

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - x

3 UNITED STATES, :

4 Petitioner :

5 v. : No. 07-308

6 CLINTWOOD ELKHORN :

7 MINING COMPANY, ET AL. :

8 - - - - - x

9 Washington, D.C.

10 Monday, March 24, 2008

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:41 a.m.

15 APPEARANCES:

16 WILLIAM M. JAY, ESQ., Assistant to the Solicitor
17 General, Department of Justice, Washington, D.C.; on
18 behalf of the Petitioner.

19 PATRICIA A. MILLETT, ESQ., Washington, D.C.; on behalf
20 of the Respondents.

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

| | PAGE |
|------------------------------|------|
| ORAL ARGUMENT OF | |
| WILLIAM M. JAY, ESQ. | |
| On behalf of the Petitioner | 3 |
| PATRICIA A. MILLETT, ESQ. | |
| On behalf of the Respondents | 16 |
| REBUTTAL ARGUMENT OF | |
| WILLIAM M. JAY, ESQ. | |
| On behalf of the Petitioner | 44 |

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(10:41 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 07-308, United States versus Clintwood Elkhorn Mining Company.

Mr. Jay.

ORAL ARGUMENT OF WILLIAM M. JAY

ON BEHALF OF THE PETITIONER

MR. JAY: Mr. Chief Justice, and may it please the Court:

Respondent sought and received a full refund of the tax they paid on exported coal for the full three-year period permitted them by the tax-refund statute. What the court of appeals' decision permitted them to do was to bring an additional action for indistinguishable relief, but for a three-year period beyond what the tax-refund statute permits.

We submit that that decision was erroneous for two principal reasons: First, the plaintiff --

JUSTICE GINSBURG: It might help if you raise that lectern a bit.

MR. JAY: Hang on.

Is that better, Your Honor?

JUSTICE GINSBURG: Yes, thank you.

MR. JAY: Thank you.

1 The plain and unambiguous terms of the
2 tax-refund statute, section 7422(a), expressly provide
3 that any claimant who alleges that a tax has been
4 illegally assessed, no matter the reason, must before
5 proceeding to court file a refund claim with the
6 Internal Revenue Service within three years after filing
7 the tax return on which the illegal tax was paid.

8 JUSTICE SCALIA: Mr. Jay, is the government
9 running with the fox and chasing with the hounds? You
10 want us to apply the provisions governing the Internal
11 Revenue Code with regard to whether the statute has
12 expired, but when it comes to interest you say oh, no,
13 no, no, that doesn't apply. Why? Why shouldn't the two
14 go *pari passu*, as we say?

15 MR. JAY: Well, we think, Your Honor, that
16 the interest provision is in fact a key part of the
17 tax-refund statute and so Respondent's attempt to invoke
18 the tax-refund judgment interest provision is
19 inconsistent with their theory, that they're proceeding
20 outside the scope of the tax ---

21 JUSTICE SCALIA: Oh, yes, they make the same
22 mistake, but that doesn't justify your making the same --
23 the same mistake.

24 MR. JAY: Well, we think, Your Honor --

25 JUSTICE SCALIA: I mean, it's either, you

1 know, they're both in one pot or they're both in the
2 other pot. And both sides want to -- want to split them
3 up, but why don't they go together?

4 MR. JAY: Well, we think the whole case is
5 in the Title 26 pot, Your Honor, that the whole case
6 should proceed under the provisions of Title 26, meaning
7 that Respondents have already received the full tax
8 refund to which they are entitled. And to be sure, they
9 received interest on that refund. And had they had to
10 sue for it, they would have received interest under
11 section 2411. But because they are -- because they are
12 no longer able to proceed under the exclusive tax-refund
13 procedure, of course we think that they -- that they
14 can't plead around that by claiming constitutional
15 damages instead.

16 But if the Court were to agree with them and
17 agree that they could pursue damages for a violation of
18 the Export Clause, section 2411 does not apply to such a
19 claim because it's not a claim for an overpayment of
20 tax. The term "overpayment" in the interest statute
21 ties back to the section 6402, which is the linchpin of
22 the tax-refund statute. And the -- when a taxpayer has
23 made an overpayment, that triggers the obligation of the
24 IRS to provide a tax refund if one is timely sought, and
25 if one isn't timely sought, as this Court recognized in

1 the Brockamp case, the Congress has provided an
2 unusually emphatic limitation on the Commissioner's
3 ability to --

4 JUSTICE BREYER: Can you explain one thing
5 to me? I take it that they -- everybody says they went
6 through all the right IRS hoops to get back three years
7 worth of damages, i.e., they get their payments back and
8 they get interest.

9 MR. JAY: That's right.

10 JUSTICE BREYER: Now, what they want is they
11 want three years before that.

12 MR. JAY: That's exactly --

13 JUSTICE BREYER: And they're too late under
14 Title 26. So what you're saying is, one, you can't get
15 any interest and, two, you can't get your money back at
16 all.

17 MR. JAY: Well, on the interest, Your Honor,
18 we're saying that they were entitled to the interest on
19 the three years.

20 JUSTICE BREYER: I'm saying for three years
21 they're home-free. They get their payment back and they
22 get their interest. Now let's go to the three preceding
23 years. I'm a little confused about that because I can't
24 work out -- I suppose that the government is saying:
25 You get nothing, you don't get your money back, and you

1 don't get your interest. Or is the government saying:
2 You get your money back; you just don't get the
3 interest? Which is it? And I don't see how it could be
4 the latter.

5 MR. JAY: It is the former, Your Honor --

6 JUSTICE BREYER: Okay.

7 MR. JAY: -- because we're saying that
8 because Respondents waited for 21 years while paying the
9 tax without -- without filing a refund claim, that
10 they're limited to the three years immediately preceding
11 the refund claim --

12 JUSTICE SCALIA: Right. I thought you were
13 making a second argument, that even if they were
14 entitled to it despite the statute, they wouldn't be
15 entitled to interest. You don't make that claim?

16 MR. JAY: No -- if they were entitled to sue,
17 not under the tax -- under the Tax Code at all, but on
18 the theory countenanced by the court of appeals, that
19 this is not a suit for a tax refund at all, but a suit
20 for damages arising directly under the Constitution --

21 JUSTICE SCALIA: I see.

22 MR. JAY: -- then there is no provision in
23 Title 28 or anywhere else that provides the required
24 express provision --

25 JUSTICE SCALIA: Right.

1 MR. JAY: -- of interest that's necessary to
2 award interest on a claim against the government.

3 JUSTICE SCALIA: It's all -- right. Okay.

4 JUSTICE GINSBURG: But why shouldn't it be a
5 suit contesting the constitutionality? I mean, in the
6 usual case where you seek a refund, there are
7 adjustments that have to be made. But here, if the only
8 question is the constitutionality of the tax, then what
9 is the point of going through any kind of administrative
10 process of the refund route?

11 MR. JAY: In the context of the coal tax,
12 Your Honor, and the Export Clause claim, the purpose of
13 requiring exhaustion, requiring Respondents to proceed
14 before the IRS, is that the coal tax is exempt from
15 taxation under the Constitution only if the coal, at the
16 moment the tax is imposed -- which in this case is when
17 it's first sold by the manufacturer, the mining company
18 -- if at that moment, the coal was in the stream of
19 export. And in the context of the coal industry that can
20 be a fairly fact-specific question, and the IRS technical
21 advice memorandum that we've cited on page 11 of our
22 reply brief explains that to some degree. So it's
23 possible for a timely refund claim to allow the IRS to
24 examine the facts and circumstances of the transaction
25 and determine whether in fact the coal was in the stream

1 of export at all.

2 Further, the IRS -- if it has only an excise
3 tax return from the taxpayer, IRS has no idea what
4 percentage of that coal was exported. Well over 90
5 percent of the coal mined in the United States remains
6 in the United States and there's nothing on Form 720,
7 the excise tax return, that specifies how much of that
8 coal is exported. So effectively by filing the two-page
9 refund claim the taxpayer puts the IRS on notice of what
10 percentage of coal in the given years was in fact in the
11 stream of export when it was sold, whether in fact the
12 broker or whoever purchased it actually exported it from
13 the country, and also how -- what the dollar amount of
14 tax refund is being sought.

15 So all of those, we think, are perfectly
16 valid purposes for requiring a short but reasonable time
17 to proceed before the IRS. And if the IRS denies the
18 claim, then of course Respondents could have proceeded
19 directly to court.

20 The IRS did not in fact deny their claim,
21 and the IRS has issued a notice of acquiescence
22 specifying that coal tax -- that coal tax payers who paid
23 this coal tax and filed timely refund claims will
24 receive a refund to the full extent that Congress has
25 permitted the IRS to grant refunds.

1 JUSTICE SCALIA: Plus interest.

2 MR. JAY: Plus interest, that's right, Your
3 Honor. Under section 6611, interest is fully available
4 on refunds. And again, if the -- if the IRS had denied
5 the claims and Respondents had been forced to go to
6 court, they would have received interest accounting for
7 that time delay as well.

8 So we think that section 7422 is the
9 exclusive means of bringing a claim that a tax was
10 illegally or erroneously assessed or collected. The
11 terms of the statute are clear; they're unambiguous; and
12 they're exclusive. 7422(a) simply is the only way of
13 bringing this claim.

14 And we think that whether Respondents
15 denominate their claim as a statutory-refund claim or a
16 constitutional claim, the terms of section 7422(a)
17 plainly cover it. So we think that the Court need not
18 necessarily answer the question of whether the Export
19 Clause creates a self-enforcing cause of action at all,
20 because --

21 CHIEF JUSTICE ROBERTS: Could the IRS say
22 that the statute -- or Congress, I guess -- say the
23 statute of limitations is one month?

24 MR. JAY: To file a timely refund claim,
25 Your Honor?

1 CHIEF JUSTICE ROBERTS: Yes, and anything
2 after that, any constitutional violation after that, is
3 just not remediable.

4 MR. JAY: Well, the constitutional violation
5 would have taken place before in Your Honor's
6 hypothetical.

7 CHIEF JUSTICE ROBERTS: Five weeks before.

8 MR. JAY: In the McKesson case, Your Honor,
9 the Court outlined a number of the options that taxing
10 authorities have to respect their strong fiscal interest
11 in the stability of their tax revenues while providing
12 appropriate relief. And the Court listed as one way in
13 which States can -- States and other taxing authorities
14 can protect that by providing a short statute of
15 limitations. The Court also suggested that --

16 CHIEF JUSTICE ROBERTS: We're talking about
17 -- we're talking about the Constitution here. And in
18 effect -- I mean, I assume I could run through the usual
19 routine. I mean, you wouldn't say they could have a
20 statute of limitations of two days, right?

21 MR. JAY: Well, Your Honor, in McKesson the
22 Court pointed to another alternative, which is requiring
23 that the tax be paid under protest. And that
24 effectively is a statute of limitations of zero days, in
25 that when -- in that when the tax is paid, the

1 taxpayer has to identify the basis of the constitutional
2 challenge and the amount being paid under protest.

3 And under -- before the Tucker Act, and
4 indeed in the early years of the Tucker Act, taxes had
5 to be paid under protest or the taxpayer was out -- was
6 out the remedy against a collector. And Congress has
7 since provided that in general taxpayers don't have to
8 pay their taxes under protest. Instead, they can bring
9 a refund claim within three years afterwards. But that
10 three-year limitation period, while relatively generous,
11 is absolute.

12 And the Court held in the Brockamp case that
13 the three years can't be extended, not even for an
14 individual taxpayer suffering from senile dementia for
15 the entire time period.

16 JUSTICE ALITO: Do you think there are any
17 circumstances in which a taxpayer can bring a claim
18 under the Tucker Act for the refund of an
19 unconstitutional tax?

20 MR. JAY: Well, we think -- I want to
21 clarify, Your Honor, that any lawsuit, whether it's on
22 Respondent's theory or on our theory, any lawsuit that's
23 filed is in fact under the Tucker Act.

24 JUSTICE ALITO: Well, any situation in which
25 such a suit can be brought without having filed a claim

1 previously with the IRS?

2 MR. JAY: If the only -- if the only basis
3 for the taxpayer's recovery is that the taxpayer has
4 paid a tax and the tax was illegally or erroneously
5 assessed because it was unconstitutional, we think that
6 section 7422(a) and the associated time limits provide
7 the procedure for recovering under the Tucker Act.

8 Section 2501, which is what Respondents
9 contend is the only procedure that applies to the claims
10 that they have brought, section 2501, as the Court
11 recognized --

12 JUSTICE ALITO: Just to be clear, so your
13 argument is not limited to the Export Clause. It
14 doesn't matter what provision of the Constitution the
15 tax violates. The same rule would apply?

16 MR. JAY: Congress has made no
17 distinction in the statute between one type of
18 constitutional claim and another, or indeed one type of
19 illegality or another. And we've cited some -- some
20 examples in our opening brief of numerous constitutional
21 provisions that taxpayers may bring challenges under.
22 And there are at least five clauses in the original
23 Constitution that regulate the Federal Government's
24 taxing authority. There are at least four more that
25 regulate the States, and, you know, not to mention the

1 Bill of Rights.

2 So constitutional claims are commonly
3 brought by taxpayers against Federal taxes, and the
4 tax-refund procedure provides a full -- a fully
5 effective, fully adequate way of vindicating that right.
6 The only requirement is that it be submitted in writing
7 to the IRS within three years after filing the tax
8 return in question.

9 JUSTICE KENNEDY: Do you know, what happened
10 before the Tucker Act with inverse condemnation claims?
11 The government violates the Fifth Amendment Takings
12 Clause or the Fourteenth Amendment Takings Clause
13 applied to the Fifth by inverse condemnation, and there
14 is no Tucker Act. Was there a constitutional cause of
15 action for damages?

16 MR. JAY: Before there was the Tucker Act,
17 Your Honor, when the government took property and was
18 obliged to pay compensation, the claim was presented to
19 Congress; and Congress could legislate relief by a
20 private bill.

