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Effective Child Support Enforcement In Kentucky: The Tax Refund Intercept Program

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Effective Child Support Enforcement
In Kentucky: The Tax Refund Intercept Program

The failure of absent parents to support their children is a serious problem for millions of women and children in this country. Default on the basic societal obligation of parents to support minor children is cheating American children out of nearly $4 billion a year. The Secretary of Health and Human Services, Margaret Heckler, has termed this problem "a national disgrace."1

INTRODUCTION

The Tax Refund Intercept Program (TRIP)2 is a method of collecting past-due child support from an absent parent by withholding any tax refund due that individual. Congress enacted TRIP in 1981 to expand the existing Child Support Enforcement Act3 and strengthen the role of the Internal Revenue Service (IRS) in the continuing federal effort to assist states in collecting


2 42 U.S.C. § 664 (1984); I.R.C. § 6402(c) (1984). See notes 33-67 infra and accompanying text (explaining statutory framework of TRIP). For purposes of this Comment, the collection of past-due support pursuant to I.R.C. § 6402(c) and 42 U.S.C § 664 is referred to as the Tax Refund Intercept Program (TRIP). Courts and commentators have sometimes used other names for the program, such as the Offset Program or Tax Refund Offset Program.

child support obligations. Section 2331 of the Omnibus Budget Reconciliation Act (OBRA) authorizes state child support agencies to use TRIP to collect past due child support that has been assigned to the state. In the past, TRIP was available only to families receiving Aid to Families with Dependent Children (AFDC) benefits. The 1984 Child Support Amendments extended TRIP to non-AFDC and foster care cases.

TRIP has been a very effective method of collecting delinquent child support in AFDC cases. Statistics show a continuing

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6 The connection between the AFDC program and TRIP is not obvious from the statutory provisions. See notes 38-67 infra and accompanying text.

7 42 U.S.C. § 664(2)(A)-(B) (1985) provides:

   (2)(A) Upon receiving notice from a State agency administering a plan approved under this part that a named individual owes past-due support (as that term is defined for purposes of this paragraph under subsection (c) of this section) which such state has agreed to collect under section 654(6) of this title, and that the State agency has sent notice to such individual in accordance with paragraph (3)(A), the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal Taxes paid, are payable to such individual (regardless of whether such individual filed a tax return as a married or unmarried individual). If the Secretary of the Treasury finds that any such amount is payable, he shall withhold from such refunds an amount equal to such past-due support, and shall concurrently send notice to such individual that the withholding has been made, including in or with such notice a notification to any other person who may have filed a joint return with such individual of the steps which such other person may take in order to secure his or her proper share of the refund. The Secretary of the Treasury shall pay the amount withheld to the State agency, and the State shall pay to the Secretary of the Treasury any fee imposed by the Secretary of the Treasury to cover the costs of the withholding and any required notifications. The State agency shall, subject to paragraph (3)(B), distribute such amount to or on behalf of the child to whom the support was owed.

   (B) This paragraph shall apply only with respect to refunds payable under section 6402 of title 26 after December 31, 1985, and before January 1, 1991. (emphasis added).

8 During 1983, the second year of operation, TRIP made impressive gains in the
increase in both female-headed families and the proportion of the poor who live in female-headed families. The serious problems encountered by these families in collecting their entitled support reinforces the compelling need to extend TRIP to non-AFDC families as well.

The number of cases processed and total amount of collections. For the 1983 tax processing year, all fifty states and three jurisdictions (Guam, Puerto Rico, and the Virgin Islands) submitted a total of 872,328 cases for potential intercept—a fifty-five percent increase over the number of cases submitted in 1982. As of September 30, 1983, intercepts had been made in 328,678 cases, about thirty percent of the cases submitted. Collections totalled $172.3 million, an increase of about $4 million over 1982. With additional processing still to occur after these figures were reported, intercepts were made in 50,000 more cases than in 1982. CHILD SUPPORT ENFORCEMENT, supra note 1, at 22-23.

In Fiscal Year 1982, about 36% of all female-headed families were poor, compared with 7.5% of married-couple families. Female-headed families with four or more children had a poverty rate of 78.5%, compared to a rate of 36.2% for all families with four or more children. U.S. BUREAU OF THE CENSUS, Current Population Reports, Series P-60, No. 144, Characteristics of the Population Below the Poverty Level: 1982, U.S. Government Printing Office, Washington, D.C., 1984 (selected tables).

In the spring of 1982, there were 8.4 million women with at least one child under the age of twenty-one whose father was not present in the household. Only about five million of these women (59%) had been awarded child support payments. During the previous year, four million were due to receive child support payments. Fewer than two million (47%) received the full amount awarded. Of the remaining women some received part of what was due; others received nothing at all. The aggregate amount of child support due in 1981 amounted to $9.9 billion, but payments actually received amounted to only about $6.1 billion. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, Child Support and Alimony, 1981, Current Population Reports Special Studies, Series P-23, No. 124, at 1-2.

