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

2 (10:41 a.m.)

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

6 Mr. Jay.

7 ORAL ARGUMENT OF WILLIAM M. JAY

8 ON BEHALF OF THE PETITIONER

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

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

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

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

22 MR. JAY: Hang on.

23 Is that better, Your Honor.

24 JUSTICE GINSBURG: Yes, thank you.

25 MR. JAY: Thank you.

1 The plain and unabiguous 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 to sue
10 for it, they would have received interest under section
11 2411. But because they are -- because they are no
12 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 refund.

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 right.

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 against the government.

3 JUSTICE SCALIA: Right. 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 export.
19 And in the context of the coal industry that can be a
20 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 purchased it,
13 actually exported it from the country, and also how --
14 what the dollar amount of 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 the coal tax -- coal taxpayers 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 7244(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 CHIEF JUSTICE ROBERTS: Could the IRS say
21 that the statute -- or Congress, I guess, say the
22 statute of limitations is one month?

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

25 CHIEF JUSTICE ROBERTS: Yes, and anything

1 after that, any constitutional violation after that, is
2 just not remediable?

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

6 CHIEF JUSTICE ROBERTS: Five weeks before.

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

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

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

1 challenge and the amount being paid under protest.

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

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

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

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

23 JUSTICE ALITO: Well, any situation in which
24 such a suit can be brought without having filed a claim
25 previously with the IRS?

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

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

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

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

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

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

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

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

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

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

19 Indeed, in Bush versus Lucas, Schweiker
20 versus Chilicky, and other cases, the Court has
21 recognized that when Congress has legislated a remedial
22 scheme, it doesn't -- this Court will still stay its
23 hand before creating a new Bivens action, even if that
24 remedial scheme has very short time limits, such as the
25 30-day time limit, the civil service remedies that were

1 at issue in Bush, or the exhaustion requirement of Title
2 VII which substitutes for an equal-protection claim for
3 Federal employees.

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

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

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

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

24 CHIEF JUSTICE ROBERTS: Ms. Millett.

25 ORAL ARGUMENT OF PATRICIA A. MILLETT

1 ON BEHALF OF THE RESPONDENTS

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

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

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

21 MS. MILLETT: Justice Stevens, that's
22 because my clients are not Fortune 100 companies, and I
23 don't think the Constitution or the Congress imposes a
24 tax or tax code that require that sort of level of
25 scrutiny.

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

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

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

19 MS. MILLETT: Justice Kennedy, there is a
20 statutory definition, 26 U.S.C. 1421, that deals with
21 stream of commerce and it mirrors this Court's decision
22 in the A.G. Spalding case, which says that either the
23 direct sales or if your manufacturer doesn't sell
24 directly to the exporter or it has the broker, so one or
25 two steps, is stream of commerce, and after that it's

1 not going to be. That's the same thing this Court did
2 in A.G. Spaulding.

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

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

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

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

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

24 JUSTICE GINSBURG: If 7422(a) had said
25 any -- any Internal Revenue tax, including a tax imposed

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

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

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

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

25 JUSTICE SCALIA: I'm not certain it was

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

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

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

24 And then the other thing is just common
25 sense: Suppose you have an insane tax collector. You

1 know, I mean, that could happen. And the insane tax
2 collector they discover some years later has been
3 assessing all these penalties for no reason and people
4 have been paying some of them because, terrible tragedy,
5 terrible thing. But I guess they'd be stuck, I'd always
6 thought, with the three-year statute of limitations, so
7 even those it's really nuts.

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

12 MS. MILLETT: The authority is this Court's
13 unanimous opinion in Enochs versus Williams --

14 JUSTICE BREYER: Okay.

15 MS. MILLETT: -- which said that if -- we
16 are dealing with the same language -- no suit shall be
17 maintained for any tax in any court. And it said in
18 that, that statutory language, "any tax" means something
19 that the government can plausibly defend as a tax.

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

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

23 JUSTICE BREYER: "Any sum in any manner
24 wrongfully collected."

25 MS. MILLETT: Right. This Court dealt with

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

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

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

25 CHIEF JUSTICE ROBERTS: So why do you -- I

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

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

14 JUSTICE SOUTER: Why aren't three years
15 enough?

16 MS. MILLETT: I'm sorry?

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

19 MS. MILLETT: Because it's a question of
20 statutory construction. And Congress determined what
21 the right statute of limitation is for a constitutional
22 claim, and that's six years. If Congress had a
23 three-year statute of limitations under the Tucker Act
24 for all constitutional claims, we wouldn't be here.

