408 U.S. 471 (1972) found that "the revocation of parole is not a part of a criminal prosecution." *Id.* at 480. Thus, *Scarpelli* was analyzed under the newly recognized right to counsel in the civil arena.

<sup>112</sup> *Scarpelli*, 411 U.S. at 783. Petitioner also argued that his due process rights were violated because there was no hearing to determine whether probation should have been revoked. The Court held that this was indeed a denial of due process. *Id.* at 782.

<sup>113</sup> *Id.* at 787-88. The Court rejected the argument that the requirements of due process were met through the existence of certain procedural safeguards such as notice to Scarpelli of the claimed violation and the evidence against him, opportunity to be heard and to present evidence, the right to confront witnesses, a "neutral and detached" body to hear the claim, and a "written statement by the factfinders as to the evidence relied on and reasons for revoking [probation or] parole." *Id.* at 786 (citing *Morrissey v. Brewer*, 408 U.S. 471 (1972)). The Court recognized that:

[T]he effectiveness of the rights guaranteed by *Morrissey* may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess . . . [T]he unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence.

*Id.* at 786-87.

<sup>114</sup> *Id.* at 788-89.

<sup>115</sup> *Id.* at 789.

<sup>116</sup> See *id.* at 787 (adversarial nature of lawyers); *id.* at 785 (rehabilitative focus of hearing).

vent him from effectively presenting his case.<sup>117</sup> Third, the necessity of protecting procedural rights by raising them in a timely manner does not exist.<sup>118</sup> Finally, a revocation hearing does not involve the problem of presenting a coherent defense to jurors.<sup>119</sup>

### 3. *A New Standard for the Determination of Due Process Issues*

In *Mathews v. Eldridge*,<sup>120</sup> the Supreme Court recognized that “governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment”<sup>121</sup> are subject to certain constitutional constraints.<sup>122</sup> The Court then articulated a new, three factor standard for evaluating whether the requirements of procedural due process have been met. In making a due process determination, a court must consider:

1. “[T]he private interest that will be affected by the official action;”<sup>123</sup>
2. “[T]he Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail;”<sup>124</sup>
3. “[T]he risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.”<sup>125</sup>

The Supreme Court first applied this new standard to the issue of whether due process requires the assistance of counsel for a civil litigant in *Lassiter v. Department of Social Services*.<sup>126</sup> In that case, the State of North Carolina social services agency threatened an indigent mother with the termination of her parental rights toward one of her sons by bringing an action in the county district court.<sup>127</sup> Recognizing that a party’s right to appointed counsel decreases as his liberty interest diminishes, the Court drew a “presumption” that the defendant’s right to appointed counsel exists “only when, if he

<sup>117</sup> *Id.* at 789.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> 424 U.S. 319 (1976). The due process issue in *Eldridge* was whether the Constitution requires that a judicial hearing be held before the Social Security Administration can terminate an individual’s disability benefits. *Id.* at 323. The Social Security Administration conceded that the receipt of the benefits was a “property” interest within the meaning of the due process clause, *id.* at 332, but disputed *Eldridge*’s contention that his due process rights were violated because of the absence of a pretermination hearing.

<sup>121</sup> *Id.* at 332.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 335.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> 452 U.S. 18 (1981).

<sup>127</sup> *Id.* at 20.

loses, he may be deprived of his physical liberty."<sup>128</sup> The Court propounded the idea that it must balance all other aspects of the determination of due process against this *Lassiter* presumption.<sup>129</sup>

Examining the first *Eldridge* factor, the Court recognized that the mother has a "commanding" interest in a termination proceeding.<sup>130</sup> The Court then discussed the state's interest and determined that it had virtually no opposing interest.<sup>131</sup> Finally, the Court considered the third *Eldridge* factor: the risk, in this case, that "a parent will be erroneously deprived of his or her child because the parent is not represented by counsel."<sup>132</sup> In evaluating this risk, the Court acknowledged the potential complexity of the issues involved in a termination proceeding, the possibility that expert testimony can confuse a layperson, and that the parents involved are likely to be uneducated.<sup>133</sup>

The Court then balanced the three *Eldridge* factors against the *Lassiter* presumption that the right to counsel only applies when physical liberty is threatened. In doing so, the Court conceded that if "the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak,"<sup>134</sup>

<sup>128</sup> *Id.* at 26-27. This "presumption" has been severely criticized by commentators. For a discussion of this criticism, see Note, *supra* note 104, at 402 n.71.