See SOCIAL SECURITY ADMINISTRATION, U.S. DEPT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY BULLETIN, Vol. 45, No. 4, at 3 (1982). 11.1 million AFDC recipients in 3.8 million families received more than $1.1 billion in monthly payments for September, 1981. The number of families receiving AFDC benefits has increased dramatically in recent years, doubling between 1959 and 1969, and doubling again by 1977. Failure to pay child support shifts the burden of supporting the AFDC program to taxpayers. Id. at 7.
The Kentucky Cabinet for Human Resources (CHR) administers TRIP\textsuperscript{13} pursuant to the Child Support Recovery Act,\textsuperscript{14} and has collected more than $7.8 million since the inception of the program in the 1981 tax year.\textsuperscript{15} On April 19, 1985, the Kentucky Court of Appeals, in Cabinet for Human Resources v. Horn,\textsuperscript{16} ruled that the CHR was meeting "few, if any of the due process requirements when it seeks to intercept an individual's property in the form of a refund of taxes paid."\textsuperscript{17} The court also said that the CHR must provide for a predeprivation hearing to comply with due process requirements.\textsuperscript{18} The Kentucky Supreme Court denied discretionary review on June 26, 1985, and ordered the court of appeals opinion not to be published.\textsuperscript{19}

It is significant, however, that in 1986 the CHR is changing the administration of TRIP\textsuperscript{20} to comply with both the due process requirements enunciated in Horn\textsuperscript{21} and the new amendments

\begin{table}[h]
\centering
\begin{tabular}{|l|l|l|l|l|}
\hline
\textbf{YEAR} & \textbf{CASES} & \textbf{AMOUNT} & \textbf{HITS} & \textbf{AMOUNT} \\
& \textbf{CERTIFIED} & \textbf{CERTIFIED} & \textbf{RECEIVED} & \textbf{RECEIVED} \\
\hline
1981 & 7,338 & $14,578,825 & 4,085 & $2,170,614 \\
1982 & 4,307 & $10,800,942 & 2,250 & $1,169,106 \\
1983 & 9,738 & $18,121,065 & 4,760 & $2,088,877 \\
1984 ** & federal & 12,653 & $30 million + & 5,061 & $2,272,396 \\
& state & 12,653 & $30 million + & 2,535 & $195,000 \\
\hline
\end{tabular}
\end{table}

* Hits refers to the number of intercepts, not cases.
** Figures for 1984 as of August 16, 1984. TRIP was used to intercept state tax refunds for the first time in the 1984 tax year.

\textsuperscript{13} 904 Ky. Admin. Regs. 2:020 (1984) [hereinafter cited as KAR].
\textsuperscript{14} Ky. Rev. Stat. Ann. §§ 205.710-.800, 205.992 (Baldwin 1974) [hereinafter cited as KRS].
\textsuperscript{15} Interview with Joseph Brown, supervisor of the Intercept Projects Section, Kentucky Cabinet for Human Resources, in Frankfort, Kentucky (Aug. 16, 1985) [hereinafter cited as Interview with J. Brown]. The following statistics were given for TRIP in Kentucky:
\textsuperscript{16} 32 Ky. L. Summ. 6, at 11 (Ky. Ct. App. May 3, 1985) [hereinafter cited as KLS].
\textsuperscript{17} Id. at 12.
\textsuperscript{18} Id.
\textsuperscript{20} Interview with J. Brown, supra note 15. Brown, the supervisor of the Intercept's Projects Section, indicated that plans for predeprivation notice and hearing are being made by his office but that specific details are not yet available.
\textsuperscript{21} See 32 KLS 6, at 12.
to the federal TRIP statutes. These changes include sending a predeprivation notice to the obligated taxpayer that details procedures for a predeprivation administrative hearing. The effect of these added procedures—increased administrative costs—will be amplified by the extension of TRIP to non-AFDC families during the 1986 tax year. The expansion of the program to intercept both state and federal tax refunds, which began with the 1984 tax year, has also increased administrative costs and procedures.

Although TRIP has been characterized by its administrators as a highly successful program, the program has been plagued by challenges to both the scope and the constitutionality of its collection procedures. Kentucky courts may soon be faced with challenges to TRIP that have been addressed by federal and other state courts. This Comment explains the complicated statutory framework of TRIP, surveys the major issues raised by both taxpayer challenges and governmental defenses, and

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22 See notes 83-85, 141-51 infra and accompanying text.
23 See notes 145-47 infra and accompanying text.
24 Interview with J. Brown, supra note 15 (indicating that additional notice and hearing requirements would increase costs).
25 KRS § 205.721 (Cum. Supp. 1984) provides:
(1) All services available to individuals receiving aid to families with dependent children (AFDC) benefits shall also be available to individuals not receiving AFDC benefits, upon application by such individuals with the cabinet.
(2) The cabinet is authorized to charge an application fee for such services based on a fee schedule, which shall take into account at least the following factors about the individual:
   (a) Locality of residence;
   (b) Family size;
   (c) Gross income; and
   (d) Liquid assets. The cabinet shall endeavor to recover these fees from the non-supporting parent and shall, if recovery is successful, reimburse these fees to the applicant. (emphasis added).
27 See note 9 supra (statistics of TRIP).
28 See notes 68-140 infra and accompanying text (jurisdictional and due process challenges to TRIP).
29 See notes 74-102 infra and accompanying text (taxpayer challenges to TRIP).
30 See notes 33-67 infra and accompanying text.
31 See notes 68-146 infra and accompanying text.
suggests administrative procedures to effectuate the smooth implementation and expansion of TRIP in Kentucky. 32