21 Eventually, Congress created the Court of
22 Claims purely as an Article I tribunal. There was no
23 judicial review because its decisions were always
24 subject to revision by Congress. And eventually
25 Congress, having tired of adjudicating all these claims

1 in a legislative manner, gave the Court of Claims
2 independent status with its decisions reviewable in
3 Article III courts. And so, by enacting the Tucker Act,
4 takings claims became brought in the Court of Federal
5 Claims.

6 So, because we think section 7422(a) is a
7 completely adequate remedy for any constitutional claim
8 that Respondents might bring, we submit that this
9 Court's Bivens cases and this Court's unlawful-tax cases
10 show that there is no warrant to create a new cause of
11 action directly under the Constitution in circumstances
12 like this where the taxpayer has a fully effective
13 remedy, allows that remedy to become time-barred, but
14 instead brings a claim, purportedly under the
15 Constitution, against the identical defendant, in the
16 identical forum seeking the identical relief. Under
17 those circumstances, this Court has never fashioned a
18 Bivens-type implied cause of action for a violation of
19 the Constitution.

20 Indeed, in *Bush versus Lucas*, *Schweiker*
21 *versus Chilicky*, and other cases, the Court has
22 recognized that when Congress has legislated a remedial
23 scheme, it doesn't -- this Court will still stay its
24 hand before creating a new Bivens action, even if that
25 remedial scheme has very short time limits, such as the

1 30-day time limit, the civil service remedies that were
2 at issue in Bush, or the exhaustion requirement of Title
3 VII which substitutes for an equal-protection claim for
4 Federal employees.

5 Even in those circumstances, and even if the
6 remedies that are available are equitable and not money
7 damages, even in those circumstances this Court will not
8 create a new cause of action for money damages. And in
9 this case, if Respondents had filed in a timely way in
10 this -- referring to the relief that they're seeking in
11 this case, they're seeking relief for 1994, 1995 and
12 1996. If they had filed by April 30th, 1997, by which
13 point Cyprus Amax Coal Company was already vigorously
14 litigating the constitutionality of the coal excise tax
15 in the Court of Federal Claims, if they had filed by
16 that time, they could have received full relief.

17 So their failure to assert their rights in a
18 timely way certainly didn't give the court of appeals
19 warrant to create a new Bivens-type implied right of
20 action.

21 If the Court has no further questions at
22 this time, I'll reserve.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 MR. JAY: Thank you, Mr. Chief Justice.

25 CHIEF JUSTICE ROBERTS: Ms. Millett.

1 ORAL ARGUMENT OF PATRICIA A. MILLETT
2 ON BEHALF OF THE RESPONDENTS

3 MS. MILLETT: Mr. Chief Justice, and may it
4 please the Court:

5 This is a question of statutory construction
6 and if Congress -- what this Court's precedent has made
7 clear in *Enochs versus Williams Packing*, is that if
8 government -- if the government wants to enjoy the
9 special, extraordinary protections of the tax-refund
10 scheme, it has to assert a plausible basis for tax
11 liability. It hasn't done that here. There was never
12 any claim that they have any legitimate right to this
13 revenue as a source, as a basis, for taxes; that they
14 have any legitimate tax regulatory power over this
15 export process; or that they have any legitimate basis
16 for defending the statute as constitutional under any
17 circumstances of the law.

18 JUSTICE STEVENS: Ms. Millett, if it was --
19 if it was that obvious, why did it take so long for the
20 coal companies to realize that the government owed them
21 money?

22 MS. MILLETT: Justice Stevens, that's
23 because my clients are not Fortune 100 companies, and I
24 don't think the Constitution or Congress imposes a test
25 on the Tax Code that requires that sort of level of

1 scrutiny.

2 I've got -- we've clients here that are
3 small. They have no in-house lawyers and they had
4 accountants who paid the taxes. And so the short answer
5 is they didn't notice.

6 It's not that they looked at it and thought
7 it was constitutional. One thing that is clear is that
8 as soon as anybody looked at this statute, as soon as
9 anybody -- the court, the government that collected the
10 tax for 20 years and did have a constitutional duty to
11 look at the Constitution, as soon as anyone looked at
12 it, there was no defense offered. This is an
13 extraordinary case, where the government made no effort
14 to defend this tax whatsoever in district court.

15 JUSTICE KENNEDY: Were there any other cases
16 where they said, well, it's not in the stream of
17 commerce yet, or there was an intermediate broker, or
18 anything like that? Are there any complexities like
19 that?

20 MS. MILLETT: Justice Kennedy, there is a
21 statutory definition, 26 U.S.C. 4221, that deals with
22 stream of commerce and that mirrors this Court's decision
23 in the A.G. Spalding case, which says that either the
24 direct sale -- that, you know the manufacturer does a
25 sale directly to the exporter or has the broker, so one

1 or two steps, is stream of commerce, and after that it's
2 not going to be. That's the same thing this Court did
3 in A.G. Spalding.

4 If someone wanted to fight about that
5 statutory application, they wouldn't be raising a
6 constitutional claim like we are here. What happened --

7 JUSTICE KENNEDY: But in none of these cases
8 did they have those sorts of problems?

9 MS. MILLETT: Not in these cases. My
10 clients -- I think almost all of the claims they
11 directly exported it themselves. There was no dispute
12 whatsoever.

13 If there's a debate, factually or legally,
14 about whether this is in the stream of -- if it's not in the
15 export stream, it's not an Export Clause violation.
16 If there is a factual debate, it wouldn't fall within
17 the Enochs versus Williams Packing exception. There was
18 no factual debate. There is a stipulated judgment in
19 this case.

20 What Enochs tells us, again, is that the
21 government can't have a tax be a tax solely for the
22 purpose of curtailing constitutional recovery. That's
23 the only way that this was a legitimate tax in their
24 view, not to collect revenue.

25 JUSTICE GINSBURG: If 7422(a) had said

1 any -- any Internal Revenue tax, including a tax imposed
2 in alleged violation of the Export Clause, that would
3 cut -- cut out the six-year statute of limitations,
4 right? If it said the refund procedure applies to any
5 Internal Revenue tax including one imposed in alleged
6 violation of the Export Clause?

7 MS. MILLETT: I think it would clear up an
8 awful lot. If I could just clarify, though. What this
9 court held in Enochs versus William Packing is that the
10 phrase "any tax" only applies if the government is at
11 least willing to assert a plausible defense for the tax.
12 And so it would depend on whether "any tax" would still
13 include that limitation in your scenario, if they are
14 willing to assert a plausible Export Clause claim
15 defense.

16 JUSTICE GINSBURG: Nothing different from
17 what it is now, but just Congress makes clear that a tax
18 and alleged violation of the Export Clause falls within
19 the term "any Internal Revenue tax"?

20 MS. MILLETT: Then I think my position would
21 be that it does not, because this Court has held for
22 half a century without Congress changing it that "any
23 tax" means a tax that the government asserts is valid.
24 It doesn't have to be correct. It has to assert that
25 it's valid. Otherwise it's in the guise of a tax and it

1 doesn't fall --

2 JUSTICE SCALIA: Well, it asserted it was
3 valid if this coal was not shipped overseas. You're
4 putting an awful burden on the government to know when
5 the coal is severed and shipped. You're saying if they
6 mistake a shipment as being only for domestic use rather
7 than for shipment abroad, they don't have any basis
8 whatever for the tax claim. I'm not sure I agree with
9 that.

10 MS. MILLETT: The problem in this case,
11 Justice Scalia, is that there were two statutes. There
12 was a statute imposing the coal tax, 26 U.S.C. 4121 --
13 this is all on the first page of our brief -- and then
14 there was an amendment to the exemption for exports in
15 26 U.S.C. 4221 that specifically said the general tax
16 exemption for exports does not apply to this coal tax,
17 and that provision captured nothing but exports of coal.

18 JUSTICE BREYER: So your point is that you
19 don't have to go through the refund requirements of 7422
20 if the government was -- although it did ask for the
21 money as a tax, they are really out to lunch. I mean,
22 the trouble -- is there any authority for an argument
23 like that? I mean, the trouble I guess that I would
24 have that argument is, one is linguistic, because it
25 goes on to say "or of any sum alleged to have been

1 excessive or in any manner wrongfully collected."

2 And then the other thing is just common
3 sense: Suppose you have an insane tax collector. You
4 know, I mean, that could happen. And the insane tax
5 collector they discover some years later has been
6 assessing all these penalties for no reason and people
7 have been paying some of them because, terrible tragedy,
8 terrible thing. But I guess they'd be stuck, I'd always
9 thought, with the three-year statute of limitations, so
10 even though it's really nuts.

11 Now, is there -- is there any authority for
12 us making a distinction between an insane -- to get an
13 extreme -- an insane assessment of a tax and just a
14 wrongful assessment of a tax?

15 MS. MILLETT: The authority is this Court's
16 unanimous opinion in *Enochs versus Williams Packing* which
17 dealt -- which said that if -- when it used -- that was
18 dealing with -- it was a tax injunction act, but the same
19 language: "No suit shall be maintained for any tax in any
20 court." And it said in that -- that statutory language,
21 "any tax" means something that the government can
22 plausibly defend as a tax. It doesn't have to --

23 JUSTICE BREYER: What about the "any sum,"
24 "in any manner"? You know, what about that language?

25 MS. MILLETT: Again, the key language --

1 JUSTICE BREYER: "Any sum in any manner
2 wrongfully collected."

3 MS. MILLETT: Right. This Court dealt with
4 that, I think in -- in Dalm, and -- has its own rules in
5 the taxing, but this is -- the question is "any tax," and
6 "any tax" doesn't mean something that's just in the guise
7 of tax, whether the guy is insane or Congress just forgot
8 to read the Export Clause. But as soon as we look,
9 everyone knows this is unconstitutional, then understand
10 what the impact of that is. That means the only way this
11 is a legitimate tax under the government's view, the only
12 legitimate tax function that this serves is to cut off
13 constitutional remedies. That's its only role.

14 JUSTICE BREYER: No. No. Their argument
15 is, I'm terribly sorry, that if the way you're hurt is
16 you paid a tax you shouldn't pay and you want to get a
17 refund, go through the administrative procedure.

18 MS. MILLETT: This Court said in Enochs that
19 you don't -- that tax -- the whole point of a tax
20 injunction act is to funnel everyone in to the tax-refund
21 procedure. And this Court said you don't have to go if
22 it is not a tax. And what they mean by not a tax, is
23 that it can't plausibly be defended by the government as
24 a tax. This doesn't happen often. This is an
25 extraordinary exception. But this is the case where it

1 did. And if the government --

2 CHIEF JUSTICE ROBERTS: So why do you -- I
3 take it, though, that you concede the six-year statute
4 of limitations under the Tucker Act, right? I mean,
5 your brief says this is an unbending and unqualified
6 prohibition on the use of exports except up to -- if
7 it's before six years and one day. You take an
8 adamant position with respect to three years but you
9 give up six years.

10 MS. MILLETT: No. It's unbending and wrong
11 whether it's within six years or ten years. But we
12 agree that a constitutional right can have a statute of
13 limitation -- if there is a constitutional right that
14 doesn't have any statute of limitations, I don't know
15 what it is and it's not this one. The question is --

16 JUSTICE SOUTER: Why aren't three years
17 enough?

18 MS. MILLETT: I'm sorry?

19 JUSTICE SOUTER: Why aren't three years
20 enough?

21 MS. MILLETT: This is a question of
22 statutory construction. And Congress determined what
23 the right statute of limitation is for a constitutional
24 claim, and that's six years. If Congress had a
25 three-year statute of limitations under the Tucker Act

1 for all constitutional claims, we wouldn't be here.

2 CHIEF JUSTICE ROBERTS: So -- so, the
3 rhetoric in your brief how this is a constitutionally
4 based prohibition is not pertinent? You're saying if
5 the statute was clear and it said three years, that
6 would be fine, even though it's a claim under the Export
7 Clause?

8 MS. MILLETT: We don't say that the Export
9 Clause, right, distinguishes between three years and six
10 years in its own right. What the Export Clause does,
11 though -- there is the statutory construction argument
12 and we have the Enochs argument, but we also think there
13 are substantial constitutional concerns here. And the
14 Export Clause makes it most imperative for this Court to
15 continue to adhere to its definition of "any tax" from
16 Enochs versus Williams Packing, and that's because --

17 JUSTICE SCALIA: Why is the Export Clause
18 so, so significant? The only other self-executing
19 constitutional clause that provides for damages
20 automatically that comes to mind is the Takings Clause.
21 And we have allowed the States to require claimants to
22 jump through innumerable hoops. They have to exhaust
23 all their administrative remedies before they can bring
24 a suit here. Why -- why is the Export Clause any -- any
25 more sacrosanct?

1 MS. MILLETT: Because we don't -- under the
2 Constitution the government hasn't done anything wrong
3 unless -- until -- unless and until it actually effects
4 a taking and doesn't pay for it through process. Those
5 processes are how we determine -- get to the point where
6 there has been an actual constitutional violation here.

7 No administrative process is necessary to
8 have -- to know that tax has been posed on exports. And
9 what's distinct about the Export Clause, to get back to
10 Chief Justice Roberts' question, is that it is -- this
11 Court said unanimously in *U.S. Shoe*, a simple, direct,
12 unqualified prohibition on congressional tax power in
13 terms, and it disallows any effort to raise revenue
14 through the Tax Power Act.

15 JUSTICE SCALIA: *Volenti non fit injuria*.
16 If indeed the taxpayer pays out the money for an
17 unconstitutional export tax, it seems to me that person
18 has no claim until he complies with the administrative
19 procedures that render that tax unconstitutional. But
20 up until the point where he is paying it voluntarily, it
21 seems to me there is no constitutional violation.

22 MS. MILLETT: Congress eliminated in the
23 early 1920s any prepayment protest requirement under the
24 tax law. And the tax law -- the Internal Revenue Code
25 applies sweepingly to Americans across this country,

1 vast majority of whom are not equipped with tax lawyers
2 at their side to make protests at the moment they pay
3 their taxes. That's never been required. The question
4 --

5 JUSTICE SCALIA: I'm not saying it has to be
6 made at the moment they pay their taxes. I'm just
7 saying until it's made there is no unconstitutional,
8 unconstitutional export tax.