<sup>129</sup> *Lassiter*, 452 U.S. at 27. This presumption against providing counsel is particularly harsh when the state is the opposing party. One commentator has suggested that when the state is really the opposing party and an indigent's fundamental interests are at stake, "due process and fundamental fairness require a presumption *in favor of* appointed counsel." Note, *supra* note 8, at 628 (emphasis added). This commentator posits that termination of parental rights and paternity actions are among those cases where the presumption should be reversed from that which the *Lassiter* Court set forth. *Id.* This Note suggests that another factor which should reverse the *Lassiter* presumption is the extremely high risk of error present in tax litigation.

<sup>130</sup> The Court recognized the mother's interest to be "an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.' . . . A parent's interest in the accuracy and injustice of the decision to terminate his or her parental status is, therefore a commanding one." *Lassiter*, 452 U.S. at 27 (quoting *Stanley v. Illinois*, 405 U.S. 645 (1972)); see also *id.* at 38-40 (Blackmun, J., dissenting) (discussion of the cases supporting family rights).

<sup>131</sup> *Id.* at 27-28. The Court pointed out that the State's interest is in the welfare of the child and perhaps may best be served by "a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal." *Id.* at 28. The Court noted that the State's financial interest differs from that of the parent's in that the State may wish to proceed as economically as possible, thereby eliminating the cost of appointed counsel. *Id.* However, the Court recognized that this concern, albeit a legitimate one, does not outweigh the important private interests of the mother, particularly since the potential costs are minimal.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 30. Obviously, a parent whom the trial "overwhelms" is not likely to be able competently to present her version of the facts. Cf. *id.* at 46 (Blackmun, J. dissenting) (the idea that what is involved in a court proceeding may "overwhelm an uncounseled parent" is a "profound understatement").

<sup>134</sup> *Id.* at 31.

the factors would outweigh the presumption and a court would have to provide counsel.<sup>135</sup> But the Court found that “the *Eldridge* factors will not always be so distributed . . . .”<sup>136</sup> In other words, the weight of these factors will vary depending on the circumstances in each case. The Court therefore adopted the *Scarpelli* case-by-case approach,<sup>137</sup> in which the trial court determines in each termination proceeding whether due process requires the appointment of counsel.<sup>138</sup>

Once the Court chose to apply the *Scarpelli* case-by-case approach, the application involved only the determination of the risk of error,<sup>139</sup> because the Court had already examined both the state<sup>140</sup> and private<sup>141</sup> interests. Despite the weighty private interest,<sup>142</sup> the Supreme Court concluded that the trial court did not violate her due process rights by failing to appoint counsel for her<sup>143</sup> because “the presence of counsel for Ms. Lassiter could not have made a determinative difference” in the outcome.<sup>144</sup>

In an adamant dissent,<sup>145</sup> Justice Blackmun argued that the risk of error will always be substantial<sup>146</sup> because a termination proceeding resembles a criminal prosecution.<sup>147</sup> Justice Blackmun reached this conclusion after considering a variety of factors: the proceeding

135 *Id.*

136 *Id.*

137 See *supra* text accompanying notes 109-13.

138 *Lassiter*, 452 U.S. at 31-32.

139 See *id.* at 32-34.

140 See *supra* note 131; see also *Lassiter*, 452 U.S. at 35 (Blackmun, J., dissenting).

141 See *supra* note 130; see also *Lassiter*, 452 U.S. at 35 (Blackmun, J., dissenting).

142 See *supra* note 130.

143 The Court refuted *Lassiter's* argument that counsel was essential to her case. Justice Stewart, writing for the majority, explained that since there were no allegations of neglect or abuse on which criminal charges could be brought, no expert witnesses testified, and there were “no specially troublesome points of law” an attorney would not have made a difference, notwithstanding problems such as the trial court’s admission of hearsay evidence. *Lassiter*, 452 U.S. at 32-33.

144 *Id.* This conclusion is distressing because it is difficult to believe that an appellate court can accurately determine that a lawyer would not have helped, when this determination is based on a record that was developed by a non-lawyer.

145 *Id.* at 35-59 (Blackmun, J., dissenting). Blackmun disagreed with the majority’s analysis on several points. First, Blackmun argued that since parental rights, as recognized by the majority, are “commanding,” and since there exists “no countervailing state interest of even remotely comparable significance . . . the obvious conclusion [is] that due process requires the presence of counsel for a parent threatened with judicial termination of parental rights . . . .” *Id.* at 35.