I. STATUTORY FRAMEWORK

The Omnibus Budget Reconciliation Act of 1981 established TRIP. 33 OBRA authorizes the United States Treasury Department to intercept federal income tax overpayments that are owed to child support obligors and transfer the refunds, to the extent of the taxpayer's past-due support obligations, to the state. Two provisions of OBRA are relevant to TRIP. The first provision is 42 U.S.C. section 664(2)(A), 34 an amendment to the Social Security Act authorizing the Secretary of the Treasury to withhold "refunds of Federal taxes paid" that are owed to a parent of children supported by AFDC. The amendment permits the Secretary to transfer these funds to the state agency administering TRIP to satisfy the parent's child support obligations. 35 The second relevant provision is I.R.C. section 6402(c), 36 an amendment to the Internal Revenue Code implementing the procedure that 42 U.S.C. section 664(a)(1) authorizes. I.R.C. Section 6402(c) provides that "[t]he amount of any overpayment to be refunded to the person making the overpayment" shall be reduced by the amount of any past-due child support. 37

32 See notes 147-60 infra and accompanying text.
33 OBRA §§ 2331(a) & (c)(2) (1981). See note 5 supra.
36 I.R.C. § 6402(c) (1984) provides:

(c) OFFSET OF PAST-DUE SUPPORT AGAINST OVERPAYMENTS. The amount of any overpayment to be refunded to the person making the overpayment shall be reduced by the amount of any past-due support (as defined in section 464(c) of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with Section 464 of the Social Security Act. The Secretary shall remit the amount by which the overpayment is so reduced to the State to which such support has been assigned and notify the person making the overpayment that so much of the overpayment as was necessary to satisfy his obligation for past-due support has been paid to the State. This subsection shall be applied to an overpayment prior to its being credited to a person's future liability for an internal revenue tax.
37 Id.
A. *The Full Collection Method*

Many of the procedural issues involved in cases challenging TRIP have resulted from confusion between TRIP (the "intercept" method), implemented by I.R.C. section 6402(c), and the "full collection" method implemented by I.R.C. section 6305(a).38 States collecting support obligations under either section must have an approved enforcement plan in effect.39 In addition, states must demonstrate to the Secretary of Health and Human Services (HHS) that they have made reasonable efforts to collect the support through state enforcement mechanisms.40 The two collection methods may be used either separately or conjunctively.41 An understanding of the differences between the two methods is essential to an evaluation of the legal challenges to TRIP.

38 I.R.C. § 6305(a) provides:
(a) in general. Upon receiving a certification from the Secretary of Health, Education, and Welfare [Secretary of Health and Human Services], under section 452(b) of the Social Security Act with respect to any individual, the Secretary shall assess and collect the amount certified by the Secretary of Health, Education, and Welfare [Secretary of Health and Human Services], in the same manner, with the same powers, and (except as provided in this section) subject to the same limitations as if such amount were a tax imposed by subtitle C the collection of which would be jeopardized by delay, except that—
(1) no interest or penalties shall be assessed or collected,
(2) for such purposes, paragraphs (4), (6), and (8) of section 6334(a) (relating to property exempt from levy) shall not apply,
(3) there shall be exempt from levy so much of the salary, wages, or other income of an individual as is being withheld therefrom in garnishment pursuant to a judgment entered by a court of competent jurisdiction for the support of his minor children, and
(4) in the case of the first assessment against an individual for delinquency under a court order against such individual for a particular person or persons, the collection shall be stayed for a period of 60 days immediately following notice and demand as described in section 6303.

See also notes 39-47 infra and accompanying text (discussing distinctions between I.R.C. §§ 6305(a) and 6402(c)).


The full collection method, enacted in 1975, authorizes the IRS to collect delinquent support obligations by a variety of methods, including garnishment, attachment and sale of property, and offset of the delinquent parent's federal tax refund. Any family may use the full collection method, including those not receiving AFDC benefits. The family must have either a court or an administrative order for support, and the amount owed must be at least $750 in arrears. States proceeding under this method are required to show that they have made reasonable efforts to collect the past-due support.

B. TRIP (The Intercept Method)

TRIP (the "intercept" method), on the other hand, requires states to show only that they have made reasonable efforts to collect the past-due support. In contrast to the full collection method, the sole collection method authorized by TRIP is the interception of tax refunds. Prior to 1986, TRIP was available only to families receiving AFDC benefits but is now available to any family with a court order for support.