25 CHIEF JUSTICE ROBERTS: So -- so, the

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

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

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

24 MS. MILLETT: Because we don't -- under the
25 Constitution the government hasn't done anything wrong

1 unless -- until -- unless and until it actually effects
2 a taking and doesn't pay for it through process. Those
3 processes are how we determine -- get to the point where
4 there has been an actual constitutional violation here.

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

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

20 MS. MILLETT: Congress eliminated in the
21 early 1920s any prepayment protest requirement under the
22 tax law. And the tax law -- the Internal Revenue Code
23 applies sweepingly to Americans across this country,
24 vast majority of whom are not equipped with tax lawyers
25 at their side to make protests at the moment they pay

1 their taxes. That's never been required.

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

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

17 JUSTICE GINSBURG: I thought you didn't have
18 to pay --

19 JUSTICE KENNEDY: Here there was a payment.
20 Here there was a payment.

21 MS. MILLETT: Yes.

22 JUSTICE KENNEDY: It's different than if you
23 try to enjoin the collection at the outset.

24 MS. MILLETT: It's only --

25 JUSTICE KENNEDY: So that argument doesn't

1 work.

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

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

13 MS. MILLETT: There -- there's nowhere for
14 them to go for this particular tax. You can't go to tax
15 court.

16 JUSTICE GINSBURG: Why not?

17 MS. MILLETT: Because tax court doesn't
18 apply to excise taxes for the most part. There may be a
19 few exceptions. It essentially applies to income gift
20 and estate taxes, and it certainly didn't apply to this
21 provision here. They could have -- they could have
22 gotten the assessment and gotten on the phone with an
23 IRS. Otherwise they'd have to wait for a lien or levy.

24 Now, the government, by the way, has --

25 JUSTICE KENNEDY: Well, but if we -- if we

1 accept your view in this case, they can go in a district
2 court and enjoin them. It's not a tax. The Tax
3 Injunction Act doesn't apply.

4 MS. MILLETT: The -- the

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

8 MS. MILLETT: I --

9 JUSTICE KENNEDY: So it seems to me there is
10 a distinction. It may be that you would prevail in your
11 argument.

12 MS. MILLETT: I know. We couldn't have --

13 JUSTICE KENNEDY: If they tried -- if they
14 tried -- do you think they could enjoin the collection
15 of a tax refund?

16 MS. MILLETT: No, they couldn't because in
17 addition to showing the government's imposition of the
18 tax is legally indefensible, you still have to show
19 entitlement to an injunction, and unless you can
20 establish irreparable harm just by paying money, which
21 I'm not aware of any coal company that could have, you
22 could have gotten an injunction. And --

23 JUSTICE KENNEDY: But, I mean, in your
24 argument you say it is absolutely -- that it doesn't
25 apply. Just get an injunction.

1 MS. MILLETT: You can't get an injunction
2 just because something is unlawful. That's never been
3 allowed under equity. You also have to show irreparable
4 harm.

5 JUSTICE KENNEDY: Well, then we'll invent
6 the hypothetical company that is going to go broke and
7 all that stuff.

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

18 JUSTICE KENNEDY: But you can't have it both
19 ways. You're saying it isn't a tax for your purposes,
20 and then in my hypothetical case you say you have to go
21 through the tax law.

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

23 JUSTICE KENNEDY: And the same with your
24 answer, what I thought was your answer to Justice
25 Ginsburg's question.

1 MS. MILLETT: It's the government that wants
2 to have it both ways. It wants to say it is a tax just
3 for purposes of making it a nonconstitutional case under
4 the Tucker Act and to make it the tax scheme, but in no
5 way is this defensible as a tax.