Blackmun also disputed the Court’s finding that precedent supports the “presumption” that due process only mandates appointed counsel when physical liberty is threatened. *Id.* at 40. He considered incarceration “to be neither a necessary nor a sufficient condition for requiring counsel on behalf of an indigent defendant.” *Id.*

146 Blackmun concluded that combined with the other *Eldridge* factors, the risk of error “assumes extraordinary proportions.” *Id.* at 46-47.

147 *Id.* at 42-47.

is "formal and adversarial;"<sup>148</sup> it has an "accusatory and punitive focus;"<sup>149</sup> a gross disparity in power exists between the state and the individual;<sup>150</sup> and the state has expert counsel.<sup>151</sup> In addition, Justice Blackmun suggested that the likelihood of error increases because of the legal standards against which a court might judge the parent's interest.<sup>152</sup> Finally, Justice Blackmun added that the legal issues with which the parent must deal "are neither simple nor easily defined."<sup>153</sup>

### C. The Denial of Due Process: No Attorney Provided for the Jeopardy Assessed Taxpayer

The Blackmun factors enumerated above also typify a tax proceeding, and increase the risk of error if a jeopardy assessed taxpayer must litigate his claim without the aid of counsel.<sup>154</sup> In addition, the intricacies specifically associated with tax law enhance this risk,<sup>155</sup> and suggest that the *Scarpelli* case-by-case determination of whether due process demands an attorney, as adopted in *Lassiter*, is inappropriate for tax disputes.

Although courts have slowly begun to recognize the necessity of counsel in some non-criminal proceedings, this new expansion of the constitutional right to counsel has not yet been extended to include the jeopardy assessed taxpayer.<sup>156</sup> However, the evolution of the Supreme Court's reasoning and its recognition of the right to counsel in certain non-criminal situations, together with the policies supporting extension of this right toward these taxpayers, indicate

<sup>148</sup> *Id.* at 42-43 (adjudication is by a state judge; formal rules of evidence and procedure apply; hearsay is inadmissible; records must be authenticated).

<sup>149</sup> *Id.* at 43. *But see id.* at 34 (Burger, C.J., concurring) (arguing that the focus of termination proceedings is protection of the child's interests, rather than punishment).

<sup>150</sup> *Id.* at 43, 46 (Blackmun, J., dissenting). The "lawyer has access to public records concerning the family and to professional social workers who are empowered to investigate the family situation and to testify against the parent." *Id.* at 43. "When the parent is indigent, lacking in education, and easily intimidated by figures of authority, the imbalance may well become insuperable." *Id.* at 46.

<sup>151</sup> *Id.* at 43.

<sup>152</sup> *Id.* at 44-45 (the parent must contend with legal concepts such as: "without cause," "concern or responsibility as to the child's welfare," "willfully," "substantial progress has been made," "diligent efforts of the Department of Social Services," "to make and follow through with constructive planning").

<sup>153</sup> *Id.* at 45.

<sup>154</sup> *See infra* text accompanying notes 167-73.

<sup>155</sup> *See infra* text accompanying note 173.

<sup>156</sup> *See, e.g.,* *Lloyd v. Patterson*, 242 F.2d 742 (5th Cir. 1957); *United States v. Brodson*, 241 F.2d 107 (7th Cir.), *cert. denied*, 354 U.S. 911 (1957); *Shapiro v. Commissioner*, 73 T.C. 313 (1979), *cert. denied*, 449 U.S. 1082 (1981); *Human Eng'g Inst. v. Commissioner*, 61 T.C. 61 (1973). In each of the above cases, the jeopardy assessed taxpayer was denied funds to pay an attorney.

that the Supreme Court should soon recognize the due process right to counsel for jeopardy assessed taxpayers.

### III

#### THE JEOPARDY ASSESSED TAXPAYER AND THE AS-YET-UNRECOGNIZED RIGHT TO COUNSEL

##### A. Precedent Favors the Right to Counsel for All Jeopardy Assessed Taxpayers

The three *Eldridge* factors—the taxpayer's property interest, the risk of error, and the governmental interest<sup>157</sup>—balanced against the *Lassiter* presumption that the right to counsel applies only when physical liberty is at stake<sup>158</sup> militate in favor of extending the right of counsel to jeopardy assessed taxpayers.