As an eligibility condition for AFDC benefits, AFDC applicants must assign their support rights to the state. The support

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43 I.R.C. § 6305(a)(1)-(4).
45 Id. § 303.71(b).
46 Id. § 303.71(c)(1).
47 Id. § 303.71(c)(2).
48 To proceed under I.R.C. § 6305, the states must describe the collection actions already taken, why such actions failed and why further state action would be unproductive. 45 C.F.R. § 303.71(e)(4)(i)-(ii). In addition, the state must establish that the delinquent parent possesses assets. Id. § 303.71(e)(7)(i).
49 I.R.C. § 6402(c). See note 36 supra (quoting I.R.C. § 6402(c)).
50 45 C.F.R. § 303.72(b)(1).
51 I.R.C. § 6402(c). See note 36 supra (quoting I.R.C. § 6402(c)).
53 I.R.C. § 6402(c).
54 42 U.S.C. § 602(26)(A) provides in part: [E]ach applicant or recipient will be required . . . (A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid and (ii) which have accrued at the time such assignment is executed.
obligation then becomes a debt owed by the delinquent parent to the state. TRIP enables a state to receive the tax overpayment of any person owing child support to the state directly from the IRS. The state welfare agency reports to the Secretary of HHS the name of any noncustodial parent who is more than $150 in arrears. The Secretary, through the Office of Child Support Enforcement, then ascertains whether a valid support order exists and whether the noncustodial parent is in default.

If the determination is positive, the Secretary of HHS certifies the parent’s name to the Secretary of the Treasury, who directs the IRS to withhold an amount of the delinquent parent’s federal tax refund sufficient to satisfy the parent’s debt. Tax overpayments may be used to satisfy past-due support obligations only after any federal income tax arrearages have been completely satisfied.

In January, 1986, TRIP became available to any family owed past-due child support. State child support agencies must submit to the IRS the names of absent parents who owe past-due support and against whom the withholding procedures may be applied. These non-AFDC claims must be limited to cases in which: (1) there are arrearages of $500 or more, and (2) current payment patterns and the state agency’s enforcement efforts indicate that payment of arrearages is unlikely before the offset occurs. In addition, states may limit arrearages submitted to the IRS to amounts that have accrued since the state undertook

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55 Id. § 656(a).
56 Id.
57 42 C.F.R. § 303.72(b)(2).
58 Id. § 303.72(d)(1). The regulations require the state agency to submit notification to the Secretary of Health and Human Services (HHS) by October of each year. Id. § 303.72(c). HHS must transmit the request to the Internal Revenue Service (IRS) by December 1 of the same year. Id. § 303.72(d)(2).
59 Id. § 303.72(d)(2).
60 I.R.C. § 6402(c). See note 36 supra (quoting I.R.C. § 6402(c)).
61 Treas. Reg. § 301.6402-5(d)(1) (1975). If any amount of the intercepted refund remains after being applied against outstanding tax liability and past-due support, the amount remaining may be credited to the taxpayer’s future tax liability. Id.
63 45 C.F.R. § 303.72(b)(1)-(3).
64 Id. § 303.72(a)(3)(ii).
65 Id. § 303.72(a)(4)-(5).
support collection for the non-AFDC family. The Secretary of 
HHS's verification process is the same for both non-AFDC fam-
ilies and AFDC cases.

II. TAXPAYER CHALLENGES AND GOVERNMENT DEFENSES

Taxpayers have challenged TRIP on a number of grounds. 
The most significant challenges have focused on inadequate no-
tice and hearing procedures used in the administration of the 
program. Federal and state government defendants have as-
serted that federal courts lack subject matter jurisdiction over 
such actions. Both the IRS and the states have also objected 
that, under the doctrine of sovereign immunity, the Anti-In-
junction Act, and the Declaratory Judgment Act, courts do 
not have jurisdiction to adjudicate these actions.

A. Taxpayer Challenges

1. Due Process

Taxpayers have challenged the procedures and scope of TRIP 
on several substantive grounds. The most significant challenge 
is that TRIP violates the fifth and fourteenth amendment due 
process requirements by failing to provide adequate notice and 
hearing before depriving taxpayers of their property. Prior to 

66 Id. § 303.72(a)(3)(iii).
67 45 C.F.R. § 303.72(d)(2).
68 See notes 74-91 infra and accompanying text (due process challenges to TRIP).
69 See notes 119-27 infra and accompanying text (jurisdictional issues in suits 
challenging TRIP).
70 See notes 103-08 infra and accompanying text (discussing sovereign immunity 
claims).
71 See notes 109-18 infra and accompanying text (discussing jurisdictional prohibi-
tions in Anti-Injunction Act).
72 See notes 109-18 infra and accompanying text (discussing jurisdictional prohibi-
tions in Declaratory Judgment Act).
73 See notes 103-18 infra and accompanying text.
74 U.S. CONST. amend. V.
75 Id. amend. XIV.
76 E.g., Marcello v. Regan, 574 F. Supp. 586, 588 (D.R.I. 1983) (plaintiffs contend 
implementation of the intercept program was accomplished without procedural safe-
guards, depriving them of due process); Nelson v. Regan, 560 F. Supp. 1101, 1105-06 
(D. Conn. 1983) (due process challenge to the adequacy of procedures).
the new amendments, federal regulations governing the administration of TRIP\textsuperscript{77} simply required that taxpayers receive advance written notice that their past-due support obligation had been referred to the IRS for collection,\textsuperscript{78} and that the proper state agency investigate complaints concerning erroneous offsets.\textsuperscript{79} The complaint procedure could be used only after the intercept had occurred.\textsuperscript{80} Federal and state program administration has generally failed to provide taxpayers with a predeprivation notice informing them of their right to challenge TRIP.\textsuperscript{81}