6 JUSTICE BREYER: In looking at your
7 argument, I see it now, I think, if I'm right. You're
8 -- that it would have very broad reach. It would reach
9 -- it doesn't just concern the constitutional claim; it
10 concerns any claim you'd have against the IRS. And
11 there's authority that says if the IRS' position is too
12 far out, you can go get an injunction. That's what
13 you're pointing to. And then your argument is,
14 because of that authority, that kind of an exception for
15 the far out IRS claim also applies to the statute of
16 limitation and administrative requirement. And your
17 problem is the latter has never been held. And the
18 reason that that's a problem, I take it, is because when
19 you're talking about injunctions, you're talking about
20 basic equity, but when you're talking about later on
21 administrative requirements, there's really no reason
22 they couldn't have filed the claim. And if we were to
23 accept an argument on the -- to the contrary and
24 analogize it, it's going to cut through rules,
25 regulations, statutes, constitutional claims,

1 everything, really making a hash of their provision
2 there -- of the administrative provision. So, what is
3 your response to that thought which --

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

14 So it's extremely limited, but I want to get
15 back -- this is not about an equity rule. This Court
16 was specific in Enochs versus Williams Packing, when it
17 said, our prior decision under Miller versus Standard
18 Nut, in which you had done a more generous view of this
19 get around the Tax Injunction Act, was wrong, because
20 the Tax Injunction Act is not an equitable rule. Enochs
21 was a statutory construction rule. Pages 6, 7, and 8 of
22 that decision make it plain in terms -- you talk about
23 what the act requires, and the language of this Court is
24 construing is the phrase "any tax." And if it has no
25 legitimate basis, then it's in the guise of a tax.

1 That same language has been on the books for
2 almost half a century. Congress went back from the Tax
3 Injunction Act eight times without changing it in
4 response to this Court's decisions. Enochs has been
5 reaffirmed by this Court five times. Congress enacted
6 an entirely new Internal Revenue Code in 1986 that used
7 that "any tax" language in 7422, with this Court's five
8 decisions on the book and kept that language. And it
9 makes sense. Congress doesn't -- doesn't enact a tax
10 where it's only tax function --

11 JUSTICE BREYER: What do you want to do
12 about your argument, as I hear it, has nothing to do
13 with the nature of the claim that you're asserting to
14 get the money back. It has to do with the nature of the
15 IRS's defense and -- well, can you do it that way? Can
16 you say the word "any tax" or "any claim" -- I can't
17 remember that other. What was it? It was any -- "any
18 sum" -- "any sum" or "any tax." Can you say, well, it
19 means one thing if they are saying that the reason they
20 want it back is that it violates the Constitution, and
21 those words mean a different thing if the reason that
22 you want it back is it violates an IRS reg; it violates
23 an IRS statute.

24 MS. MILLETT: I'm not saying that "any tax"
25 means anything different. I'm just pointing out that if

1 you succeed --

2 JUSTICE BREYER: Well, if it doesn't mean
3 anything different and then if the very far-out claim to
4 a tax is so far out it isn't a tax, that would be true
5 in the regulation context, in the statutory context as
6 well as the constitutional context. Am I missing
7 something?

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

17 The difference is constitutional
18 enforcement, and this is fundamentally a constitutional
19 right that's being enforced. And the question is, would
20 Congress had thought -- this is all a question of
21 statutory construction -- would Congress have thought
22 this is more a constitutional claim or a tax claim? And
23 they've made the sensible decision, at least as this
24 Court construed it in Enochs, in South Carolina versus
25 Regan -- addressed it in Janis and Bob Jones University

1 and the Americans United case, all of which are in our
2 brief --

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

15 MS. MILLETT: One can get -- there is
16 nothing in the tax administrative scheme where one when
17 shows up to file a tax refund where you say if I go by
18 this route, I'm waiving all others. It's not like I'm
19 agreeing to go go through arbitration and forgoing my
20 rights to go through a court procedure. Congress has --

21 JUSTICE GINSBURG: In other words, what were
22 you just telling us is that this is not a refund claim;
23 this is a constitutional claim. But you are now saying,
24 I think, that it's both; it's whatever the taxpayer or
25 the plaintiff wants it to be.

1 MS. MILLETT: It's a constitutional claim to
2 get your tax money back. That's right. And the
3 administrative scheme is fully amenable to that. That's
4 certainly the government's position, and we don't
5 disagree. The question is --

6 CHIEF JUSTICE ROBERTS: Plus you get
7 interest.

8 MS. MILLETT: Yes. Absolutely. We could
9 get it on both grounds, but you get --

10 JUSTICE GINSBURG: You're saying you get
11 interest too in either way. You're saying -- I thought
12 you said for the three years that are within the
13 three-year refund limit, you get interest and then
14 you're also saying, going back six years, you also get
15 interest. You're not saying that if you -- if you're
16 outside the refund procedure you don't get interest.