##### I. *Application of the Eldridge Factors to the Jeopardy Assessed Taxpayer*

The jeopardy assessed taxpayer has a great property interest at stake. A jeopardy assessment can affect virtually *all* of a person's belongings. In addition to seizing the taxpayer's cash, the Service may put liens on his home, his mode of transportation, and his means of earning a living.<sup>159</sup> Indeed, a taxpayer "may be rendered indigent overnight"<sup>160</sup> by the government's actions. On the other hand, the government also has an important interest. "The collection of taxes is a *sine qua non* of a nation's existence. Without reve-

<sup>157</sup> See *supra* discussion of the *Eldridge* factors in text accompanying notes 120-25.

<sup>158</sup> See *supra* discussion of the *Lassiter* presumption in text accompanying notes 128-29.

<sup>159</sup> See, e.g., *Kimmel v. Tomlinson*, 151 F. Supp. 901 (S.D. Fla. 1957) (Service seized "every bit" of the taxpayer's property); see *Hearing Before the Subcomm. on Administration of the I.R.C.*, *supra* note 81, at 64 n.149, which included this commentary:

Although early cases allowed injunctions against assessments the enforcement of which would deprive the taxpayer of his livelihood and reduce his family to destitution, *Macejko v. United States*, 174 F. Supp. 87 (N.D. Ohio 1959); *Arnold v. Cobb*, 57-2 U.S. Tax Cas. ¶ 9711 (N.D. Ga. 1957); *Long v. United States*, 148 F. Supp. 758 (S.D. Ala. 1957), that result is no longer possible. *McClure v. Roundtree*, 330 F.2d 954 (6th Cir. 1964); *Johnson v. Wall*, 329 F.2d 149 (4th Cir. 1964); *Botta v. Scanlon*, 314 F.2d 392 (2d Cir. 1963).

See also SUBCOMM. ON OVERSIGHT OF THE COMMITTEE ON WAYS AND MEANS, COLLECTION OF DELINQUENT TAXES, A REPORT TO THE STEERING COMM. FOR THE INTERNAL REVENUE SERVICE PROJECT OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 94th Cong., 2d Sess., at 64 (1976) [hereinafter COLLECTION OF DELINQUENT TAXES] ("normally all assets will have been seized" from a jeopardy assessed taxpayer); *id.* at 65 ("The jeopardy assessment may be of such magnitude as to force the taxpayer out of his home and destroy his business, not to mention his reputation. It may strip the taxpayer of all means of supporting himself or his family."); I.R.C. § 6321 (Service may put liens on virtually all property).

<sup>160</sup> Comment, *supra* note 67, at 704.

nues, it could not amass the manpower or resources necessary"<sup>161</sup> to sustain a functioning government.

Yet, the government's interest cannot and should not extend beyond the collection of money legitimately *due* under the Constitution and the tax laws. The sixteenth amendment empowered Congress to tax "income";<sup>162</sup> Congress enacted statutes to define income and to assess a certain portion of that income. To the extent that the Service jeopardy assesses and keeps money in excess of the statutorily defined portion of income that the taxpayer owes, it has acted in wrongful disregard of the tax laws.<sup>163</sup>

Furthermore, the government's interest in collecting taxes does not necessarily conflict with the taxpayer's interest in having access to his funds to hire an attorney. By implementing the jeopardy assessment provision, Congress did *not* seek to preserve assets which the taxpayer might otherwise use to secure legal counsel; rather, Congress sought to prevent the taxpayer from hiding his assets or removing them from the country.<sup>164</sup> In a non-jeopardy situation, an individual may use his last dollar to defend himself against a proposed assessment, as long as the Service does not believe that the taxpayer intends to flee the country. Thus, it is both inconsistent and unjust to deny the jeopardy taxpayer the same ability to hire legal counsel.

Finally, the government's interest would be compromised only slightly, if at all, if a court allowed the taxpayer to use the seized funds to hire an attorney. Regardless of the amount spent on attorney fees, the taxpayer ultimately would owe whatever a court determined to be the accurate assessment. Although the government would not have possession of the money spent on attorney's fees and would have to use another means of collection, this is true for non-jeopardy assessed taxpayers as well.