In evaluating the deprivation aspects of TRIP, courts have applied the United States Supreme Court's three-pronged balancing test used in the seminal notice case, \textit{Mathews v. Eldridge}.\textsuperscript{82} The \textit{Mathews} test balances the risk of an erroneous deprivation under current procedures against the potential reduction in deprivation that additional procedural safeguards would provide. Furthermore, the test considers both the governmental interest in regulating the subject matter and the administrative burden that additional safeguards would entail.\textsuperscript{83} Courts

\textsuperscript{77} See notes 33-37 \textit{supra} and accompanying text (discussing regulations for implementing TRIP).

\textsuperscript{78} 45 C.F.R. § 303.72(f)(1). Under the regulations, the state agency may elect to provide the notice; otherwise, the Office of Child Support Enforcement notifies the taxpayer of the certification to the IRS. \textit{Id.} The Office of Child Support Enforcement's notice refers taxpayers to the appropriate state agency "if [the taxpayers] have any questions, want to report an error, or want to pay past-due support to avoid offset of their tax refund." 48 Fed. Reg. 2534, 2535 (1983) (explaining final regulation codified at 45 C.F.R. § 303.72(f)(1)).

\textsuperscript{79} 45 C.F.R. § 303.72(g) (complaint procedure).

\textsuperscript{80} \textit{Id.} § 303.72(g)(1) (discussing complaint regarding refund that "has been offset").

\textsuperscript{81} \textit{Id.} § 303.72(g)(1)-(3) (providing mechanism for correcting errors only after offset made). \textit{See} Sorenson \textit{v. Secretary of Treasury}, 557 F. Supp. 729, 738 (W.D. Wash. 1982) (taxpayer entitled under state law to challenge the administrative determination that support is owed), \textit{aff'd}, 752 F.2d 1433 (9th Cir. 1985), \textit{cert. granted}, 105 S. Ct. 3475 (1985). \textit{But see} 560 F. Supp. at 1109 (state began offering administrative review of proposed offset in response to complaints).

\textsuperscript{82} 424 U.S. 319 (1976). In \textit{Mathews}, the Supreme Court considered whether due process required the Social Security Administration to hold evidentiary hearings before terminating disability benefits. \textit{Id.} at 323. The Court found that an evidentiary hearing was not required and that the available administrative procedures comport fully with due process. \textit{Id.} at 349. The procedure in \textit{Mathews} included a process for asserting a claim prior to administrative action, a right to a hearing, and a right to judicial review. \textit{Id.}

\textsuperscript{83} 424 U.S. at 335.
have generally held that, under the Mathews analysis, TRIP violates taxpayers' due process rights.84

Finding a great risk of erroneous deprivation under TRIP, the district court in McClelland v. Massinga85 noted that predeprivation notice and hearing would not impose either great administrative or financial burdens upon the states.86 The McClelland court, relying upon the reasoning of two similar cases,87 concluded that "[d]ue process requires a fair notice of the possibility of interception and an opportunity to contest that interception before it occurs."88

A recent amendment to TRIP89 that took effect on December 31, 1985, requires the state to send delinquent parents notice of impending intercepts before their names are certified to the Secretary of the Treasury.90 Procedures to inform nonobligated taxpayers (e.g., persons who have filed jointly with obligated taxpayers) of their right to file an amended return requesting their portion of the refund are outlined in other new amendments.91 Proper administration of these new procedures should prevent erroneous deprivation and many of the due process

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84 See, e.g., McClelland v. Massinga, 600 F. Supp. 558, 566 (D. Md. 1984), rev'd, 786 F.2d 1205 (4th Cir. 1986) (change in notice procedure would be burden on the state but would improve greatly due process notice requirements); 574 F. Supp. at 598 (risk of harm to plaintiff's interests could be lessened greatly by an easily implemented state action such as a hearing); 560 F. Supp. at 1111 (to adequately protect due process rights, state must provide predeprivation administrative review, not a full-blown hearing).