9 MS. MILLETT: That's right. Until the tax
10 -- well, there can be an unconstitutional statute on the
11 books. No one has been injured by it or affected by it
12 until somebody actually pays it or is required by the
13 government to pay it. I don't dispute that, but keep in
14 mind we're dealing with a tax-refund scheme. The tax-
15 refund scheme is an extraordinary creature in the law
16 for many good reasons but that -- that reverses the
17 order of everything. It makes you pay before any
18 entitlement has been shown to that money by the
19 government.

20 JUSTICE GINSBURG: I thought you didn't have
21 to pay --

22 JUSTICE KENNEDY: Yes, but here there was a
23 payment. Here there was a payment.

24 MS. MILLETT: Yes.

25 JUSTICE KENNEDY: It's different than if you

1 try to enjoin the collection at the outset.

2 MS. MILLETT: It's only different --

3 JUSTICE KENNEDY: So that argument doesn't
4 work.

5 MS. MILLETT: It's only different in the
6 sense that the government's interests are less, and the
7 government's interests are most acute in having people
8 pointed to the tax-refund scheme, this Court has said
9 time and again, before -- to pay first and fight later.
10 And as a result -- I mean --

11 JUSTICE GINSBURG: Well, what about the
12 deficiency procedure? And I don't know if that applies
13 with excise taxes, but suppose they didn't pay this tax
14 and they get a notice of deficiency. Where would they
15 go?

16 MS. MILLETT: There -- there's nowhere for
17 them to go for this particular tax. You can't go to tax
18 court.

19 JUSTICE GINSBURG: Why not?

20 MS. MILLETT: Because Tax Court doesn't
21 apply to excise taxes for the most part. There may be a
22 few exceptions. It essentially applies to income gift
23 and estate taxes, and it certainly didn't apply to this
24 provision here. They could have -- they could have
25 gotten the assessment and gotten on the phone with the

1 IRS. Otherwise they'd have to wait for a lien or levy.

2 Now, the government, by the way, in its reply
3 brief suggests --

4 JUSTICE KENNEDY: Well, but if we -- if we
5 accept your view in this case, they can go in a district
6 court and enjoin it. It's not a tax. The Tax
7 Injunction Act doesn't apply.

8 MS. MILLETT: The -- if you accept this
9 Court's --

10 JUSTICE KENNEDY: And -- which is just what
11 Justice Ginsburg's questions point out. And earlier I
12 had indicated that in this case they did pay the tax.

13 MS. MILLETT: I --

14 JUSTICE KENNEDY: So it seems to me there is
15 a distinction. It may be that you would prevail in your
16 argument.

17 MS. MILLETT: Oh, no. We couldn't have --

18 JUSTICE KENNEDY: If they tried -- if they
19 tried -- do you think they could enjoin the collection
20 of a tax refund?

21 MS. MILLETT: No, they couldn't because in
22 addition to showing the government's imposition of the
23 tax is legally indefensible, you still have to show
24 entitlement to an injunction, and unless you can
25 establish irreparable harm just by paying money, which

1 I'm not aware of any coal company that could have, you
2 couldn't have gotten the injunction. And everything --

3 JUSTICE KENNEDY: Well, but I mean, in your
4 argument you say it is absolutely void, that it doesn't
5 apply. Just get an injunction.

6 MS. MILLETT: You can't get an injunction
7 just because something is unlawful. That's never been
8 allowed under equity. You also have to show irreparable
9 harm.

10 JUSTICE KENNEDY: Well, then we'll invent
11 the hypothetical company that is going to go broke and
12 all that stuff.

13 MS. MILLETT: Well, I mean, it's not a
14 question of inventing. This Court dealt with exactly
15 that question in Enochs, where -- Enochs versus Williams
16 Packing, and later again in South Carolina versus Regan,
17 Commissioner versus Shapiro -- that you can't just
18 come in and say it's unlawful, that you actually have to
19 then establish irreparable harm. Everything in the tax
20 scheme points to taxpayers with enormous penalties and
21 enormous risks to pay first, fight later. And when a
22 taxpayer does that, it's also --

23 JUSTICE KENNEDY: But you can't have it both
24 ways. You're saying it isn't a tax for your purposes,
25 and then in my hypothetical case you say, oh, well, you

1 have to go through the tax --

2 MS. MILLETT: It's the government that --

3 JUSTICE KENNEDY: And the same with your
4 answer, what I thought was your answer to Justice
5 Ginsburg's question.

6 MS. MILLETT: It's the government that wants
7 to have it both ways. It wants to say it is a tax just
8 for purposes of making it a nonconstitutional case under
9 the Tucker Act and to make you go through the tax scheme,
10 but in no other way is this defensible as a tax.

11 JUSTICE BREYER: In looking at your
12 argument, I see it now, I think, if I'm right. You're
13 -- that it would have very broad reach. It would reach
14 -- it doesn't just concern the constitutional claim; it
15 concerns any claim you'd have against the IRS. And
16 there's authority that says if the IRS position is too
17 far out, you can go get an injunction. That's what
18 you're pointing to. And then your argument is,
19 because of that authority, that kind of an exception for
20 the far out IRS claim also applies to the statute of
21 limitation and administrative requirement. And your
22 problem is the latter has never been held. And the
23 reason that that's a problem, I take it, is because when
24 you're talking about injunctions, you're talking about
25 basic equity, but when you're talking about later-on

1 administrative requirements, there's really no reason
2 they couldn't have filed the claim. And if we were to
3 accept an argument on the -- to the contrary and
4 analogize it, it's going to cut through rules,
5 regulations, statutes, constitutional claims,
6 everything, really making a hash of their provision
7 there -- of the administrative provision. So, what is
8 your response to that thought which --

9 MS. MILLETT: I have two responses: One,
10 it's going to have far less effect in this situation, in
11 the post-payment situation, than it did in Enochs, where
12 it wasn't limited to the Export Clause. This situation
13 is only going to work where you not only establish the
14 government has no basis for this tax, a hard thing to
15 do, but that you have a money-mandating constitutional
16 provision. There aren't many of those. If you don't
17 have a money-mandating provision, you've got nowhere else
18 to go but the tax scheme.

19 So it's extremely limited, but I want to get
20 back -- this is not about an equity rule. This Court
21 was specific in Enochs versus Williams Packing, when it
22 said, our prior decision under Miller versus Standard
23 Nut, which had done a more generous view of this
24 get-around-the-Tax-Injunction-Act, was wrong, because
25 the Tax Injunction Act is not an equitable rule. Enochs

1 was a statutory construction rule. Pages 6, 7, and 8 of
2 that decision make it plain in terms -- we talk about
3 what the Act requires, and the language of this Court is
4 construing is the phrase "any tax." And if it has no
5 legitimate basis, then it's in the guise of a tax.

6 That same language has been on the books for
7 almost half a century. Congress went back to the Tax
8 Injunction Act eight times without changing it in
9 response to this Court's decision. Enochs has been
10 reaffirmed by this Court five times. Congress enacted
11 an entirely new Internal Revenue Code in 1986 that used
12 that "any tax" language in 7422, with this Court's five
13 decisions on the book and kept that language. And it
14 makes sense. Congress doesn't -- doesn't enact a tax
15 where it's only tax function is to cut off constitutional
16 remedies.

17 JUSTICE BREYER: So what do you want to do
18 about your argument, as I hear it, has nothing to do
19 with the nature of the claim that you're asserting to
20 get the money back. It has to do with the nature of the
21 IRS's defense and -- well, can you do it that way? Can
22 you say the word "any tax" or "any claim" -- I can't
23 remember that other -- what was it? It was any -- "any
24 sum" -- "any sum" or "any tax." Can you say, well, it
25 means one thing if they are saying that the reason they

1 want it back is that it violates the Constitution, and
2 those words mean a different thing if the reason that
3 you want it back is it violates an IRS reg, it violates
4 an IRS statute?

5 MS. MILLETT: I'm not saying that "any tax"
6 means anything different. I'm just pointing out that if
7 you succeed --

8 JUSTICE BREYER: Well, if it doesn't mean
9 anything different and then if the very far-out claim to
10 a tax is so far out it isn't a tax, that would be true
11 in the regulation context, in the statutory context as
12 well as the constitutional context. Am I missing
13 something?

14 MS. MILLETT: No, because you have to have a
15 money-mandating claim under the Constitution to fall
16 within the Tucker Act. The -- as this Court said, the
17 Tucker Act for purposes of statutory claims under
18 the Internal Revenue Code, as this Court said in
19 *Kreider*, takes three years to the statute of
20 limitations. So I don't think, after *Kreider*, that you
21 would still have a six-year statute of limitations under
22 the Tucker Act for a statutory tax claim.

23 The difference is constitutional
24 enforcement, and this is fundamentally a constitutional
25 right that's being enforced. And the question is, would

1 Congress have thought -- this is all a question of
2 statutory construction -- would Congress have thought
3 this is more a constitutional claim or a tax claim? And
4 they've made the sensible decision, at least as this
5 Court construed it in Enochs, in South Carolina versus
6 Regan -- addressed it in Janis and Bob Jones University
7 and the "Americans United" case, all of which are in our
8 brief --

9 JUSTICE GINSBURG: But you're saying it's
10 both. You're not saying it's "either/or" because for
11 three years you did use the refund procedure. So you
12 used the refund procedure for the years that were within
13 the three-year period, and then for the years that were
14 outside the three-year period, you have this other
15 theory. So you're not saying this is not for refund.
16 That route is closed. The only route is this
17 constitutional -- this claim directly under the Export
18 Clause. But your own conduct seems to have been it's
19 our option. We can treat it as a refund claim or we can
20 treat it as a constitutional claim.

21 MS. MILLETT: One can get -- there is
22 nothing in the tax administrative scheme where one when
23 shows up to file a tax refund where you say if I go by
24 this route, I'm waiving all others. It's not like I'm
25 agreeing to go through arbitration and forgoing my

1 rights to go through a court procedure. Congress has --

2 JUSTICE GINSBURG: But I thought what you
3 were just telling us is that this is not a refund claim;
4 this is a constitutional claim. But you are now saying,
5 I think, that it's both; it's whatever the taxpayer or
6 the plaintiff wants it to be.

7 MS. MILLETT: It's a constitutional claim to
8 get your tax money back. That's right. And the
9 administrative scheme is fully amenable to that. That's
10 certainly the government's position, and we don't
11 disagree. The question is --

12 CHIEF JUSTICE ROBERTS: Plus you get
13 interest.

14 MS. MILLETT: Yes. Absolutely. We think we
15 get it on both grounds, but you get --

16 JUSTICE GINSBURG: You're saying you get
17 interest too in either way. You say -- I thought
18 you said for the three years that are within the
19 three-year refund limit, you get interest and then
20 you're also saying, going back six years, you also get
21 interest. You're not saying that if you -- if you're
22 outside the refund procedure you don't get interest.

23 MS. MILLETT: Right. But that's because
24 we're -- I mean, there's a -- there's a separate
25 interest provision in the Tax Code for the

1 administrative refund procedure. They don't really an
2 28 U.S.C. 2411. I think it's 26 U.S.C. 6511. But
3 there's a specific administrative brief on tax -- I'm
4 sorry, interest provision for the administrative refund
5 scheme. And so, under that, when you're in the
6 administrative scheme, you get what the administrative
7 scheme's interest provision gives you. We don't dispute
8 that.

9 And then the question is, once you've gone
10 to court, the relevant interest provision is the one in
11 28 U.S.C. -- not in the Tax Code, by the way -- but in 28
12 U.S.C., providing -- providing for interest when you've
13 recovered an overpayment of taxes.

14 JUSTICE KENNEDY: Is the interest the same
15 in amount in either case?

16 MS. MILLETT: Yes, because in 2411 it
17 cross-references the -- well, let me clarify. There is
18 one potential wrinkle, but generally speaking 2411 if
19 you look at it, and it's at the end of the --
20 cross-references --

21 JUSTICE GINSBURG: But 2411 -- 2411 is what
22 you use in the court when you have a straight tax-refund
23 claim. It's not as though 2411 is there for some other
24 claim. It's what you get when you go to court and
25 you're suing for a refund. That's 2411. That's

1 applicable if you get a judgment for an overpayment in
2 respect of any Internal Revenue tax. That's what --
3 it's in Title 28, but that's what it's for. It's for an
4 overpayment in respect of any Internal Revenue tax.

5 MS. MILLETT: This is all on page 4a of the
6 government's brief if you want to see where it
7 cross-references the Internal Revenue interest
8 provision.

9 No, there's nothing there that says you have
10 to have gone through the administrative scheme. All you
11 have to have is an overpayment. If you have an
12 overpayment, under Bonwit Teller --

13 JUSTICE GINSBURG: But -- an overpayment of
14 any Internal Revenue tax, and you -- your whole argument
15 is this isn't an Internal Revenue tax; it's so clearly
16 not an Internal Revenue tax that you have a
17 constitutional claim directly under the Constitution.
18 So how does it become, for purposes of 2411, an Internal
19 Revenue tax?

20 MS. MILLETT: I'm sorry, I misunderstood
21 your question, Justice Ginsburg. But I want to make
22 clear that you don't have to go through the refund
23 scheme to get this. This interest would apply in Bonwit
24 Teller for accounts stated, in the Rosenman case for
25 deposit on taxes. That's how we read it.

1 Your second point, yes, that if we say this
2 is not a plausible tax under Enochs versus Williams, what
3 we would -- then I think, and if this Court agrees, that
4 this is not a tax under Enochs versus Williams, so that
5 we're not bound by 7422, then I agree that our interest
6 argument becomes harder at that point textually.