The weight of the last *Eldridge* factor—in this case, the risk of erroneously depriving the taxpayer of his property—is very great when a jeopardy assessed taxpayer must litigate without an attorney. First, unlike a probation revocation hearing,<sup>165</sup> the judicial determination of taxes owed includes many of the Blackmun factors that weigh in favor of appointing counsel.<sup>166</sup> Second, because tax law is a highly specialized and intricate field, it is particularly unlikely that

161 COLLECTION OF DELINQUENT TAXES, *supra* note 159, at 27.

162 U.S. CONST. amend XVI; *cf.* I.R.C. § 61 ("gross income means all income from whatever source derived").

163 See *supra* notes 161-62 and accompanying text.

164 See *supra* note 20 and accompanying text.

165 See *supra* notes 109-19 and accompanying text for a discussion of *Gagnon v. Scarpelli*.

166 See *supra* text accompanying notes 145-53.

a *pro se* litigant can adequately represent himself in the determination of his tax liability.

Many of the Blackmun factors<sup>167</sup> exist in any tax case. First, like a criminal prosecution, tax litigation is both adversarial and formal.<sup>168</sup> Both parties must argue that the same tax laws support their opposing positions. The Service seeks to collect as much money as possible from the taxpayer; the taxpayer wants to prevent this from happening. In addition, like the termination hearing in *Lassiter*,<sup>169</sup> a tax proceeding is formal. In order to represent himself adequately, the taxpayer may have to make motions, request documents, or take other "legal" actions he is not competent to perform.

The second Blackmun factor, the accusatory and punitive nature of the proceeding,<sup>170</sup> exists here as well. It is difficult to imagine an individual who would not feel *persecuted* by the government after the Service takes his money, forces him to initiate suit for a refund, puts the burden of proof on his shoulders as the plaintiff, and finally, informs him that he must await a post-trial determination of whether he had the right to an attorney.

The disparity in power between the litigants,<sup>171</sup> and the expertise of the government's counsel,<sup>172</sup> the third and fourth Blackmun factors, also greatly enhance the risk of error. The Service has taken all of the taxpayer's resources and left him completely unable to contest the action. Moreover, the government's advocate is not the local legal aid clinic, but the United States Justice Department: the Service is well represented by counsel.

In addition to a risk of error analogous to that in a criminal prosecution, tax litigation involves a highly complex set of statutes. An individual untrained in tax law could not possibly chart his way through the various applicable Code sections and Treasury Regulations. Even an otherwise competent lawyer, without some experience in the field of tax law, would be hard pressed to accurately determine and argue for the correct amount of tax.<sup>173</sup>

---

167 *Id.*

168 *See supra* note 148.

169 452 U.S. 18 (1981).

170 *See supra* note 149.

171 *See supra* note 150.

172 *See supra* note 151.

173 Without some expertise and familiarity with the Tax Code it would be virtually impossible for an individual with enough money to have attracted the Service's attention to be able to argue his position. To begin with, the Internal Revenue Code fills 1678 pages of the United States Code. *See* Title 26, U.S.C. Moreover, the Code is highly complicated, containing many interrelated sections. *See, e.g.*, I.R.C. § 170, providing for a charitable contribution deduction. Section 170 fills fourteen and one-half pages of the United States Code, 26 U.S.C. § 170 (1988), and incorporates numerous other Code sections. In addition, there are a number of interrelated Code sections which are not

The second part of the *Eldridge* "risk of error" factor focuses on the likely value of procedural safeguards in protecting the litigant's interests.<sup>174</sup> In a jeopardy case virtually no such remedies or procedural rights protect the taxpayer.<sup>175</sup> As Justice Powell found in *Gagnon v. Scarpelli*,<sup>176</sup> rights such as the ability to confront a witness and the opportunity to be heard are meaningless when the individual lacks the skill to make effective use of these protections.<sup>177</sup>

2. *Eldridge Factors vs. Lassiter Presumption: The Risk of Erroneous Deprivation Outweighs the Presumption Against the Right to an Attorney*

As the majority in *Lassiter*<sup>178</sup> determined, a court must balance the three *Eldridge* factors<sup>179</sup> against the presumption that the right to counsel exists only when physical liberty is at stake.<sup>180</sup> If the Supreme Court were only to consider the two conflicting interests—the taxpayer's and the government's—then the *Lassiter* presumption against counsel would likely outweigh these interests, and no constitutional right to counsel would exist.<sup>181</sup> After all, several Supreme Court opinions have made clear that the Court values property rights less dearly than the rights to life and liberty.<sup>182</sup> However, when the third *Eldridge* factor, the risk of erroneously depriving an individual of his property,<sup>183</sup> is as great as it is here,<sup>184</sup> the Court