86 Id. at 567.
87 See 574 F. Supp. at 598; 560 F. Supp. at 1111.
88 600 F. Supp. at 568.
89 42 U.S.C. § 664(3)(A) provides:

(3)(A) Prior to notifying the Secretary of the Treasury under paragraph (1) or (2) that an individual owes past-due support, the State shall send notice to such individual that a withholding will be made from any refund otherwise payable to such individual. The notice shall also (i) instruct the individual owing the past-due support of the steps which may be taken to contest the State's determination that past-due support is owed or the amount of the past-due support, and (ii) provide information, as may be prescribed by the Secretary of Health and Human Services by regulation in consultation with the Secretary of the Treasury, with respect to procedures to be followed, in the case of a joint return, to protect the share of the refund which may be payable to another person.

90 Id.
91 Id. § 664(a)(1)(3)(B)-(D).
challenges raised in TRIP cases prior to the new amendments.

2. Earned Income Credit

Perhaps the major unresolved policy issue concerning TRIP is whether earned income credit (EIC) can be intercepted. EIC is available as a credit against income tax to a low income parent with a dependent child living in the same household. In *Rucker v. Secretary of Treasury*, the court, reasoning that TRIP authorizes withholding only of federal taxes paid, held that EIC cannot be intercepted.

The Ninth Circuit, in *Sorenson v. Secretary of Treasury*, reached a different conclusion. The *Sorenson* court found that EIC can be intercepted because there was nothing in the legislative history to indicate that Congress intended to treat EIC differently than other funds classified as overpayments and paid as a tax refund. The Supreme Court has granted certiorari in *Sorenson* to resolve this issue. The Court must decide whether the term "overpayment" as defined in I.R.C. section 6401, which includes EIC, should be given the same definition under I.R.C. section 6402(c) for TRIP purposes or should be narrowed to include only the amount of taxes actually paid. Balancing the purposes of EIC against the importance of child support will make this issue a close question. The Court must decide between the competing interests of the low-income taxpayer earning EIC and the low-income family seeking child support payments. Given the strong congressional support for child support enforce-

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92 See I.R.C. § 32 (1985) (definition of earned income credit). See, e.g., 752 F.2d at 1440-44.
93 See I.R.C. § 32(c)(1) (eligible individual defined).
94 751 F.2d 351 (10th Cir. 1984).
95 751 F.2d at 357.
96 752 F.2d 1433 (9th Cir. 1985), cert granted, 105 S. Ct. 3475 (1985). EDITOR’S NOTE: As this Comment was going to print, the United States Supreme Court affirmed the Ninth Circuit and found that excess earned income credits were overpayments and subject to the intercept provisions. 106 S. Ct. 1600 (1986).
97 752 F.2d at 1444.
98 Id.
100 I.R.C. § 6401(b) (1976 & Supp. V 1981) (providing that earned income credit is included in the term overpayment).
101 See Nelson v. Regan, 731 F.2d 105, 110-12, cert. denied, 105 S. Ct. 175 (2d Cir. 1984) (discussing issues involved in intercepting EIC).
102 See id.
ment, as shown by the 1984 amendments, the Court should affirm the Sorenson court and allow the interception of EIC.

B. Government Defenses

1. Sovereign Immunity

As sovereign, the United States is immune from suit unless Congress explicitly waives immunity. District courts have dismissed the sovereign immunity defense in TRIP cases, recognizing that government officials can be sued without an express congressional waiver when the complaint alleges that government officials have violated constitutional authority and when the statute conferring power upon the official is claimed to be unconstitutional.

In Jahn v. Regan, for example, the Court allowed an action against the Secretary of the Treasury and enjoined prospective administration of the intercept program. The Court refused the plaintiff's demand for monetary relief, however, holding that there must be an express congressional waiver to create jurisdiction over an action claiming money damages against federal officials. The doctrine of sovereign immunity, therefore, does not bar a taxpayer action for injunctive relief prohibiting future implementation of TRIP, but does prohibit suits against government officials for damages for refunds already intercepted.

2. The Anti-Injunction Act and the Declaratory Judgment Act

The government also has argued that the procedural limits of the Anti-Injunction Act and the Declaratory Judgment Act

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103 E.g., Nelson v. Regan, 560 F. Supp. 1101, 1104, aff'd, 731 F.2d 105, cert. denied sub nom., Manning v. Nelson, 105 S. Ct. 175 (1984) (sovereign immunity does not bar suit in which, as here, plaintiffs claim agents of the government have exceeded constitutional authority); Marcello v. Regan, 574 F. Supp. 586, 595 (plaintiffs argue that intercept program abrogated their constitutional rights, and that, therefore, the defendant is not shielded by sovereign immunity).

105 Id.
106 Id. at 406-07.
preclude taxpayer challenges to TRIP. The Anti-Injunction Act prohibits suits “for the purpose of restraining the assessment or collection of any tax,” while the Declaratory Judgment Act expressly denies federal courts the power to grant declaratory relief “with respect to federal taxes.” Courts have generally rejected the characterization of TRIP cases as “tax cases,” holding inapplicable the jurisdictional limitations of both the Anti-Injunction Act and the Declaratory Judgment Act.