17 MS. MILLETT: Right. But that's because
18 we're -- I mean, there's a -- there's a separate
19 interest provision in the tax code for the
20 administrative refund procedure. They don't really an
21 28 U.S.C. 2411. I think it's 26 U.S.C. 6511. But
22 there's a specific administrative brief on tax -- I'm
23 sorry, interest provision for the administrative refund
24 scheme. And so, under that, when you're in the
25 administrative scheme, you get what the administrative

1 scheme's interest provision gives you. We don't dispute
2 that.

3 And then the question is, once you've gone
4 to court, the relevant interest provision is the one in
5 28 U.S.C., not in the tax code, by the way, but in 28
6 U.S.C., providing them -- providing for interest when
7 you've recovered an overpayment of taxes.

8 JUSTICE KENNEDY: Is the interest the same
9 in amount in either case?

10 MS. MILLETT: Yes, because in 2411 it
11 cross-references the -- well, let me clarify. There is
12 one potential wrinkle, but generally speaking 2411 if
13 you look at it, and it's at the end of the
14 cross-references --

15 JUSTICE GINSBURG: 2411 -- 2411 is what you
16 use in the court when you have a straight tax refund
17 claim. It's not as though 2411 is there for some other
18 claim. It's what you get when you go to court and
19 you're suing for a refund. That's 2411. That's
20 applicable if you get a judgment for an overpayment in
21 respect of any Internal Revenue tax. That's what --
22 it's in Title 28, but that's what it's for. It's for an
23 overpayment in respect of any Internal Revenue tax.

24 MS. MILLETT: This is all on page 4a of the
25 Government's brief if you want to see where it

1 cross-references the Internal Revenue interest
2 provisions.

3 No, there's nothing there that says you have
4 to have gone through the administrative scheme. All you
5 have to have is an overpayment. If you have an
6 overpayment, under Bonwit Teller --

7 JUSTICE GINSBURG: But -- the use of any
8 Internal Revenue tax, and your whole argument is this
9 isn't an Internal Revenue tax. So it's clearly not an
10 Internal Revenue tax that you have a constitutional
11 claim directly under the Constitution, so how does it
12 become for purposes of 2411 an Internal Revenue tax?

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

19 Your second point, yes, that if we say this
20 is not a plausible tax under Enochs versus Williams,
21 that I think, and if this Court agrees, that this is not
22 a tax under Enochs versus Williams, so that we're not
23 bound by 7422, then I agree that our interest argument
24 becomes harder at that point textually.

25 I will tell you that I still think the fact

1 that they say "in respect of any Internal Revenue tax"
2 gives us room to say that where the government has at
3 least treated it and collected the money as though it
4 were an Internal Revenue tax, that might be a way to get
5 interest. If this Court agrees, though, that it's
6 not --

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

11 MS. MILLETT: Only -- I'm sorry. Only
12 because we have the "in respect of language." That's
13 the only -- but if this Court disagrees with that, and
14 we recognize it's harder if this Court agreed, we have a
15 separate constitutional argument that the Export Clause,
16 just like the Just Compensation Clause requires interest
17 paid in its own right. And so that's the alternative
18 basis.

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

21 But I want to get back. Very clearly that
22 there is, the bottom -- I mean, Justice Scalia, you
23 talked about, you know, which pot you want to put this
24 in. The rarity of this case and what's unique about it
25 is that the government came in agreeing up front,

1 stipulated judgment, no fact dispute, no law disputes,
2 this is in the pot of no legitimate status of the tax.
3 No claim whatsoever. The government couldn't think of
4 anything.

5 But for purposes of limiting your
6 constitutional relief, then it's in the pot of a
7 legitimate. Tax and we think they can't have it both,
8 ways and particularly as a matter of statutory
9 construction. This is ultimately a question of which
10 scheme is better fitted to vindicating the Constitution.
11 And Congress said any tax, just like it said in the Tax
12 Injunction Act. This court has said what any tax means.
13 It said it five times after Enochs. And Congress has
14 not reacted to it.