---

cross-referenced, so that even if a taxpayer could read and apply the Code sections, he would not necessarily know to do so. For instance, Code § 1001 provides for the recognition and realization of gain. However, nowhere in the section does it say that Code §§ 1245 and 1250 overrule § 1001 in the case of certain depreciable assets. Code §§ 1245 and 1250 state that if property defined within those sections is disposed of, gain shall be recognized according to those sections, "notwithstanding any other provision of this subtitle." I.R.C. §§ 1245(a)(1), 1250(a)(1). See also the title to a recent article appearing in *The Wall Street Journal* indicating a general sense of incomprehensibility regarding the tax system: *Codified Confusion Tax Law is Growing Ever More Complex, Outcry Ever Louder—Even Legislators Who Wrote it Sometimes are Baffled; Advisors Refuse to Advise—For Small Business, a Disaster*, *The Wall Street Journal*, April 12, 1990, at A1, col. 6.

<sup>174</sup> See *supra* text accompanying note 123.

<sup>175</sup> See *supra* subpart 1(D) of this Note.

<sup>176</sup> 411 U.S. 778 (1973).

<sup>177</sup> See *supra* note 113.

<sup>178</sup> 452 U.S. 18 (1981).

<sup>179</sup> See *supra* text accompanying notes 123-25.

<sup>180</sup> See *supra* text accompanying notes 128-29.

<sup>181</sup> In *Lassiter*, the extraordinarily important individual interest in maternal rights combined with the weak, opposing state interest did not outweigh the presumption against counsel because the majority determined that the risk of error under the circumstances of that case was very low. 452 U.S. at 18. Certainly a taxpayer's monetary interest cannot compare with the threat of being stripped of motherhood. Thus, without the "risk of error" consideration, jeopardy assessed taxpayers would not have a right to counsel under the Court's present formulation.

<sup>182</sup> See *supra* text accompanying notes 48-49.

<sup>183</sup> See *supra* note 125 and accompanying text.

<sup>184</sup> See *supra* text accompanying notes 165-73.

should recognize that due process demands that the taxpayer have the right to counsel. When the risk of error is so substantial, and the government has, in effect, prevented an individual from obtaining counsel, courts should find that these facts outweigh the *Lassiter* presumption.

3. *The Scarpelli Case-By-Case Method Is Inappropriate for Jeopardy Assessed Taxpayers*

The *Scarpelli* Court's rationale for determining case-by-case whether due process requires the appointment of an attorney does not apply in the jeopardy assessment context. In *Scarpelli*, the Court focused on the differences between a revocation hearing and a criminal proceeding in determining that "the need or the likelihood in a particular case for a constructive contribution by counsel" will not always arise.<sup>185</sup> A tax proceeding, on the other hand, does resemble a criminal prosecution,<sup>186</sup> and the counsel's contribution is not only constructive but necessary.

The *Scarpelli* Court also observed that in many instances, any evidence that would mitigate the case against the probationer would be "so simple as not to require either investigation or exposition by counsel."<sup>187</sup> This is not necessarily true in tax cases, because these cases often require the taxpayer to explain much more complicated problems and address more substantial legal issues than simply, *e.g.*, why he violated parole.

B. Policy Considerations Demand Due Process for the Taxpayer

As the Court recognized in *Powell v. Alabama*,<sup>188</sup> if a court were "arbitrarily to refuse to hear a party by counsel . . . such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."<sup>189</sup> The *Powell* Court further recognized that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."<sup>190</sup> This right to be heard is a minimum due process requirement in civil, as well as criminal, cases.<sup>191</sup> Nevertheless, courts have allowed the government to *prevent* the taxpayer from being heard by counsel by depriv-

---

<sup>185</sup> *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973).

<sup>186</sup> See *supra* text accompanying notes 167-72.

<sup>187</sup> *Scarpelli*, 411 U.S. at 787.

<sup>188</sup> 287 U.S. 45 (1932).

<sup>189</sup> *Id.* at 69; see also *supra* text accompanying note 91.

<sup>190</sup> *Powell*, 287 U.S. at 69.