7 I will tell you that I still think the fact
8 that they say "in respect of any Internal Revenue tax"
9 gives us room to say that where the government has at
10 least treated it and collected the money as though it
11 were an Internal Revenue tax, that might be a way to get
12 interest. If this Court agrees, though, that it's
13 not --

14 JUSTICE GINSBURG: But you don't agree in
15 your basic claim that if the government is treating it
16 as an Internal Revenue tax, which it certainly didn't,
17 you'd say that works only for the interest, not --

18 MS. MILLETT: Only -- I'm sorry. Only
19 because we have the "in respect of" language. That's
20 the only -- but if this Court disagrees with that, and
21 we recognize it's harder if this Court agrees, we have a
22 separate constitutional argument that the Export Clause,
23 just like the Just Compensation Clause, requires interest
24 paid in its own right. And so that's the alternative
25 basis.

1 And this Court, of course, can affirm the
2 judgment on any basis supported by the record.

3 But I want to get back, very clearly that
4 there is -- the bottom -- I mean, Justice Scalia, you
5 talked about, you know, which pot you want to put this
6 in. The rarity of this case and what's unique about it
7 is that the government came in agreeing up front,
8 stipulated judgment, no fact disputes, no law disputes,
9 this is in the pot of "no legitimate status as a tax.
10 No claim whatsoever. The government couldn't think of
11 anything.

12 But for purposes of limiting your
13 constitutional relief, then it's in the pot of a
14 legitimate tax. And we think they can't have it both,
15 ways and particularly as a matter of statutory
16 construction. This is ultimately a question of which
17 scheme is better fitted to vindicating the Constitution.
18 And Congress said "any tax," just like it said in the Tax
19 Injunction Act. This Court has said what "any tax" means.
20 It said it five times after Enochs. And Congress has
21 not reacted to it.

22 Stare decisis applies most powerfully in the
23 statutory construction Congress -- context, and if
24 Congress thought there were a problem with what -- with
25 how this Court defined "any tax," it would have said so.

1 It could have done so. It's had half a century to do
2 something.

3 CHIEF JUSTICE ROBERTS: You give all of this
4 up when it comes to the statute of limitations. I mean,
5 the government's argument could be just as implausible
6 as you suggest it is here. But if it involves a claim
7 six years and one day out, it's just too bad. It
8 doesn't matter that it's a constitutional claim. It
9 doesn't matter how erroneous the government's position
10 was, because the government can impose limitations like
11 that even on the assertion of constitutional claims.
12 That's all they are doing here.

13 MS. MILLETT: But the Tucker Act doesn't use
14 the word "any tax" in defining the statute of
15 limitations. It's a statute of limitations for
16 constitutional claims.

17 Our argument is about what the word "any tax"
18 means in 7422 and does it force us to go through the tax
19 refund scheme. Our argument is, as this Court said
20 unanimously in Enochs -- a decision that has never been
21 questioned by any justice of this Court -- that "any tax"
22 does not apply if it has no tax status for any other
23 purpose. It can't be just to limit --

24 CHIEF JUSTICE ROBERTS: Well, we said just as
25 unanimously a couple of things last year in Hinck and EC

1 Term as well, and that -- certainly the Federal Circuit's
2 decision wouldn't have come out the same way if they had
3 had Hinck and EC Term of Trust on the books.

4 MS. MILLETT: I'm not sure -- I'm not sure
5 it would have come out differently. Maybe they would
6 have explained things differently. But this Court said
7 in those cases, the question is which statutory scheme is
8 better fitted. And at two levels we think the Tucker
9 Act is better fitted for this claim.

10 One, because "any tax" only applies when
11 there is an asserted, legitimate basis for the tax; and
12 two, the Export Clause is a unique limitation,
13 specifically denies the government any authority to use
14 exports as a source of revenue. And you have a refund
15 scheme here that has been designed over the years
16 specifically to protect revenue interest, to make you pay
17 the revenue first and have them hold it.

18 It's not just holding them for six months.
19 They had to pay every two weeks. But, of course, the
20 government didn't treat that as "paid for purposes of
21 interest" until the end of the quarter when a return was
22 filed. That's one way why the interest calculation
23 might be different under the Tucker Act than it would be
24 under the refund scheme, just the timing of whether it's
25 the deposit or the actual return.

1 Justice Kennedy, I forgot to get back to you
2 on that.

3 But the question here is whether the Export
4 Clause can be fully enforced by -- which it's -- it's
5 not a suggestion and it doesn't say when you're doing
6 your tax stuff, it's okay if you slop over on exports a
7 little bit. Exports are completely off limit for the
8 tax power. And Congress using its tax power to create a
9 tax scheme that specifically preserves and protects
10 revenue and is not a revenue neutral system is not the
11 best scheme for vindicating the Export Clause. It's not
12 better fitted for that. It is at cross-purposes with the
13 Export Clause.

14 But at bottom, this Court doesn't need to
15 get to that constitutional question. We think it
16 certainly informs the analysis. It certainly is enough
17 of a constitutional concern or doubt to conclude that
18 Enochs still applies "any tax" in the Tax Injunction Act --
19 "any tax in any court." "No suit shall be maintained for
20 any tax in any court" means the same thing in 7422 that
21 it means in the Tax Injunction Act. If Congress thought
22 it meant something different, it has had half -- almost
23 half a century to tell us.

24 It hasn't done that, and the Export Clause
25 can't serve its unique historical function of keeping

1 government's tax regulatory hands off the Export -- may I
2 finish my sentence?

3 CHIEF JUSTICE ROBERTS: Yes.

4 MS. MILLETT: Keep my hands -- hands off the
5 tax export process and the revenue out of the Federal
6 fisc unless this is treated as a constitutional claim.

7 Thank you, Mr. Chief Justice.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 Ms. Millett. Mr. Jay, you have 15 minutes.

10 JUSTICE GINSBURG: Mr. Jay, I hope in the 15
11 minutes, you will state what the government's position
12 is on this Enochs case that's been mentioned at least a
13 dozen times.

14 REBUTTAL ARGUMENT OF WILLIAM M. JAY

15 ON BEHALF OF THE PETITIONER

16 MR. JAY: I'll be glad to, Your Honor.
17 Enochs case construed not section 7422, but section
18 7421, the Anti-Injunction Act provision of the Tax Code.
19 And the question in Enochs was whether the taxpayer
20 simply by alleging that the tax was so -- so invalidly
21 applied that it was only in the guise of a tax, could
22 avoid paying the tax and bring an injunctive claim.

23 The Court in Enochs held that it could not
24 because the taxpayer had not, in fact, satisfied the
25 basic requirement of all claims for injunctive relief as

1 irreparable injury. And the Court also held that
2 whether a tax is defensible for purposes of this very
3 narrow exception is to be determined on the basis of the
4 information to the government at the time of suit. So
5 in this --

6 JUSTICE SCALIA: Wait. What very narrow
7 exception? It didn't apply the exception.

8 MR. JAY: The Court was preserving, I
9 think in dicta, because -- because the Court
10 ultimately denied the exception in that case and in each
11 case since, preserving the holding in Standard Nut and
12 Margarine, a case from the 1920s. Justice Breyer
13 alluded to this when he asked my friend, Ms. Millett,
14 about whether this exception is geared primarily to
15 factual issues or to legal issues. In Standard Nut and
16 Margarine the government had decided to attempt to
17 impose a tax meant for oleomargarine on a product made
18 entirely from nuts. And this Court, you know, without
19 construing the tax-injunction provision, simply
20 referring to principles of equity, this Court held that
21 the government's theory of assessing the tax was simply
22 in the guise of a tax and it permitted the injunctive
23 claim to proceed.

24 In Williams Packing the government's -- the
25 government had a colorable basis for assessing the tax,

1 and so the taxpayer was remitted to the same remedy that
2 any taxpayer who wants to challenge a tax as having been
3 unlawfully assessed or collected is subject to; that is,
4 to pay the tax, file a refund claim, and if the refund
5 claim is upheld either by the IRS or subsequently in
6 court, to receive a full refund with interest.

7 JUSTICE SCALIA: Don't the two go together?
8 If you could bring an injunction action, surely you
9 don't have to pay the tax.

10 MR. JAY: Well, if you can satisfy the
11 requirements for injunctive relief -- and Williams
12 Packing, the taxpayer, couldn't; and in the cases since
13 the taxpayer couldn't -- then the court can enjoin the
14 collection of the taxes applied to you.

15 JUSTICE SCALIA: Well, that's what she is
16 saying -- she is saying that those conditions exist here.
17 That this is not -- not a plausible tax; and, therefore,
18 she could have gotten an injunction; and, therefore, by
19 parity of reasoning, she doesn't have to go through
20 the tax provisions.

21 MR. JAY: I think I have three responses to
22 that.

23 One is that we don't think that a -- an
24 exception to the -- to 7421 should carry over into
25 section 7422. But even in the circumstances of this

1 case, this is a facially constitutional tax. The tax is
2 imposed on coal mined in the United States. And if no
3 -- if none of the coal that is subject to the tax is
4 ever in the stream of export when the tax is imposed,
5 then the tax is perfectly constitutional. And that is
6 why section 4121 remains on the books today.

7 The tax is unconstitutional only in certain
8 narrow circumstances when the coal actually is in the
9 stream of export. As I explained --

10 JUSTICE SCALIA: Well, you could say the
11 same about the tax on oleomargarine. It is a perfectly
12 valid tax but not when you impose it on nuts. And here
13 the tax on coal is a perfectly valid tax, but not when
14 you impose it on coal that's in the stream of export.

15 MR. JAY: But if one of these coal companies
16 had sought to enjoin the tax, the government would have
17 pointed to the provision in Williams Packing that says
18 that whether the tax is defensible is to be determined
19 on the basis of the information available to the
20 government at the time of suit until the taxpayer
21 demonstrates that the coal is actually in the stream of
22 export, which is precisely what's done during the refund
23 process that the taxpayers used in this case to show
24 that their coal was in the stream of export when they
25 obtained the refund. That's what -- that's how they

1 obtained a full -- full relief.

2 But, in any event, the history of this
3 litigation shows that this is not -- this is not a claim
4 about the facial unconstitutionality of the tax because
5 the tax continued to be collected without protest in the
6 case of the Respondents here for 21 consecutive years.

7 And by the time they filed for a refund this
8 Court had decided IBM. It had decided U.S. Shoe. The
9 district court had decided Ranger Fuel, and the
10 government had announced that it would not appeal the
11 decision in Ranger Fuel striking down the coal tax.

12 But that doesn't mean that for that -- for
13 that entire time the government had no basis on which to
14 defend the tax. I mean the government had colorable
15 arguments to defend the tax at issue in U.S. Shoe in
16 1996 -- June of 1996. And it had colorable arguments to
17 defend the harbor maintenance tax in U.S. Shoe. I may
18 have misspoke. IBM in 1996, and U.S. Shoe in 1998.

19 So to say that during the period at issue in
20 this case, 1994 through 1996, the tax was so facially
21 invalid that the narrow Williams Packing exception to
22 another statutory provision justifies Respondents'
23 attempt to circumvent the tax-refund statute, we just
24 think is not correct.

25 In the case of a taxpayer who -- who can't

1 satisfy the exception, you know, the Tax Code does,
2 indeed, put that taxpayer to the choice. It gives them
3 a fully effective postpayment refund remedy where they
4 can avoid any penalties and interest by paying the tax
5 and litigating for a full refund after the fact.

6 JUSTICE BREYER: Right. Is the government's
7 view that the money that they are seeking here, if you
8 look at 7422, that it falls within the language of "any
9 Internal Revenue tax alleged to be erroneously or
10 illegally assessed," or the language "any sum alleged to
11 have been in any manner wrongfully collected," or both?

12 MR. JAY: I don't think that we need to go
13 beyond the first clause, Your Honor.

14 JUSTICE BREYER: So when I decide this case,
15 I should forget the words "any sum"?

16 MR. JAY: I mean the Court construed a
17 similar provision in *Flora versus United States* in 1960,
18 which explained that "any sum" is a cumulative
19 provision. So that if something is within the scope of
20 an "Internal Revenue tax alleged to have been erroneously
21 or illegally collected or assessed," that's as far as you
22 need to go.

23 JUSTICE BREYER: But it -- but if, in
24 fact, it is not within the scope of the word "tax," then
25 it is not within "any sum"?

1 MR. JAY: No. To the contrary, Your Honor.
2 I think that the holding in Flora is that if it's not
3 within the scope of the first provision, then you would
4 need to look at the second -- actually the third
5 provision, the "any sum" language.

6 JUSTICE BREYER: In Enochs -- she is quite
7 right, your opposing lawyer -- it says the exaction is
8 merely in the guise of a tax. And when it says it is
9 within the guise of a tax, then it doesn't fall within
10 the Tax Injunction Act.

11 And there it says if it is clear that under
12 no circumstances could the government ultimately
13 prevail, the central purpose of the Tax Injunction Act
14 is inapplicable. And then it's just in the guise of a
15 tax. And that, she says, is the test we should apply
16 here. So that's where I think Justice Ginsburg began.

17 What is your specific response to that?

18 MR. JAY: Well, my specific response, Your
19 Honor, first is that in this case the tax simply was not
20 in the guise of a tax. But even if, you know, today, if
21 the taxpayer were -- if a taxpayer were alleging that
22 the coal tax were in the guise of a tax and that it,
23 therefore, could bring a prepayment -- a prepayment
24 action, it does not then follow that the taxpayer could
25 still after the fact, if it opted not to bring that

1 prepayment action, the taxpayer could then escape the
2 three-year, nontollable, unusually emphatic limitation
3 period that applies to a claim for a postpayment remedy,
4 which is the exclusive means of obtaining a postpayment
5 remedy.

6 And, you know, the courts recognized time
7 and again that taxing authorities have a strong interest
8 in fiscal stability, and it effectively closes the books
9 on a particular tax year. So that taxpayers, after the
10 tax is paid, if they want to protest the tax, they have
11 three years in which to put the government on notice.
12 That, you know, even if the claim is this tax is so
13 beyond the pale that it can't be defended, they have to
14 put the government on notice of that claim.

15 And if they do, then the IRS considers it;
16 and if the IRS turns them down, then they can proceed to
17 district court or to the Court of Federal Claims.