Most courts facing this issue have found that the federal government’s compelling interest in initially collecting and assessing taxes without judicial interference is not present with respect to tax refunds. In Marcello v. Regan, for example, the district court found that neither of these acts “contemplate[s] barring actions, such as this, where the litigation [does] not threaten to deny anticipated tax revenues to the Government.” In Vidra v. Egger, however, the district court found that both the Anti-Injunction Act and the Declaratory Judgment Act bar taxpayer challenges to the intercept program. Since challenges to TRIP occur after taxes have been assessed and collected, the majority view that the Anti-Injunction Act and the Declaratory Act.
Judgment Act are inapplicable appears to be the correct approach.118

3. Subject Matter Jurisdiction

Much of the litigation concerning the procedural aspects of TRIP arises from confusing the intercept and full collection methods.119 Government defendants have contended that the jurisdictional provision of the full collection method, which states that no federal court shall have jurisdiction over any action "brought to restrain or review the assessment and collection of amounts under subsection (a),"120 is applicable to the intercept method as well.121 This jurisdictional provision precludes federal jurisdiction to review or restrain assessment or to collect amounts due under the full collection method. In the past there was no such restriction on federal jurisdiction over TRIP suits brought under the intercept method.122 Therefore, most courts held that the jurisdictional limitations of the full collection method do not bar a taxpayer's claim under the intercept method.123

118 See, e.g., 560 F. Supp. at 1103.
119 See notes 34-67 supra and accompanying text (explaining the collection procedures of I.R.C. §§ 6305(a) and 6402(c)).
120 I.R.C. § 6305(b) imposes jurisdictional limitations on suits brought to challenge the assessment and collection of past-due support by the Secretary of the Treasury pursuant to I.R.C. § 6305(a). See note 38 supra (quoting I.R.C. § 6305(a)). I.R.C. § 6305(b) provides:

(b) Review of assessments and collections. No court of the United States, whether established under article I or article III of the Constitution, shall have jurisdiction of any action, whether legal or equitable, brought to restrain or review the assessment and collection of amounts by the Secretary under subsection (a), nor shall any such assessment and collection be subject to review by the Secretary in any proceeding. This subsection does not preclude any legal, equitable, or administrative action against the State by an individual in any State court or before any State agency to determine his liability for any amount assessed against him and collected, or to recover any such amount collected from him, under this section.

121 See 557 F. Supp. at 733; 584 F. Supp. at 703-04; 574 F. Supp. at 592-93. See also notes 34-67 supra and accompanying text (explaining collection procedures of I.R.C. §§ 6305(a) and 6402(c)).
122 See 584 F. Supp. at 703-05 (explaining why no jurisdictional restrictions apply to I.R.C. § 6402(c)).
123 See, e.g., 557 F. Supp. at 733; 584 F. Supp. at 703-05; 574 F. Supp. at 593.
The 1984 amendments, however, have placed similar jurisdictional limitations on suits challenging TRIP. These severe jurisdictional limitations on federal forums, coupled with the expansion of TRIP to non-AFDC families, indicate that state courts may soon be faced with a significant increase in the number of cases challenging TRIP.

4. Eleventh Amendment

State defendants in TRIP suits have claimed that the eleventh amendment prevents taxpayers from seeking monetary relief for tax refunds that have already been intercepted. A sovereign state or state agency cannot be sued for damages without its consent when the suit seeks payments out of its treasury. Therefore, taxpayer suits seeking only the return of tax refunds

124 I.R.C. § 6402(e) (effective after Dec. 31, 1985 and before Jan. 1, 1988) provides: (e) Review of reductions.—No court of the United States shall have jurisdiction to hear any action, whether legal or equitable, brought to restrain or review a reduction authorized by subsection (c) or (d). No such reduction shall be subject to review by the Secretary in an administrative proceeding. No action brought against the United States to recover the amount of any such reduction shall be considered to be a suit for refund of tax. This subsection does not preclude any legal, equitable, or administrative action against the Federal agency to which the amount of such reduction was paid.

125 See id.

126 See note 7 supra (quoting 42 U.S.C. § 664(2)(A)-(B)) and accompanying text.

127 Jurisdictional limitations on federal courts will force taxpayers to assert claims against TRIP in state courts. Compare In re Biddle, 31 Bankr. 449, 453 (Bankr. N.D. Iowa 1983), in which the court held that a federal court has jurisdiction to determine whether the diversion of a debtor's income tax overpayments to the state to be applied to the debtor's delinquent child support obligation constituted a preference pursuant to 28 U.S.C. § 1471(b). The court explained that I.R.C. § 6305(b) would force the debtor to litigate these issues in state court but that 28 U.S.C. § 1471(b) overrides the restriction on federal jurisdiction in I.R.C. § 6305(b).

128 U.S. CONST. AMEND. XI provides: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of a Foreign State.

129 E.g., 731 F.2d at 110 (defendants claimed suit was for the return of refunds and violates eleventh amendment immunity from suit for damages); Vidra v. Egger, 575 F. Supp. at 1308 (plaintiff's claims barred by the eleventh amendment to the extent that repayment of refund withheld is sought).

that have been intercepted and transferred to the state treasury are barred by the eleventh amendment.