15 Stare decisis applies most powerfully in the
16 statutory construction Congress -- context, and if
17 Congress thought there were a problem with what -- with
18 how this Court defined any tax, it would have said so.
19 It could have done so. It's had half a century to do
20 something.

21 CHIEF JUSTICE ROBERTS: You give all of this
22 up when it comes to the statute of limitations. I mean,
23 the government's argument could be just as implausible
24 as you suggested it is here. But if it involves a claim
25 six years and one day out, it's just too bad. It

1 doesn't matter that it's a constitutional claim. It
2 doesn't matter how erroneous the government's position
3 was, because the government can impose limitations like
4 that even on the assertion of constitutional claims.
5 That's all they are doing here.

6 MS. MILLETT: But the Tucker Act doesn't use
7 the "word any tax" in defining the statute of
8 limitations. It's a statute of limitations for
9 constitutional claims.

10 Our argument is what the word "any tax"
11 means in 7422 and does it force us to go through the tax
12 refund scheme. Our argument is, as this Court said
13 unanimously in Enochs -- the decision has never been
14 questioned by any justice of this court -- that any tax
15 does not apply if it had no tax status for any other
16 purpose. It can't be just to limit --

17 CHIEF JUSTICE ROBERTS: We say just as
18 unanimously a couple of things last year on -- term as
19 well in Jencks and certainly the Federal circuit's
20 decision wouldn't have come out the same if they had had
21 Hinck's term of trust on the books.

22 MS. MILLETT: I'm not sure -- I'm not sure
23 it would have come out differently. Maybe they would
24 have explained things differently. But this Court said
25 in most cases the question is which statutory scheme is

1 better fitted. And at two levels we think the Tucker
2 Act is better fitted for this claim.

3 One, because any tax only applies when there
4 is asserted legitimate basis for the tax; and two, the
5 Export Clause is a unique limitation, specifically
6 denies the government any authority to use exports as a
7 source of revenue. And you have a refund scheme here
8 that has been designed over the years specifically to
9 protect revenue interest, to make you pay the revenue
10 first and have them hold it.

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

19 Justice Kennedy, I forgot to get back to you
20 on that.

21 But the question here is whether the Export
22 Clause can be fully enforced by -- which it's -- it's
23 not a suggestion and it doesn't say when you're doing
24 your tax stuff, it's okay if you slop on on exports a
25 little bit. Exports are completely off limits to the

1 tax power. And Congress using its tax power to create a
2 tax scheme that specifically preserves and protects
3 revenue and is not a revenue neutral system is not the
4 best scheme for vindicating the Export Clause. It's not
5 better for that. It is at cross purposes with the
6 Export Clause.

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

17 It hasn't done that, and the Export Clause
18 can't serve its unique historical function of keeping
19 government's tax regulatory hands off -- hands off the
20 tax export process and the revenue out of the Federal
21 Fiske unless this is treated as a constitutional claim.

22 Thank you, Mr. Chief Justice.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Ms. Millett. Mr. Jay, you have 15 minutes.

25 JUSTICE GINSBURG: Mr. Jay, I hope in the 15

1 minutes, you will state what the government's position
2 is on this Enochs case that's been mentioned at least a
3 dozen times.

4 REBUTTAL ARGUMENT OF WILLIAM M. JAY
5 ON BEHALF OF THE PETITIONER

6 MR. JAY: I'll be glad to, Your Honor.
7 Enochs case construed not Section 7422, but Section
8 7421, the Injunction Act provision of the tax code. And
9 the question in Enochs was whether the taxpayer simply
10 by alleging that the tax was so -- so invalidly applied
11 that it was only in the guise of the tax could avoid
12 paying the tax and bring an injunctive claim.