18 In addition, I think I just wanted to
19 clarify one point about the availability of prepayment
20 remedies in this case. Justice Ginsburg, my
21 friend, Miss Millett, was correct about the fact that
22 this excise tax does not -- is not susceptible to the
23 deficiency proceeding in Tax Court.

24 And we have cited in footnote 7 of our reply
25 brief, page 16, the possibility that there may be

1 another route if the taxpayer feels strongly about the
2 unconstitutionality of the tax and is willing to take
3 the chance that if the taxpayer's position is rejected,
4 that the taxpayer may be liable for penalties and
5 interest for not paying the tax.

6 It means, of course, the general rule is that
7 the taxpayer is expected to pay the tax and proceed
8 postpayment by putting the IRS on notice of the claim.
9 But Congress, in section 6330(c)(2)(B) of Title 26, has
10 provided some limited ability, if a taxpayer has not
11 previously been able to litigate the merits of the tax,
12 the taxpayer has a limited opportunity to do so first
13 before the IRS, then in Tax Court, and then before the
14 court of appeals.

15 And, again, on Miss Millett's supposition
16 that this is a completely, clearly unconstitutional tax,
17 then the taxpayer would have the option of doing that.
18 Again, the refund scheme is set up so that if the
19 taxpayer doesn't want to take the chance that its
20 argument will not be accepted, the taxpayer has a
21 simple, open remedy: To file a refund claim at any
22 point within three years.

23 That's exactly what Respondents did not do
24 for the 21 consecutive years that they paid this tax
25 without complaint.

1 If the Court has no further questions?

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 The case is submitted. We'll hear the third case

4 beginning this afternoon.

5 (Whereupon, at 11:38 a.m., the case in the
6 above-entitled matter was submitted.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

| | | | | |
|----------|---|--|---|---|
| A | <p>14:25 adjustments 8:7 administrative 8:9 23:17 25:23 26:7,18 31:21 32:1,7 35:22 36:9 37:1,3,4,6,6 38:10 advice 8:21 affirm 40:1 afternoon 53:4 agree 5:16,17 21:8 24:12 39:5,14 agreeing 35:25 40:7 agrees 39:3,12 39:21 AL 1:7 ALITO 12:16 12:24 13:12 alleged 20:2,5 20:18 21:25 49:9,10,20 alleges 4:3 alleging 44:20 50:21 allow 8:23 allowed 25:21 30:8 allows 15:13 alluded 45:13 alternative 11:22 39:24 Amax 16:13 amenable 36:9 amendment 14:11,12 21:14 Americans 26:25 35:7 amount 9:13 12:2 37:15 analogize 32:4 analysis 43:16 announced 48:10</p> | <p>answer 10:18 18:4 31:4,4 Anti-Injunction 44:18 anybody 18:8,9 appeal 48:10 appeals 3:14 7:18 16:18 52:14 APPEARAN... 1:15 applicable 38:1 application 19:5 applied 14:13 44:21 46:14 applies 13:9 20:4,10 26:25 28:12,22 31:20 40:22 42:10 43:18 51:3 apply 4:10,13 5:18 13:15 21:16 28:21,23 29:7 30:5 38:23 41:22 45:7 50:15 appropriate 11:12 April 16:12 arbitration 35:25 argument 1:13 2:2,7 3:3,7 7:13 13:13 17:1 21:22,24 23:14 25:11,12 28:3 29:16 30:4 31:12,18 32:3 33:18 38:14 39:6,22 41:5,17,19 44:14 52:20 arguments 48:15,16 arising 7:20 Article 14:22 15:3</p> | <p>asked 45:13 assert 16:17 17:10 20:11,14 20:24 asserted 21:2 42:11 asserting 33:19 assertion 41:11 asserts 20:23 assessed 4:4 10:10 13:5 46:3 49:10,21 assessing 22:6 45:21,25 assessment 22:13,14 28:25 Assistant 1:16 associated 13:6 assume 11:18 attempt 4:17 45:16 48:23 authorities 11:10,13 51:7 authority 13:24 21:22 22:11,15 31:16,19 42:13 automatically 25:20 availability 51:19 available 10:3 16:6 47:19 avoid 44:22 49:4 award 8:2 aware 30:1 awful 20:8 21:4 A.G 18:23 19:3 a.m 1:14 3:2 53:5</p> | <p>bad 41:7 based 25:4 basic 31:25 39:15 44:25 basis 12:1 13:2 17:10,13,15 21:7 32:14 33:5 39:25 40:2 42:11 45:3,25 47:19 48:13 began 50:16 beginning 53:4 behalf 1:18,19 2:4,6,9 3:8 17:2 44:15 best 43:11 better 3:23 40:17 42:8,9 43:12 beyond 3:17 49:13 51:13 bill 14:1,20 bit 3:21 43:7 Bivens 15:9,24 Bivens-type 15:18 16:19 Bob 35:6 Bonwit 38:12,23 book 33:13 books 27:11 33:6 42:3 47:6 51:8 bottom 40:4 43:14 bound 39:5 Breyer 6:4,10 6:13,20 7:6 21:18 22:23 23:1,14 31:11 33:17 34:8 45:12 49:6,14 49:23 50:6 brief 8:22 13:20 21:13 24:5 25:3 29:3 35:8 37:3 38:6</p> |
| B | | | | |
| | | | <p>back 5:21 6:6,7 6:15,21,25 7:2 26:9 32:20 33:7,20 34:1,3 36:8,20 40:3 43:1</p> | |

| | | | | |
|--|--|---|---|--|
| <p>51:25 bring 3:15 12:8 12:17 13:21 15:8 25:23 44:22 46:8 50:23,25 bringing 10:9,13 brings 15:14 broad 31:13 Brockamp 6:1 12:12 broke 30:11 broker 9:12 18:17,25 brought 12:25 13:10 14:3 15:4 burden 21:4 Bush 15:20 16:2</p> <hr/> <p style="text-align: center;">C</p> <p>C 2:1 3:1 calculation 42:22 captured 21:17 Carolina 30:16 35:5 carry 46:24 case 3:4 5:4,5 6:1 8:6,16 11:8 12:12 16:9,11 18:13,23 19:19 21:10 23:25 29:5,12 30:25 31:8 35:7 37:15 38:24 40:6 44:12,17 45:10,11,12 47:1,23 48:6 48:20,25 49:14 50:19 51:20 53:3,3,5 cases 15:9,9,21 18:15 19:7,9 42:7 46:12 cause 10:19 14:14 15:10,18</p> | <p>16:8 central 50:13 century 20:22 33:7 41:1 43:23 certain 47:7 certainly 16:18 28:23 36:10 39:16 42:1 43:16,16 challenge 12:2 46:2 challenges 13:21 chance 52:3,19 changing 20:22 33:8 chasing 4:9 Chief 3:3,9 10:21 11:1,7 11:16 16:23,24 16:25 17:3 24:2 25:2 26:10 36:12 41:3,24 44:3,7 44:8 53:2 Chilicky 15:21 choice 49:2 Circuit's 42:1 circumstances 8:24 12:17 15:11,17 16:5 16:7 17:17 46:25 47:8 50:12 circumvent 48:23 cited 8:21 13:19 51:24 civil 16:1 claim 4:5 5:19 5:19 7:9,11,15 8:2,12,23 9:9 9:18,20 10:9 10:13,15,15,16 10:24 12:9,17 12:25 13:18 14:18 15:7,14</p> | <p>16:3 17:12 19:6 20:14 21:8 24:24 25:6 26:18 31:14,15,20 32:2 33:19,22 34:9,15,22 35:3,3,17,19 35:20 36:3,4,7 37:23,24 38:17 39:15 40:10 41:6,8 42:9 44:6,22 45:23 46:4,5 48:3 51:3,12,14 52:8,21 claimant 4:3 claimants 25:21 claiming 5:14 claims 9:23 10:5 13:9 14:2,10 14:22,25 15:1 15:4,5 16:15 19:10 25:1 32:5 34:17 41:11,16 44:25 51:17 clarify 12:21 20:8 37:17 51:19 clause 5:18 8:12 10:19 13:13 14:12,12 19:15 20:2,6,14,18 23:8 25:7,9,10 25:14,17,19,20 25:24 26:9 32:12 35:18 39:22,23 42:12 43:4,11,13,24 49:13 clauses 13:22 clear 10:11 13:12 17:7 18:7 20:7,17 25:5 38:22 50:11</p> | <p>clearly 38:15 40:3 52:16 clients 17:23 18:2 19:10 Clintwood 1:6 3:4 closed 35:16 closes 51:8 coal 3:12 8:11 8:14,15,18,19 8:25 9:4,5,8,10 9:22,22,23 16:13,14 17:20 21:3,5,12,16 21:17 30:1 47:2,3,8,13,14 47:15,21,24 48:11 50:22 Code 4:11 7:17 17:25 26:24 33:11 34:18 36:25 37:11 44:18 49:1 collect 19:24 collected 10:10 18:9 22:1 23:2 39:10 46:3 48:5 49:11,21 collection 28:1 29:19 46:14 collector 12:6 22:3,5 colorable 45:25 48:14,16 come 30:18 42:2 42:5 comes 4:12 25:20 41:4 commerce 18:17 18:22 19:1 Commissioner 30:17 Commissioner's 6:2 common 22:2 commonly 14:2 companies</p> | <p>17:20,23 47:15 company 1:7 3:5 8:17 16:13 30:1,11 compensation 14:18 39:23 complaint 52:25 completely 15:7 43:7 52:16 complexities 18:18 complies 26:18 concede 24:3 concern 31:14 43:17 concerns 25:13 31:15 conclude 43:17 condemnation 14:10,13 conditions 46:16 conduct 35:18 confused 6:23 Congress 6:1 9:24 10:22 12:6 13:16 14:19,19,21,24 14:25 15:22 17:6,24 20:17 20:22 23:7 24:22,24 26:22 33:7,10,14 35:1,2 36:1 40:18,20,23,24 43:8,21 52:9 congressional 26:12 consecutive 48:6 52:24 considers 51:15 Constitution 7:20 8:15 11:17 13:14,23 15:11,15,19 17:24 18:11 26:2 34:1,15 38:17 40:17</p> |
|--|--|---|---|--|

| | | | | |
|--|--|--|--|--|
| constitutional 5:14 10:16 11:2,4 12:1 13:18,20 14:2 14:14 15:7 17:16 18:7,10 19:6,22 23:13 24:12,13,23 25:1,13,19 26:6,21 31:14 32:5,15 33:15 34:12,23,24 35:3,17,20 36:4,7 38:17 39:22 40:13 41:8,11,16 43:15,17 44:6 47:1,5 | couple 41:25 course 5:13 9:18 40:1 42:19 52:6 court 1:1,13 3:10,14 4:5 5:16,25 7:18 9:19 10:6,17 11:9,12,15,22 12:12 13:10 14:21 15:1,4 15:17,21,23 16:7,15,18,21 17:4 18:9,14 19:2 20:9,21 22:20 23:3,18 23:21 25:14 26:11 28:8,18 28:20 29:6 30:14 32:20 33:3,10 34:16 34:18 35:5 36:1 37:10,22 37:24 39:3,12 39:20,21 40:1 40:19,25 41:19 41:21 42:6 43:14,19,20 44:23 45:1,8,9 45:18,20 46:6 46:13 48:8,9 49:16 51:17,17 51:23 52:13,14 53:1 | 43:12 cross-references 37:17,20 38:7 cumulative 49:18 curtailing 19:22 cut 20:3,3 23:12 32:4 33:15 Cyprus 16:13 | 45:2 47:18 deficiency 28:12 28:14 51:23 defined 40:25 defining 41:14 definition 18:21 25:15 degree 8:22 delay 10:7 dementia 12:14 demonstrates 47:21 denied 10:4 45:10 denies 9:17 42:13 denominate 10:15 deny 9:20 Department 1:17 depend 20:12 deposit 38:25 42:25 designed 42:15 despite 7:14 determine 8:25 26:5 determined 24:22 45:3 47:18 dicta 45:9 difference 34:23 different 20:16 27:25 28:2,5 34:2,6,9 42:23 43:22 differently 42:5 42:6 direct 18:24 26:11 directly 7:20 9:19 15:11 18:25 19:11 35:17 38:17 disagree 36:11 disagrees 39:20 | disallows 26:13 discover 22:5 dispute 19:11 27:13 37:7 disputes 40:8,8 distinct 26:9 distinction 13:17 22:12 29:15 distinguishes 25:9 district 18:14 29:5 48:9 51:17 doing 41:12 43:5 52:17 dollar 9:13 domestic 21:6 doubt 43:17 dozen 44:13 duty 18:10 D.C 1:9,17,19 |
| constitutionali... 8:5,8 16:14 constitutionally 25:3 construction 17:5 24:22 25:11 33:1 35:2 40:16,23 construed 35:5 44:17 49:16 construing 33:4 45:19 contend 13:9 contesting 8:5 context 8:11,19 34:11,11,12 40:23 continue 25:15 continued 48:5 contrary 32:3 50:1 correct 20:24 48:24 51:21 counsel 16:23 53:2 countenanced 7:18 country 9:13 26:25 | courts 15:3 51:6 Court's 15:9,9 17:6 18:22 22:15 29:9 33:9,12 cover 10:17 create 15:10 16:8,19 43:8 created 14:21 creates 10:19 creating 15:24 creature 27:15 cross-purposes | <hr/> D <hr/> D 3:1 Dalm 23:4 damages 5:15 5:17 6:7 7:20 14:15 16:7,8 25:19 day 24:7 41:7 days 11:20,24 dealing 22:18 27:14 deals 18:21 dealt 22:17 23:3 30:14 debate 19:13,16 19:18 decide 49:14 decided 45:16 48:8,8,9 decision 3:14,18 18:22 32:22 33:2,9 35:4 41:20 42:2 48:11 decisions 14:23 15:2 33:13 decisis 40:22 defend 18:14 22:22 48:14,15 48:17 defendant 15:15 defended 23:23 51:13 defending 17:16 defense 18:12 20:11,15 33:21 defensible 31:10 | <hr/> E <hr/> E 2:1 3:1,1 earlier 29:11 early 12:4 26:23 EC 41:25 42:3 effect 11:18 32:10 effective 14:5 15:12 49:3 effectively 9:8 11:24 51:8 effects 26:3 effort 18:13 26:13 eight 33:8 either 4:25 18:23 36:17 37:15 46:5 either/or 35:10 eliminated 26:22 Elkhorn 1:6 3:5 emphatic 6:2 51:2 | |