<sup>191</sup> *Boddie v. Connecticut*, 401 U.S. 371, 377 (1972) ("[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given

ing him of the means of hiring counsel to protect him from the "machinery" of the state.<sup>192</sup>

The unfairness of government actions which prevent an individual from paying for an attorney is exacerbated in jeopardy assessment cases because of their noncriminal nature. If the defendant in a criminal case, for example a RICO indictment, is unable to pay for

---

a meaningful opportunity to be heard."); see also *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

<sup>192</sup> See *United States v. Brodson*, 241 F.2d 107 (7th Cir.), cert. denied, 354 U.S. 911 (1957). The Service jeopardy assessed Brodson, who was subsequently indicted for criminal tax evasion. Brodson argued that as a result of the jeopardy assessment, he was unable to obtain an accountant to help defend him in the criminal proceeding, and that he was being denied his constitutional rights to counsel. The court held in favor of the prosecution, but Chief Judge Duffy, in his dissent, recognized that:

[T]he Government, by its deliberate act, by a jeopardy assessment, captured the defendant's assets and thus denied him the use of his own funds to defend himself; the tools of defense were taken from him; the Government pauperized him by placing him in a financial straight-jacket . . . . The tactics of the Government in this case in preventing defendant from utilizing the necessary tools of defense certainly offends my sense of justice.

*Id.* at 111.

Commentators have recently asserted a similar complaint against criminal fee forfeiture statutes. The 1984 Forfeiture Act, which was passed as part of the Comprehensive Crime Control Act of 1984, allows prosecutors to obtain a restraining order forbidding an individual from transferring his assets to anyone. This has been held to include fees paid to an attorney. The Act was passed to prevent defendants from avoiding the effects of criminal forfeiture laws which are a part of the RICO and CCE statutes, by transferring assets to others. These commentators have argued that because fees paid to attorneys do not have statutory immunity from forfeiture, private attorneys will refuse to represent anyone whose assets are subject to forfeiture. Morgan Cloud, *Government Intrusions into the Attorney-Client Relationship: The Impact of Fee Forfeiture on the Balance of Power in the Adversary System of Criminal Justice*, 36 EMORY L.J. 817, 825-26 (1987); William J. Genego, *The Legal and Practical Implications of Forfeiture of Attorney's Fees*, 36 EMORY L.J. 837, 841 (1987). Thus, these statutes could also prevent the defendant from hiring an attorney. Genego, *supra* note 193, at 837.

The Supreme Court recently addressed this issue in *Caplin & Drysdale*, Chartered v. United States, 109 S. Ct. 2646 (1989). In *Caplin*, defense counsel challenged the validity of a forfeiture statute, arguing that, as applied to attorney fees, the statute violates the sixth amendment right to counsel of one's choice. *Id.* at 2651. The Court stated that the right to counsel of one's choice only protects "the individual's right to spend his own money to obtain the advice and assistance of . . . counsel." *Id.* at 2652 (citing *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 370 (1985)). The fee forfeiture statute includes a "relation back" provision which states that title to the forfeited funds vests in the United States as of the commission of the act which gave rise to forfeiture. 21 U.S.C. § 853(c) (1982 & Supp. V); see also *Caplin*, 109 S. Ct. at 2652-53. The *Caplin* Court relied on this relation back provision to hold that the defendant has no sixth amendment right to use the forfeited funds to pay for counsel of his choice because the funds belong to the government. *Id.* The Court, however, ignored the possibility that the defendant may be acquitted, in which case title to the funds would *not* have vested in the United States.

For further explanation of the effects of the Forfeiture Act, see Cloud, *supra*; Genego, *supra*, at 841.

an attorney, the government provides one for him.<sup>193</sup> Here, the government renders some taxpayers indigent,<sup>194</sup> but because courts generally do not provide attorneys for civil litigants, the taxpayer is represented by no one.

Although courts consider certain protections less necessary in a civil trial than in a criminal prosecution,<sup>195</sup> surely the requirement of fundamental fairness exists for the civil litigant. The Constitution mandates that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . .”<sup>196</sup> The jeopardy assessed taxpayer has not been accorded due process when the government’s actions place his property at such great risk of an erroneous deprivation. The “noble ideal” of the “fair trial”<sup>197</sup> should extend to civil litigants so that the government can no longer prevent a jeopardy assessed taxpayer from hiring counsel by denying him access to his seized funds.