13 The court in Enochs held that it could not
14 because the taxpayer had not, in fact, satisfied the
15 basic requirement of all claims for injunctive relief as
16 irreparable injury. And the court also held that
17 whether a tax is defensible for purposes of this very
18 narrow exception is to be determined on the basis of the
19 information to the government at the time of suit. So
20 in this --

21 JUSTICE SCALIA: Wait what very narrow
22 exception? It didn't apply the exception.

23 MR. JAY: As the Court was preserving, I
24 think, in Dick, though, because -- because the Court
25 ultimately denied the exception in that case and in each

1 case since, preserving the holding in Standard Nut and
2 Margarine, a case from the 1920's. Justice Breyer
3 alluded to this when he asked my friend, Ms. Millett,
4 about whether this exception is geared primarily to
5 factual issues or to legal issues. In Standard Nut and
6 Margarine the government had decided to attempt to
7 impose a tax meant for oleomargarine on a product made
8 entirely from nuts. And this Court, you know, without
9 construing the tax-injunctive provision, simply
10 referring to principles of equity, this Court held that
11 the government's theory of assessing the tax was simply
12 in the guise of a tax and it permitted the injunctive
13 claim to proceed.

14 In Williams Packing the government's -- the
15 government had a collateral basis for assessing the tax,
16 and so the taxpayer was remitted to the same remedy that
17 any taxpayer who wants to challenge a tax as having been
18 unlawfully assessed or collected is subject to; that is,
19 to pay the tax, file a refund claim, and if the refund
20 claim is upheld either by the IRS or subsequently in
21 court, to receive a full refund with interest.

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

25 MR. JAY: Well, if you can satisfy the

1 requirements for injunctive relief -- and Williams
2 Packing, the taxpayer, couldn't; and in the cases since
3 the taxpayer couldn't -- then the court can enjoin the
4 collection of the taxes applied to you.

5 JUSTICE SCALIA: Well, that's what she is
6 saying. She is saying that those conditions exist here.
7 That this is not -- not a plausible tax; and, therefore,
8 she could have gotten an injunction; and, therefore, by
9 a parity of reasoning, she doesn't have to go through
10 the tax provisions.

11 MR. JAY: I think I have three responses to
12 that.

13 One is that we don't think that a -- an
14 exception to the -- to 7421 should carry over into
15 Section 7422. But even in the circumstances of this
16 case, this is a facially constitutional tax. The tax is
17 imposed on coal mined in the United States. And if no
18 -- if none of the coal that is subject to the tax is
19 ever in the stream of export when the tax is imposed,
20 then the tax is perfectly constitutional. And that is
21 why Section 4121 remains on the books today.

22 The tax is unconstitutional only in certain
23 narrow circumstances when the coal actually is in the
24 stream of export. As I explained --

25 JUSTICE SCALIA: Well, you could say the

1 same about the tax on oleomargarine. It is a perfectly
2 valid tax but not when you impose it on nuts. And here
3 the tax on coal is a perfectly valid tax, but not when
4 you impose it on coal that's in the stream of export.

5 MR. JAY: But if one of these coal companies
6 had sought to enjoin the tax, the government would have
7 pointed to the provision in Williams Packing that says
8 that whether the tax is defensible is to be determined
9 on the basis of the information available to the
10 government at the time of suit until the taxpayer
11 demonstrates that the coal is actually in the stream of
12 export, which is precisely what's done during the refund
13 process that the taxpayers used in this case to show
14 that their coal was in the stream of export when they
15 obtained the refund. That's what -- that's how they
16 obtained a full -- full relief.

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

22 And by the time they filed for a refund this
23 Court had decided IBM. It had decided U.S. shoe. The
24 district court had decided Ranger Fuel, and the
25 government had announced that it would not appeal the

1 decision in Ranger Fuel striking down the coal tax.

2 But that doesn't mean that for that -- for
3 that entire time the government had no basis on which to
4 defend the tax. I mean the government had colorful
5 arguments to defend the tax at issue in U.S. Shoe in
6 June 1996. Shoe was in 1996. And it had colorful
7 arguments to defend the harbor maintenance tax in U.S.
8 Shoe. I may have misspoke. IBM in 1996, and U.S. Shoe
9 in 1998.

10 So to say that during the period at issue in
11 this case, 1994 through 1996, the tax was so facially
12 invalid that the narrow Williams Packing exception to
13 another statutory provision justifies Respondents'
14 attempt to circumvent the tax refund statute, we just
15 think is not correct.

16 In the case of a taxpayer who -- who can
17 satisfy the exception, you know, the Tax Code does,
18 indeed, put that taxpayer to the choice. It gives them
19 a fully effective post- payment refund remedy where they
20 can avoid any penalties and interest by paying the tax
21 and litigating for a full refund.