| | | | | |
|--------------------------|--------------------------|-------------------------|---------------------------|--------------------------|
| employees 16:4 | 2:5,8 | 25:14,17,24 | 49:21 | Fourteenth |
| enact 33:14 | essentially 28:22 | 26:9,17 27:8 | far-out 34:9 | 14:12 |
| enacted 33:10 | establish 29:25 | 32:12 35:17 | fashioned 15:17 | fox 4:9 |
| enacting 15:3 | 30:19 32:13 | 39:22 42:12 | Federal 13:23 | friend 45:13 |
| enforced 34:25 | estate 28:23 | 43:3,11,13,24 | 14:3 15:4 16:4 | 51:21 |
| 43:4 | ET 1:7 | 44:1,5 47:4,9 | 16:15 42:1 | front 40:7 |
| enforcement | event 48:2 | 47:14,22,24 | 44:5 51:17 | Fuel 48:9,11 |
| 34:24 | eventually 14:21 | exported 3:12 | feels 52:1 | full 3:11,12 5:7 |
| enjoin 28:1 29:6 | 14:24 | 9:4,8,12 19:11 | Fifth 14:11,13 | 9:24 14:4 |
| 29:19 46:13 | everybody 6:5 | exporter 18:25 | fight 19:4 28:9 | 16:16 46:6 |
| 47:16 | exaction 50:7 | exports 21:14,16 | 30:21 | 48:1,1 49:5 |
| enjoy 17:8 | exactly 6:12 | 21:17 24:6 | file 4:5 10:24 | fully 10:3 14:4,5 |
| Enochs 17:7 | 30:14 52:23 | 26:8 42:14 | 35:23 46:4 | 15:12 36:9 |
| 19:17,20 20:9 | examine 8:24 | 43:6,7 | 52:21 | 43:4 49:3 |
| 22:16 23:18 | examples 13:20 | express 7:24 | filed 9:23 12:23 | function 23:12 |
| 25:12,16 30:15 | exception 19:17 | expressly 4:2 | 12:25 16:9,12 | 33:15 43:25 |
| 30:15 32:11,21 | 23:25 31:19 | extended 12:13 | 16:15 32:2 | fundamentally |
| 32:25 33:9 | 45:3,7,7,10,14 | extent 9:24 | 42:22 48:7 | 34:24 |
| 35:5 39:2,4 | 46:24 48:21 | extraordinary | filing 4:6 7:9 9:8 | funnel 23:20 |
| 40:20 41:20 | 49:1 | 17:9 18:13 | 14:7 | further 9:2 |
| 43:18 44:12,17 | exceptions | 23:25 27:15 | fine 25:6 | 16:21 53:1 |
| 44:19,23 50:6 | 28:22 | extreme 22:13 | finish 44:2 | |
| enormous 30:20 | excessive 22:1 | extremely 32:19 | first 3:19 8:17 | G |
| 30:21 | excise 9:2,7 | | 21:13 28:9 | G 3:1 |
| entire 12:15 | 16:14 28:13,21 | F | 30:21 42:17 | geared 45:14 |
| 48:13 | 51:22 | facial 48:4 | 49:13 50:3,19 | general 1:17 |
| entirely 33:11 | exclusive 5:12 | facially 47:1 | 52:12 | 12:7 21:15 |
| 45:18 | 10:9,12 51:4 | 48:20 | fisc 44:6 | 52:6 |
| entitled 5:8 6:18 | exempt 8:14 | fact 4:16 8:25 | fiscal 11:10 51:8 | generally 37:18 |
| 7:14,15,16 | exemption | 9:10,11,20 | fit 26:15 | generous 12:10 |
| entitlement | 21:14,16 | 12:23 39:7 | fitted 40:17 42:8 | 32:23 |
| 27:18 29:24 | exhaust 25:22 | 40:8 44:24 | 42:9 43:12 | get-around-th... |
| equal-protecti... | exhaustion 8:13 | 49:5,24 50:25 | five 11:7 13:22 | 32:24 |
| 16:3 | 16:2 | 51:21 | 33:10,12 40:20 | gift 28:22 |
| equipped 27:1 | exist 46:16 | facts 8:24 | Flora 49:17 50:2 | Ginsburg 3:20 |
| equitable 16:6 | expected 52:7 | factual 19:16,18 | follow 50:24 | 3:24 8:4 19:25 |
| 32:25 | expired 4:12 | 45:15 | footnote 51:24 | 20:16 27:20 |
| equity 30:8 | explain 6:4 | factually 19:13 | force 41:18 | 28:11,19 35:9 |
| 31:25 32:20 | explained 42:6 | fact-specific | forced 10:5 | 36:2,16 37:21 |
| 45:20 | 47:9 49:18 | 8:20 | forget 49:15 | 38:13,21 39:14 |
| erroneous 3:18 | explains 8:22 | failure 16:17 | forgoing 35:25 | 44:10 50:16 |
| 41:9 | export 5:18 8:12 | fairly 8:20 | forgot 23:7 43:1 | 51:20 |
| erroneously | 8:19 9:1,11 | fall 19:16 21:1 | Form 9:6 | Ginsburg's |
| 10:10 13:4 | 10:18 13:13 | 34:15 50:9 | former 7:5 | 29:11 31:5 |
| 49:9,20 | 17:15 19:15,15 | falls 20:18 49:8 | Fortune 17:23 | give 16:18 24:9 |
| escape 51:1 | 20:2,6,14,18 | far 31:17,20 | forum 15:16 | 41:3 |
| ESQ 1:16,19 2:3 | 23:8 25:6,8,10 | 32:10 34:10 | four 13:24 | given 9:10 |

| | | | | |
|--|---|---------------------------------------|---|--|
| gives 37:7 39:9 49:2 | 21:23 22:8 | hounds 4:9 | 3:16 | 39:8,11,16 49:9,20 |
| glad 44:16 | guise 20:25 23:6 33:5 44:21 | hurt 23:15 | individual 12:14 | invalid 48:21 |
| go 4:14 5:3 6:22 10:5 21:19 | 45:22 50:8,9 | hypothetical 11:6 30:11,25 | industry 8:19 | invalidly 44:20 |
| 23:17,21 28:15 | 50:14,20,22 | <hr/> I <hr/> | information 45:4 47:19 | invent 30:10 |
| 28:17,17 29:5 | guy 23:7 | IBM 48:8,18 | informs 43:16 | inventing 30:14 |
| 30:11 31:1,9 | <hr/> H <hr/> | idea 9:3 | injunction 22:18 23:20 29:7,24 | inverse 14:10,13 |
| 31:17 32:18 | half 20:22 33:7 41:1 43:22,23 | identical 15:15 15:16,16 | 30:2,5,6 31:17 | invoke 4:17 |
| 35:23,25 36:1 | hand 15:24 | identify 12:1 | 32:25 33:8 | involves 41:6 |
| 37:24 38:22 | hands 44:1,4,4 | III 15:3 | 40:19 43:18,21 | in-house 18:3 |
| 41:18 46:7,19 | Hang 3:22 | illegal 4:7 | 46:8,18 50:10 | irreparable 29:25 30:8,19 |
| 49:12,22 | happen 22:4 23:24 | illegality 13:19 | 50:13 | 45:1 |
| goes 21:25 | happened 14:9 19:6 | illegally 4:4 10:10 13:4 | injunctions 31:24 | IRS 5:24 6:6 8:14,20,23 9:2 |
| going 8:9 19:2 30:11 32:4,10 | harbor 48:17 | 49:10,21 | injunctive 44:22 44:25 45:22 | 9:3,9,17,17,20 9:21,25 10:4 |
| 32:13 36:20 | hard 32:14 | immediately 7:10 | 46:11 | 10:21 13:1 |
| good 27:16 | harder 39:6,21 | impact 23:10 | injured 27:11 | 14:7 29:1 |
| gotten 28:25,25 30:2 46:18 | harm 29:25 30:9 30:19 | imperative 25:14 | injuria 26:15 | 31:15,16,20 |
| governing 4:10 | hash 32:6 | implausible 41:5 | injury 45:1 | 34:3,4 46:5 |
| government 4:8 6:24 7:1 8:2 | hear 3:3 33:18 53:3 | implied 15:18 16:19 | innumerable 25:22 | 51:15,16 52:8 52:13 |
| 14:11,17 17:8 | held 12:12 20:9 20:21 31:22 | impose 41:10 45:17 47:12,14 | insane 22:3,4,12 22:13 23:7 | IRS's 33:21 |
| 17:8,20 18:9 | 44:23 45:1,20 | imposed 8:16 20:1,5 47:2,4 | interest 4:12,16 4:18 5:9,10,20 | issue 16:2 48:15 48:19 |
| 18:13 19:21 | help 3:20 | imposes 17:24 | 6:8,15,17,18 | issued 9:21 |
| 20:10,23 21:4 | Hinck 41:25 42:3 | imposing 21:12 | 6:22 7:1,3,15 | issues 45:15,15 |
| 21:20 22:21 | historical 43:25 | imposition 29:22 | 8:1,2 10:1,2,3 | i.e 6:7 |
| 23:23 24:1 | history 48:2 | inapplicable 50:14 | 10:6 11:10 | <hr/> J <hr/> |
| 26:2 27:13,19 | hold 42:17 | include 20:13 | 36:13,17,19,21 | Janis 35:6 |
| 29:2 31:2,6 | holding 42:18 45:11 50:2 | including 20:1,5 | 36:22,25 37:4 | Jay 1:16 2:3,8 3:6,7,9,22,25 |
| 32:14 39:9,15 | home-free 6:21 | income 28:22 | 37:7,10,12,14 | 4:8,15,24 5:4 |
| 40:7,10 41:10 | Honor 3:23 4:15 4:24 5:5 6:17 | inconsistent 4:19 | 38:7,23 39:5 | 6:9,12,17 7:5,7 |
| 42:13,20 45:4 | 7:5 8:12 10:3 | indefensible 29:23 | 39:12,17,23 | 7:16,22 8:1,11 |
| 45:16,25 47:16 | 10:25 11:8,21 | independent 15:2 | 42:16,21,22 | 10:2,24 11:4,8 |
| 47:20 48:10,13 | 12:21 14:17 | indicated 29:12 | 46:6 49:4 51:7 | 11:21 12:20 |
| 48:14 50:12 | 44:16 49:13 | indistinguishable... | 52:5 | 13:2,16 14:16 |
| 51:11,14 | 50:1,19 | | interests 28:6,7 | 16:24 44:9,10 |
| government's 13:23 23:11 | Honor's 11:5 | | intermediate 18:17 | 44:14,16 45:8 |
| 28:6,7 29:22 | hoops 6:6 25:22 | | Internal 4:6,10 20:1,5,19 | 46:10,21 47:15 |
| 36:10 38:6 | hope 44:10 | | 26:24 33:11 | 49:12,16 50:1 50:18 |
| 41:5,9 44:1,11 | | | 34:18 38:2,4,7 | Jones 35:6 |
| 45:21,24 49:6 | | | 38:14,15,16,18 | judgment 4:18 |
| grant 9:25 | | | | |
| grounds 36:15 | | | | |
| guess 10:22 | | | | |

| | | | | |
|---|--|--|---|--|
| <p>19:18 38:1 40:2,8 judicial 14:23 jump 25:22 June 48:16 justice 1:17 3:3 3:9,20,24 4:8 4:21,25 6:4,10 6:13,20 7:6,12 7:21,25 8:3,4 10:1,21 11:1,7 11:16 12:16,24 13:12 14:9 16:23,24,25 17:3,18,22 18:15,20 19:7 19:25 20:16 21:2,11,18 22:23 23:1,14 24:2,16,19 25:2,17 26:10 26:15 27:5,20 27:22,25 28:3 28:11,19 29:4 29:10,11,14,18 30:3,10,23 31:3,4,11 33:17 34:8 35:9 36:2,12 36:16 37:14,21 38:13,21 39:14 40:4 41:3,21 41:24 43:1 44:3,7,8,10 45:6,12 46:7 46:15 47:10 49:6,14,23 50:6,16 51:20 53:2 justifies 48:22 justify 4:22</p> <hr/> <p style="text-align: center;">K</p> <p>keep 27:13 44:4 keeping 43:25 Kennedy 14:9 18:15,20 19:7</p> | <p>27:22,25 28:3 29:4,10,14,18 30:3,10,23 31:3 37:14 43:1 kept 33:13 key 4:16 22:25 kind 8:9 31:19 know 5:1 13:25 14:9 18:24 21:4 22:4,24 24:14 26:8 28:12 40:5 45:18 49:1 50:20 51:6,12 knows 23:9 Kreider 34:19 34:20</p> <hr/> <p style="text-align: center;">L</p> <p>language 22:19 22:20,24,25 33:3,6,12,13 39:19 49:8,10 50:5 late 6:13 later-on 31:25 law 17:17 26:24 26:24 27:15 40:8 lawsuit 12:21,22 lawyer 50:7 lawyers 18:3 27:1 lectern 3:21 legal 45:15 legally 19:13 29:23 legislate 14:19 legislated 15:22 legislative 15:1 legitimate 17:12 17:14,15 19:23 23:11,12 33:5 40:9,14 42:11 let's 6:22 level 17:25</p> | <p>levels 42:8 levy 29:1 liability 17:11 liable 52:4 lien 29:1 limit 16:1 36:19 41:23 43:7 limitation 6:2 12:10 20:13 24:13,23 31:21 42:12 51:2 limitations 10:23 11:15,20 11:24 20:3 22:9 24:4,14 24:25 34:20,21 41:4,10,15,15 limited 7:10 13:13 32:12,19 52:10,12 limiting 40:12 limits 13:6 15:25 linchpin 5:21 linguistic 21:24 listed 11:12 litigate 52:11 litigating 16:14 49:5 litigation 48:3 little 6:23 43:7 long 17:19 longer 5:12 look 18:11 23:8 37:19 49:8 50:4 looked 18:6,8,11 looking 31:11 lot 20:8 Lucas 15:20 lunch 21:21</p> <hr/> <p style="text-align: center;">M</p> <p>M 1:16 2:3,8 3:7 44:14 maintained 22:19 43:19 maintenance</p> | <p>48:17 majority 27:1 making 4:22 7:13 22:12 31:8 32:6 manner 15:1 22:1,24 23:1 49:11 manufacturer 8:17 18:24 March 1:10 Margarine 45:12,16 matter 1:12 4:4 13:14 40:15 41:8,9 53:6 McKesson 11:8 11:21 mean 4:25 8:5 11:18,19 21:21 21:23 22:4 23:6,22 24:4 28:10 30:3,13 34:2,8 36:24 40:4 41:4 48:12,14 49:16 meaning 5:6 means 10:9 20:23 22:21 23:10 33:25 34:6 40:19 41:18 43:20,21 51:4 52:6 meant 43:22 45:17 memorandum 8:21 mention 13:25 mentioned 44:12 merely 50:8 merits 52:11 Miller 32:22 Millett 1:19 2:5 16:25 17:1,3 17:18,22 18:20 19:9 20:7,20</p> | <p>21:10 22:15,25 23:3,18 24:10 24:18,21 25:8 26:1,22 27:9 27:24 28:2,5 28:16,20 29:8 29:13,17,21 30:6,13 31:2,6 32:9 34:5,14 35:21 36:7,14 36:23 37:16 38:5,20 39:18 41:13 42:4 44:4,9 45:13 51:21 Millett's 52:15 mind 25:20 27:14 mined 9:5 47:2 mining 1:7 3:5 8:17 minutes 44:9,11 mirrors 18:22 missing 34:12 misspoke 48:18 mistake 4:22,23 21:6 misunderstood 38:20 moment 8:16,18 27:2,6 Monday 1:10 money 6:15,25 7:2 16:6,8 17:21 21:21 26:16 27:18 29:25 33:20 36:8 39:10 49:7 money-manda... 32:15,17 34:15 month 10:23 months 42:18</p> <hr/> <p style="text-align: center;">N</p> <p>N 2:1,1 3:1 narrow 45:3,6</p> |
|---|--|--|---|--|