### C. Recommendations in Light of the Necessity for an Attorney in Jeopardy Cases

The right to counsel should extend to all jeopardy assessed taxpayers. However, courts should not go to the extreme of appointing counsel at the government’s expense for two reasons. First, a pool of attorneys to represent these taxpayers does not exist. A public defender may adequately represent an indigent criminal defendant because the public defender is trained and experienced in criminal defense work. However, because the Code is so complex and tax is such a specialized field, a litigator inexperienced in tax law would be unable to render effective assistance to the taxpayer.<sup>198</sup> Second, a jeopardy assessed taxpayer is no more deserving of free counsel than is a non-jeopardy assessed taxpayer because in both cases the taxpayer presumably can afford to pay an attorney.

The jeopardy assessed taxpayer, however, should have limited access to his seized funds. A non-jeopardy assessed taxpayer may

---

<sup>193</sup> See discussion of the right to an attorney in criminal cases, *supra* subsection 2(A). But see Morgan Cloud, *Forfeiting Defense Attorney’s Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 Wis. L. Rev. 1, 37. Cloud argues that in some circumstances the defendants in these forfeiture actions will be unable to use their assets to procure private counsel, yet they will not qualify as indigents and may not be able to get appointed counsel. But, he also notes that “the Justice Department asserts it would not contest such appointments” in those situations. *Id.* at 39.

<sup>194</sup> *United States v. Brodson*, 241 F.2d 107, 111 (7th Cir.), *cert. denied*, 354 U.S. 911 (1957).

<sup>195</sup> For example, the burden of proof is significantly lighter in a civil trial than in a criminal case.

<sup>196</sup> U.S. Const. amend. V.

<sup>197</sup> See *supra* text accompanying note 100.

<sup>198</sup> See *supra* subpart III(A)(1) of this Note.

spend as much money as he wishes on attorney fees. If, by virtue of having paid his attorney's fees, he is left without funds to pay a tax liability, the Service must collect the debt as best it can. Allowing a jeopardy assessed taxpayer access to his funds to secure counsel, upon a finding that he has no other means of meeting this expense, would place the jeopardy assessed taxpayer in much the same position as the non-jeopardy taxpayer. This is a logical result because the only asserted difference between the two is that the jeopardy assessed taxpayer was more likely to leave the country or hide his assets to avoid paying a tax liability,<sup>199</sup> not that he was more likely to spend money to dispute his tax liability.<sup>200</sup>

Courts have long considered *Phillips v. Commissioner*<sup>201</sup> to stand for the proposition that jeopardy assessments are constitutional.<sup>202</sup> In addition, the Supreme Court has held summary seizures constitutional when pre-seizure notice would frustrate the purposes of the statute, as it would in this case. The Supreme Court is therefore unlikely to declare jeopardy assessments unconstitutional.<sup>203</sup> Nonetheless, Congress should amend the jeopardy assessment provision to provide for a court-administered escrow account. A court could mandate reasonable fees and prevent the taxpayer from using the money for frivolous expenses. The government would still be assured that the taxpayer could not hide or abscond with his assets. This would protect the government's interests and simultaneously assure that a jeopardy assessed taxpayer was not precluded by the government's actions from receiving adequate representation.

### CONCLUSION

Courts have held that existing jeopardy assessment procedures do not violate the due process clause of the fifth amendment. However, the Supreme Court's interpretation of the Constitution is not stagnant. The right to counsel has been evolving, and the Court has held more and more often that civil litigants in certain types of cases have a due process right to counsel. Under current doctrine, a jeopardy assessed taxpayer must wait until after trial to determine whether he was denied due process rights because the Service seized his property and left him without sufficient funds to pay for

---

199 See *supra* note 20.

200 See *supra* text accompanying note 40.

201 283 U.S. 589 (1931).

202 See *supra* note 56.

203 One commentator has noted that "[c]ourts overwhelmingly rely upon democratic institutions to remedy abuses in taxation, rather than exercising a strong hand in judicial review." Gale Ann Norton, *The Limitless Federal Taxing Power*, 8 HARV. J.L. & PUB. POL'Y 591, 591 (1985). The author discusses the heavy presumption in favor of holding any tax statute constitutional. *Id.* at 621.

an attorney. Based on the longstanding history of the jeopardy assessment, the Supreme Court is not likely to declare the statute unconstitutional, but the Court should recognize the existence of the right to counsel for a jeopardy assessed taxpayer whom the Service renders indigent. Moreover, Congress should amend the statute to make the taxpayer's seized assets available for the limited purpose of paying attorney's fees.

*Karen M. Streisfeld*†

---

† I wish to thank Professor Howard Abrams, of Emory University School of Law, whose patience, guidance and support contributed greatly to every stage of the publication of this Note.