22 JUSTICE BREYER: Right. Is the government's
23 view that the money that they are seeking here, if you
24 look at 7422, that it falls within the language of any
25 Internal Revenue tax alleged to be erroneously or

1 illegally assessed or the language "any sum alleged to
2 have been in any manner wrongfully collected," or both?

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

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

7 MR. JAY: I mean the Court construed a
8 similar provision in Flora versus United States in 1960,
9 which explained that "any sum" is a cumulative
10 provision. So that if something is within the scope of
11 an Internal Revenue tax alleged to have been erroneously
12 or illegally collected or assessed, that's as far as you
13 need to go.

14 JUSTICE BREYER: But it means that if, in
15 fact, it is not within the scope of the word "tax," then
16 it is not within "any sum"?

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

22 JUSTICE BREYER: In Enochs -- she is quite
23 right, your opposing lawyer -- it says the exaction is
24 merely in the guise of a tax. And when it says it is
25 within the guise of a tax, then it doesn't fall within

1 the Tax Injunction Act.

2 And there it says if it is clear that under
3 no circumstances could the government ultimately
4 prevail, the central purpose of the Tax Injunction Act
5 is inapplicable. And then it's just in the guise of a
6 tax. And that, she says, is the test we should apply
7 here. So that's where I think Justice Ginsburg began.

8 What is your specific response to that?

9 MR. JAY: Well, my specific response, Your
10 Honor, first is that in this case the tax simply was not
11 in the guise of a tax. But even if, you know, today, if
12 the taxpayer were -- if a taxpayer were alleging that
13 the coal tax were in the guise of a tax and that it,
14 therefore, could bring a prepayment -- a prepayment
15 action, it does not then follow that the taxpayer could
16 still after the fact, if it opted not to bring that
17 prepayment action, the taxpayer could then escape the
18 three-year, nontollable, unusually emphatic limitation
19 period that applies to a claim for a postpayment remedy,
20 which is the exclusive means of obtaining a postpayment
21 remedy.

22 And, you know, the courts recognized time
23 and again that taxing authorities have a strong interest
24 in fiscal stability, and it effectively closes the books
25 on a particular tax year. So that taxpayers, after the

1 tax is paid, if they want to protest the tax, they have
2 three years in which to put the government on notice.
3 That, you know, even if the claim is this tax is so
4 beyond the pale that it can't be defended, they have to
5 put the government on notice of that claim.

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

9 In addition, I think I just wanted to
10 clarify one point about the availability of prepayment
11 remedies in this case. I think, Justice Ginsburg, my
12 friend, Miss Millett, was correct about the fact that
13 this excise tax does not -- is not susceptible to the
14 deficiency proceeding in tax court.

15 And we have cited in footnote 7 of our reply
16 brief at page 16 the possibility that there may be
17 another route if the taxpayer feels strongly about the
18 unconstitutionality of the tax and is willing to take
19 the chance that if the taxpayer's position is rejected,
20 that the taxpayer may be liable for penalties and
21 interest for not paying the tax.

22 I mean, of course, the general rule is that
23 the taxpayer is expected to pay the tax and proceed
24 postpayment by putting the IRS on notice of the claim.
25 But Congress, in Section 6330(c)(2)(B) of Title 26, has

1 provided some limited ability, if a taxpayer has not
2 previously been able to litigate the merits of the tax,
3 the taxpayer has a limited opportunity to do so first
4 before the IRS, then in Tax Court, and then before the
5 Court of Appeals.

6 And, again, on Miss Millett's supposition
7 that this is a completely, clearly unconstitutional tax,
8 then the taxpayer would have the option of doing that.
9 Again, the refund scheme is set up so that if the
10 taxpayer doesn't want to take the chance that its
11 argument will not be accepted, the taxpayer has a
12 simple, open remedy: To file a refund claim at any
13 point within three years.

14 That's exactly what Respondents did not do
15 for the 21 consecutive years that they paid this tax
16 without complaint.

17 If the Court has no further questions?

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.
19 The case is submitted. We'll hear the third case
20 beginning this afternoon.

21 (Whereupon, at 11:38 a.m., the case in the
22 above-entitled matter was submitted.)
23
24
25

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