| | | | | |
|---|--|---|---|---|
| <p>47:8 48:21 nature 33:19,20 necessarily 10:18 necessary 8:1 26:7 need 10:17 43:14 49:12,22 50:4 neutral 43:10 never 15:17 17:11 27:3 30:7 31:22 41:20 new 15:10,24 16:8,19 33:11 non 26:15 nonconstitutio... 31:8 nontollable 51:2 notice 9:9,21 18:5 28:14 51:11,14 52:8 number 11:9 numerous 13:20 Nut 32:23 45:11 45:15 nuts 22:10 45:18 47:12</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 obligation 5:23 obliged 14:18 obtained 47:25 48:1 obtaining 51:4 obvious 17:19 offered 18:12 oh 4:12,21 29:17 30:25 okay 7:6 8:3 43:6 oleomargarine 45:17 47:11 once 37:9 open 52:21</p> | <p>opening 13:20 opinion 22:16 opportunity 52:12 opposing 50:7 opted 50:25 option 35:19 52:17 options 11:9 oral 1:12 2:2 3:7 17:1 order 27:17 original 13:22 outlined 11:9 outset 28:1 outside 4:20 35:14 36:22 overpayment 5:19,20,23 37:13 38:1,4 38:11,12,13 overseas 21:3 owed 17:20</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 Packing 17:7 19:17 20:9 22:16 25:16 30:16 32:21 45:24 46:12 47:17 48:21 page 2:2 8:21 21:13 38:5 51:25 Pages 33:1 paid 3:12 4:7 9:22 11:23,25 12:2,5 13:4 18:4 23:16 39:24 42:20 51:10 52:24 pale 51:13 pari 4:14 parity 46:19 part 4:16 28:21 particular 28:17</p> | <p>51:9 particularly 40:15 passu 4:14 PATRICIA 1:19 2:5 17:1 pay 12:8 14:18 23:16 26:4 27:2,6,13,17 27:21 28:9,13 29:12 30:21 42:16,19 46:4 46:9 52:7 payers 9:22 paying 7:8 22:7 26:20 29:25 44:22 49:4 52:5 payment 6:21 27:23,23 payments 6:7 pays 26:16 27:12 penalties 22:6 30:20 49:4 52:4 people 22:6 28:7 percent 9:5 percentage 9:4 9:10 perfectly 9:15 47:5,11,13 period 3:13,16 12:10,15 35:13 35:14 48:19 51:3 permits 3:17 permitted 3:13 3:14 9:25 45:22 person 26:17 pertinent 25:4 Petitioner 1:4 1:18 2:4,9 3:8 44:15 phone 28:25 phrase 20:10</p> | <p>33:4 place 11:5 plain 4:1 33:2 plainly 10:17 plaintiff 3:19 36:6 plausible 17:10 20:11,14 39:2 46:17 plausibly 22:22 23:23 plead 5:14 please 3:10 17:4 Plus 10:1,2 36:12 point 8:9 16:13 21:18 23:19 26:5,20 29:11 39:1,6 51:19 52:22 pointed 11:22 28:8 47:17 pointing 31:18 34:6 points 30:20 posed 26:8 position 20:20 24:8 31:16 36:10 41:9 44:11 52:3 possibility 51:25 possible 8:23 postpayment 49:3 51:3,4 52:8 post-payment 32:11 pot 5:1,2,5 40:5 40:9,13 potential 37:18 power 17:14 26:12,14 43:8 43:8 powerfully 40:22 precedent 17:6 preceding 6:22</p> | <p>7:10 precisely 47:22 prepayment 26:23 50:23,23 51:1,19 presented 14:18 preserves 43:9 preserving 45:8 45:11 prevail 29:15 50:13 previously 13:1 52:11 primarily 45:14 principal 3:19 principles 45:20 prior 32:22 private 14:20 problem 21:10 31:22,23 40:24 problems 19:8 procedure 5:13 13:7,9 14:4 20:4 23:17,21 28:12 35:11,12 36:1,22 37:1 procedures 26:19 proceed 5:6,12 8:13 9:17 45:23 51:16 52:7 proceeded 9:18 proceeding 4:5 4:19 51:23 process 8:10 17:15 26:4,7 44:5 47:23 processes 26:5 product 45:17 prohibition 24:6 25:4 26:12 property 14:17 protect 11:14 42:16 protections 17:9 protects 43:9</p> |
|---|--|---|---|---|

| | | | | |
|--|--|---|--|---|
| protest 11:23 12:2,5,8 26:23 48:5 51:10 | 10:18 14:8 17:5 23:5 24:15,21 26:10 | 51:6 | remediable 11:3 | responses 32:9 |
| protests 27:2 | 27:3 30:14,15 | record 40:2 | remedial 15:22 | 46:21 |
| provide 4:2 5:24 13:6 | 31:5 34:25 35:1 36:11 | recovered 37:13 | 15:25 | result 28:10 |
| provided 6:1 12:7 52:10 | 37:9 38:21 40:16 42:7 | recovering 13:7 | remedies 16:1,6 | return 4:7 9:3,7 |
| provides 7:23 14:4 25:19 | 43:3,15 44:19 | recovery 13:3 19:22 | 23:13 25:23 33:16 51:20 | 14:8 42:21,25 |
| providing 11:11 11:14 37:12,12 | questioned 41:21 | referring 16:10 45:20 | remedy 12:6 | revenue 4:6,11 |
| provision 4:16 4:18 7:22,24 | questions 16:21 29:11 53:1 | refund 3:11 4:5 5:8,9,24 7:9,11 | 15:7,13,13 46:1 49:3 51:3 | 17:13 19:24 |
| 13:14 21:17 28:24 32:6,7 | quite 50:6 | 7:19 8:6,10,23 9:9,14,23,24 | 51:5 52:21 | 20:1,5,19 |
| 32:16,17 36:25 37:4,7,10 38:8 | R | 10:24 12:9,18 20:4 21:19 | remember 33:23 | 26:13,24 33:11 |
| 44:18 45:19 | R 3:1 | 23:17 27:15 29:20 35:11,12 | remitted 46:1 | 34:18 38:2,4,7 |
| 47:17 48:22 | raise 3:21 26:13 | 35:15,19,23 36:3,19,22 | render 26:19 | 38:14,15,16,19 |
| 49:17,19 50:3 50:5 | raising 19:5 | 37:1,4,25 38:22 41:19 | reply 8:22 29:2 51:24 | 39:8,11,16 |
| provisions 4:10 5:6 13:21 46:20 | Ranger 48:9,11 | 42:14,24 46:4 46:4,6 47:22 | require 25:21 | 42:14,16,17 |
| purchased 9:12 | rarity 40:6 | 47:25 48:7 49:3,5 52:18 | required 7:23 27:3,12 | 43:10,10 44:5 49:9,20 |
| purely 14:22 | reach 31:13,13 | 52:21 | requirement 14:6 16:2 | revenues 11:11 |
| purportedly 15:14 | reacted 40:21 | refunds 9:25 10:4 | 26:23 31:21 44:25 | reverses 27:16 |
| purpose 8:12 19:22 41:23 50:13 | read 23:8 38:25 | reg 34:3 | requirements 21:19 32:1 46:11 | review 14:23 |
| purposes 9:16 30:24 31:8 | reaffirmed 33:10 | Regan 30:16 35:6 | requires 17:25 33:3 39:23 | reviewable 15:2 |
| 34:17 38:18 | realize 17:20 | regard 4:11 | requiring 8:13 8:13 9:16 11:22 | revision 14:24 |
| 40:12 42:20 45:2 | really 21:21 22:10 32:1,6 37:1 | regulate 13:23 13:25 | reserve 16:22 | rhetoric 25:3 |
| pursue 5:17 | reason 4:4 22:6 31:23 32:1 33:25 34:2 | regulation 34:11 | respect 11:10 24:8 38:2,4 39:8,19 | right 6:6,9 7:12 7:25 8:3 10:2 11:20 14:5 16:19 17:12 20:4 23:3 24:4 24:12,13,23 25:9,10 27:9 31:12 34:25 36:8,23 39:24 49:6 50:7 |
| put 40:5 49:2 51:11,14 | reasonable 9:16 | regulations 32:5 | respondent 16:22 | rights 14:1 16:17 36:1 |
| puts 9:9 | reasoning 46:19 | regulatory 17:14 44:1 | Respondent 3:11 | risks 30:21 |
| putting 21:4 52:8 | reasons 3:19 27:16 | rejected 52:3 | Respondents 1:20 2:6 5:7 7:8 8:13 9:18 10:5,14 13:8 15:8 16:9 17:2 48:6,22 52:23 | Roberts 3:3 10:21 11:1,7 11:16 16:23,25 24:2 25:2 26:10 36:12 41:3,24 44:3,8 53:2 |
| Q | REBUTTAL 2:7 44:14 | relatively 12:10 | Respondent's 4:17 12:22 | role 23:13 |
| quarter 42:21 | receive 9:24 46:6 | relevant 37:10 | response 32:8 33:9 50:17,18 | room 39:9 |
| question 8:8,20 | received 3:11 5:7,9,10 10:6 16:16 | relief 3:16 11:12 14:19 15:16 16:10,11,16 40:13 44:25 46:11 48:1 | | Rosenman 38:24 |
| | recognize 39:21 | remains 9:5 47:6 | | route 8:10 35:16 35:16,24 52:1 |

| | | | | |
|-------------------------|-------------------------|-------------------------|--------------------------|-------------------------|
| routine 11:19 | 15:20 | side 27:2 | 43:9 | stipulated 19:18 |
| rule 13:15 32:20 | scope 4:20 49:19 | sides 5:2 | specifies 9:7 | 40:8 |
| 32:25 33:1 | 49:24 50:3 | significant | specifying 9:22 | straight 37:22 |
| 52:6 | scrutiny 18:1 | 25:18 | split 5:2 | stream 8:18,25 |
| rules 23:4 32:4 | second 7:13 39:1 | similar 49:17 | stability 11:11 | 9:11 18:16,22 |
| run 11:18 | 50:4 | simple 26:11 | 51:8 | 19:1,14,15 |
| running 4:9 | section 4:2 5:11 | 52:21 | Standard 32:22 | 47:4,9,14,21 |
| | 5:18,21 10:3,8 | simply 10:12 | 45:11,15 | 47:24 |
| S | 10:16 13:6,8 | 44:20 45:19,21 | Stare 40:22 | striking 48:11 |
| S 2:1 3:1 | 13:10 15:6 | 50:19 | state 44:11 | strong 11:10 |
| sacrosanct | 44:17,17 46:25 | situation 12:24 | stated 38:24 | 51:7 |
| 25:25 | 47:6 52:9 | 32:10,11,12 | States 1:1,3,13 | strongly 52:1 |
| sale 18:24,25 | see 7:3,21 31:12 | six 24:7,9,11,24 | 3:4 9:5,6 11:13 | stuck 22:8 |
| satisfied 44:24 | 38:6 | 25:9 36:20 | 11:13 13:25 | stuff 30:12 43:6 |
| satisfy 46:10 | seek 8:6 | 41:7 42:18 | 25:21 47:2 | subject 14:24 |
| 49:1 | seeking 15:16 | six-year 20:3 | 49:17 | 46:3 47:3 |
| saying 6:14,18 | 16:10,11 49:7 | 24:3 34:21 | status 15:2 40:9 | submit 3:18 |
| 6:20,24 7:1,7 | self-enforcing | slop 43:6 | 41:22 | 15:8 |
| 21:5 25:4 27:5 | 10:19 | small 18:3 | statute 3:14,17 | submitted 14:6 |
| 27:7 30:24 | self-executing | sold 8:17 9:11 | 4:2,11,17 5:20 | 53:3,6 |
| 33:25 34:5 | 25:18 | solely 19:21 | 5:22 7:14 | subsequently |
| 35:9,10,15 | senile 12:14 | Solicitor 1:16 | 10:11,22,23 | 46:5 |
| 36:4,16,20,21 | sense 22:3 28:6 | somebody 27:12 | 11:14,20,24 | substantial |
| 46:16,16 | 33:14 | soon 18:8,8,11 | 13:17 17:16 | 25:13 |
| says 6:5 18:23 | sensible 35:4 | 23:8 | 18:8 20:3 | substitutes 16:3 |
| 24:5 31:16 | sentence 44:2 | sorry 23:15 | 21:12 22:9 | succeed 34:7 |
| 38:9 47:17 | separate 36:24 | 24:18 37:4 | 24:3,12,14,23 | sue 5:10 7:16 |
| 50:7,8,11,15 | 39:22 | 38:20 39:18 | 24:25 25:5 | suffering 12:14 |
| Scalia 4:8,21,25 | serve 43:25 | sort 17:25 | 27:10 31:20 | suggest 41:6 |
| 7:12,21,25 8:3 | serves 23:12 | sorts 19:8 | 34:4,19,21 | suggested 11:15 |
| 10:1 21:2,11 | service 4:6 16:1 | sought 3:11 5:24 | 41:4,14,15 | suggestion 43:5 |
| 25:17 26:15 | set 52:18 | 5:25 9:14 | 48:23 | suggests 29:3 |
| 27:5 40:4 45:6 | severed 21:5 | 47:16 | statutes 21:11 | suing 37:25 |
| 46:7,15 47:10 | Shapiro 30:17 | source 17:13 | 32:5 | suit 7:19,19 8:5 |
| scenario 20:13 | shipment 21:6,7 | 42:14 | statutory 17:5 | 12:25 22:19 |
| scheme 15:23,25 | shipped 21:3,5 | SOUTER 24:16 | 18:21 19:5 | 25:24 43:19 |
| 17:10 27:14,15 | Shoe 26:11 48:8 | 24:19 | 22:20 24:22 | 45:4 47:20 |
| 28:8 30:20 | 48:15,17,18 | South 30:16 | 25:11 33:1 | sum 21:25 22:23 |
| 31:9 32:18 | short 9:16 11:14 | 35:5 | 34:11,17,22 | 23:1 33:24,24 |
| 35:22 36:9 | 15:25 18:4 | Spalding 18:23 | 35:2 40:15,23 | 49:10,15,18,25 |
| 37:5,6 38:10 | show 15:10 | 19:3 | 42:7 48:22 | 50:5 |
| 38:23 40:17 | 29:23 30:8 | speaking 37:18 | statutory-refu... | supported 40:2 |
| 41:19 42:7,15 | 47:23 | special 17:9 | 10:15 | suppose 6:24 |
| 42:24 43:9,11 | showing 29:22 | specific 32:21 | stay 15:23 | 22:3 28:13 |
| 52:18 | shown 27:18 | 37:3 50:17,18 | steps 19:1 | supposition |
| scheme's 37:7 | shows 35:23 | specifically | Stevens 17:18 | 52:15 |
| Schweiker | 48:3 | 21:15 42:13,16 | 17:22 | Supreme 1:1,13 |

| | | | | |
|--|---|--|--|--|
| <p>sure 5:8 21:8 42:4,4 surely 46:8 susceptible 51:22 sweepingly 26:25 system 43:10</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 take 6:5 17:19 24:3,7 31:23 52:2,19 taken 11:5 takes 34:19 takings 14:11,12 15:4 25:20 talk 33:2 talked 40:5 talking 11:16,17 31:24,24,25 tax 3:12 4:3,7,7 4:20 5:7,20,24 7:9,17,17,19 8:8,11,14,16 9:3,7,14,22,22 9:23 10:9 11:11,23,25 12:19 13:4,4 13:15 14:7 16:14 17:10,14 17:25 18:10,14 19:21,21,23 20:1,1,5,10,11 20:12,17,19,23 20:23,25 21:8 21:12,15,16,21 22:3,4,13,14 22:18,19,21,22 23:5,6,7,11,12 23:16,19,19,22 23:22,24 25:15 26:8,12,14,17 26:19,24,24 27:1,8,9,14 28:13,17,17,20</p> | <p>29:6,6,12,20 29:23 30:19,24 31:1,7,9,10 32:14,18,25 33:4,5,7,12,14 33:15,22,24 34:5,10,10,22 35:3,22,23 36:8,25 37:3 37:11 38:2,4 38:14,15,16,19 39:2,4,8,11,16 40:9,14,18,18 40:19,25 41:14 41:17,18,21,22 42:10,11 43:6 43:8,8,9,18,18 43:19,20,21 44:1,5,18,20 44:21,22 45:2 45:17,21,22,25 46:2,4,9,17,20 47:1,1,3,4,5,7 47:11,12,13,13 47:16,18 48:4 48:5,11,14,15 48:17,20 49:1 49:4,9,20,24 50:8,9,10,13 50:15,19,20,22 50:22 51:9,10 51:10,12,22,23 52:2,5,7,11,13 52:16,24</p> <p>taxation 8:15 taxes 12:4,8 14:3 17:13 18:4 27:3,6 28:13,21,23 37:13 38:25 46:14</p> <p>taxing 11:9,13 13:24 23:5 51:7</p> <p>taxpayer 5:22 9:3,9 12:1,5,14 12:17 13:3</p> | <p>15:12 26:16 30:22 36:5 44:19,24 46:1 46:2,12,13 47:20 48:25 49:2 50:21,21 50:24 51:1 52:1,4,7,10,12 52:17,19,20</p> <p>taxpayers 12:7 13:21 14:3 30:20 47:23 51:9</p> <p>taxpayer's 13:3 52:3</p> <p>tax-injunction 45:19</p> <p>tax-refund 3:13 3:17 4:2,17,18 5:12,22 14:4 17:9 23:20 27:14 28:8 37:22 48:23</p> <p>technical 8:20 tell 39:7 43:23 Teller 38:12,24 telling 36:3 tells 19:20 ten 24:11 term 5:20 20:19 42:1,3 terms 4:1 10:11 10:16 26:13 33:2</p> <p>terrible 22:7,8 terribly 23:15 test 17:24 50:15 textually 39:6 thank 3:24,25 16:23,24 44:7 44:8 53:2 theory 4:19 7:18 12:22,22 35:15 45:21 they'd 22:8 29:1 thing 6:4 18:7 19:2 22:2,8</p> | <p>32:14 33:25 34:2 43:20</p> <p>things 41:25 42:6</p> <p>think 4:15,24 5:4,13 9:15 10:8,14,17 12:16,20 13:5 15:6 17:24 19:10 20:7,20 23:4 25:12 29:19 31:12 34:20 36:5,14 37:2 39:3,7 40:10,14 42:8 43:15 45:9 46:21,23 48:24 49:12 50:2,16 51:18</p> <p>third 50:4 53:3 thought 7:12 18:6 22:9 27:20 31:4 32:8 35:1,2 36:2,17 40:24 43:21</p> <p>three 4:6 6:6,11 6:19,20,22 7:10 12:9,13 14:7 24:8,16 24:19 25:5,9 34:19 35:11 36:18 46:21 51:11 52:22</p> <p>three-year 3:13 3:16 12:10 22:9 24:25 35:13,14 36:19 51:2</p> <p>ties 5:21 time 9:16 10:7 12:15 13:6 15:25 16:1,16 16:22 28:9 45:4 47:20 48:7,13 51:6 timely 5:24,25</p> | <p>8:23 9:23 10:24 16:9,18</p> <p>times 33:8,10 40:20 44:13</p> <p>time-barred 15:13</p> <p>timing 42:24 tired 14:25 Title 5:5,6 6:14 7:23 16:2 38:3 52:9</p> <p>today 47:6 50:20 tragedy 22:7 transaction 8:24 treat 35:19,20 42:20 treated 39:10 44:6 treating 39:15 tribunal 14:22 tried 29:18,19 triggers 5:23 trouble 21:22,23 true 34:10 Trust 42:3 try 28:1</p> <p>Tucker 12:3,4 12:18,23 13:7 14:10,14,16 15:3 24:4,25 31:9 34:16,17 34:22 41:13 42:8,23</p> <p>turns 51:16 two 3:19 4:13 6:15 11:20 19:1 21:11 32:9 42:8,12 42:19 46:7</p> <p>two-page 9:8 type 13:17,18</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimately 40:16 45:10 50:12 unambiguous 4:1 10:11</p> |
|--|---|--|--|--|

| | | | | |
|--|--|--|---|---|
| unanimous 22:16 | 15:21 17:7 19:17 20:9 | 29:2 31:10 33:21 36:17 | 23:2 49:11 | 2008 1:10 |
| unanimously 26:11 41:20,25 | 22:16 25:16 30:15,16,17 | 37:11 39:11 42:2,22 | <hr/> X <hr/> | 21 7:8 48:6 52:24 |
| unbending 24:5 24:10 | 32:21,22 35:5 39:2,4 49:17 | ways 30:24 31:7 40:15 | x 1:2,8 | 24 1:10 |
| unconstitutio... 12:19 13:5 | view 19:24 23:11 29:5 | weeks 11:7 42:19 | <hr/> Y <hr/> | 2411 5:11,18 37:2,16,18,21 |
| 23:9 26:17,19 27:7,8,10 47:7 | 32:23 49:7 | went 6:5 33:7 we'll 3:3 30:10 53:3 | year 41:25 51:9 years 4:6 6:6,11 | 37:21,23,25 38:18 |
| 52:16 | vigorously 16:13 | we're 6:18 7:7 11:16,17 27:14 | 6:19,20,23 7:8 7:10 9:10 12:4 | 2501 13:8,10 |
| unconstitutio... 48:4 52:2 | VII 16:3 | 36:24 39:5 | 12:9,13 14:7 18:10 22:5 | 26 5:5,6 6:14 18:21 21:12,15 |
| understand 23:9 | vindicating 14:5 40:17 43:11 | we've 8:21 13:19 18:2 | 24:7,8,9,11,11 24:16,19,24 | 28 7:23 37:2,11 37:11 38:3 |
| unique 40:6 42:12 43:25 | violates 13:15 14:11 34:1,3,3 | whatsoever 18:14 19:12 40:10 | 25:5,9,10 34:19 35:11,12 | <hr/> 3 <hr/> |
| United 1:1,3,13 3:4 9:5,6 35:7 | violation 5:17 11:2,4 15:18 | William 1:16 2:3,8 3:7 20:9 | 35:13 36:18,20 41:7 42:15 | 3 2:4 |
| 47:2 49:17 | 19:15 20:2,6 20:18 26:6,21 | 44:14 | 48:6 51:11 52:22,24 | 30th 16:12 |
| University 35:6 | void 30:4 | Williams 17:7 19:17 22:16 | <hr/> Z <hr/> | 30-day 16:1 |
| unlawful 30:7 30:18 | Volenti 26:15 | 25:16 30:15 32:21 39:2,4 | zero 11:24 | <hr/> 4 <hr/> |
| unlawfully 46:3 | voluntarily 26:20 | 45:24 46:11 47:17 48:21 | <hr/> 0 <hr/> | 4a 38:5 |
| unlawful-tax 15:9 | <hr/> W <hr/> | willing 20:11,14 52:2 | 07-308 1:5 3:4 | 4121 21:12 47:6 |
| unqualified 24:5 26:12 | wait 29:1 45:6 waited 7:8 | word 33:22 41:14,17 49:24 | <hr/> 1 <hr/> | 4221 18:21 21:15 |
| unusually 6:2 51:2 | waiving 35:24 want 4:10 5:2,2 | words 34:2 49:15 | 10:41 1:14 3:2 | 44 2:9 |
| upheld 46:5 | 6:10,11 12:20 23:16 32:19 | work 6:24 28:4 32:13 | 100 17:23 | <hr/> 6 <hr/> |
| use 21:6 24:6 35:11 37:22 | 33:17 34:1,3 38:6,21 40:3,5 | works 39:17 worth 6:7 | 11 8:21 | 6 33:1 |
| 41:13 42:13 | 51:10 52:19 | wouldn't 7:14 11:19 19:5,16 | 11:38 53:5 | 6330(c)(2)(B) 52:9 |
| usual 8:6 11:18 | wanted 19:4 51:18 | 25:1 42:2 | 15 44:9,10 | 6402 5:21 |
| U.S 26:11 48:8 48:15,17,18 | warrant 15:10 16:19 | wrinkle 37:18 writing 14:6 | 16 2:6 51:25 | 6511 37:2 |
| U.S.C 18:21 21:12,15 37:2 | Washington 1:9 1:17,19 | wrong 24:10 26:2 32:24 | 1920s 26:23 45:12 | 6611 10:3 |
| 37:2,11,12 | wasn't 32:12 way 10:12 11:12 | wrongful 22:14 wrongfully 22:1 | 1960 49:17 | <hr/> 7 <hr/> |
| <hr/> V <hr/> | 14:5 16:9,18 19:23 23:10,15 | | 1986 33:11 | 7 33:1 51:24 |
| v 1:5 | | | 1994 16:11 48:20 | 720 9:6 |
| valid 9:16 20:23 20:25 21:3 | | | 1995 16:11 | 7421 44:18 46:24 |
| 47:12,13 | | | 1996 16:12 48:16,16,18,20 | 7422 10:8 21:19 33:12 39:5 |
| vast 27:1 | | | 1997 16:12 | 41:18 43:20 |
| versus 3:4 15:20 | | | 1998 48:18 | 44:17 46:25 49:8 |
| | | | <hr/> 2 <hr/> | 7422(a) 4:2 10:12,16 13:6 15:6 19:25 |
| | | | 20 18:10 | |

| | | | | |
|----------------------|--|--|--|--|
| <hr/> 8 <hr/> | | | | |
| 833:1 | | | | |
| <hr/> 9 <hr/> | | | | |
| 909:4 | | | | |