The United States Supreme Court, in *Edelman v. Jordan*, held that the eleventh amendment limits remedies against states to prospective injunctive relief only, thereby prohibiting retroactive awards from state treasuries. The Court, in *Quern v. Jordan*, however, qualified its earlier holding by distinguishing orders for money judgments from orders for notice and hearings that might result in money judgments. The Second Circuit, in *Nelson v. Regan*, relied on *Quern* in affirming the district court's decision ordering the commissioner of the Connecticut Department of Human Resources to hold postdeprivation hearings that could result in retroactive awards of offsets.

Other courts have declined to address the eleventh amendment issue, finding that taxpayer plaintiffs were seeking only declaratory relief. The eleventh amendment issue is now even more significant because a new amendment to the intercept

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131 415 U.S. 651.
132 Id. at 677. In *Edelman*, the plaintiffs brought a class action for injunctive and declaratory relief against Illinois officials responsible for administering the combined federal and state programs of Aid to the Aged, Blind, and Disabled, then authorized by the Social Security Act, 42 U.S.C. §§ 1381-85 (1964). 415 U.S. at 653. The plaintiffs sought recovery of disability benefits for a period of eligibility overlooked by the states. Id. at 655. The Court held that the eleventh amendment does not permit a suit that seeks the award of an accrued monetary liability that must be paid from a state's general revenues without consent or waiver by the state, and that the lower court's award of a monetary judgment against the state was improper. See *id.* at 664-65 (distinguishing *Ex parte Young*, 209 U.S. 123 (1908)).
134 Id. at 346-49. The Court rejected the state's argument that the proposed notice would lead to the payment of state funds for retroactive benefits and, therefore, in effect, would amount to a monetary award. *Id.* at 347. According to the Court, the "chain of causation" argued by the state was broken because the decision to award retroactive benefits would rest entirely with the state. *Id.* at 348.
135 731 F.2d 105 (2d Cir. 1984).
136 731 F.2d at 110. The Second Circuit also noted that the state's incurring administrative expense in providing the required notice and hearing does not result in eleventh amendment violations. *Id.* (citing 440 U.S. at 347, and *Milliken v. Bradley*, 433 U.S. 267 (1977)).
137 See, e.g., 584 F. Supp. at 699 n.3 (The court was not required to rule on the plaintiff's demand for injunctive relief, and did not address the eleventh amendment issue.).
statute prohibits suits against federal officials, forcing taxpayers challenging TRIP into state courts. States should avoid this potential problem by following the newly mandated procedures for predeprivation notice and hearing, thereby preventing post-intercept challenges. The preintercept notice should specify methods for contesting the intercept within a specified time so that any errors can be corrected before the tax refund is paid to the state. This will prevent state courts from having to give retroactive monetary relief.

5. Other Defenses

Government defendants have tried to block challenges to the intercept program by using a variety of other methods. These include claims that taxpayer suits were moot, that the plaintiff lacked standing to bring the challenge, that there was improper service of process, that the plaintiff failed to add necessary parties, and that litigation in federal court would duplicate state proceedings. Federal courts have generally ruled against

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138 See note 118 supra (quoting I.R.C. § 6402(e)). This restriction forces taxpayers to assert TRIP claims against state officials in state courts. See Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900, 908 (1984) (Under the eleventh amendment, a nonconsenting state is immune from suit in federal court.).

139 See notes 145-54 infra and accompanying text.

140 E.g., Rucker v. Secretary of Treasury, 555 F. Supp. 1051, 1053 (D. Colo. 1983), rev'd, 751 F.2d 351, 355 (10th Cir. 1984) (claiming no case or controversy because nonobligated taxpayer had received her share of the earned income credit); Presley v. Regan, 604 F. Supp. 609, 612 (N.D.N.Y. 1985) (due process claims moot because statutory amendment required preintercept notices); McClelland v. Massinga, 600 F. Supp. 558, 561 (D. Md. 1984) (asserting plaintiffs' claims are moot because they had received their tax refund); 584 F. Supp. at 702 (contention that return of earned income credit to nonobligated spouse moots demands for declaratory and injunctive relief).

141 E.g., 600 F. Supp. at 562 (defendants claimed some plaintiffs lack standing because they are not entitled to tax refunds even in the absence of the state intercept program). Cf. Doitte v. Blum, 585 F. Supp. 887, 895-96 (N.D.N.Y. 1984) (court raised the issue of plaintiff's standing sua sponte).


143 See 600 F. Supp. at 564 (defendants claim that ex-spouses entitled to receive child support payments are indispensable parties).

144 Id. The McClelland court rejected this claim by finding that no claims challenging the constitutionality of the state program were pending in state court.
state and federal defendants asserting these defenses, finding that constitutional challenges to TRIP are appropriate issues for the federal forums.¹⁴⁶

III. EXPANDING AND IMPLEMENTING CHANGES TO TRIP IN KENTUCKY

Congress has reacted to many of the issues raised in taxpayer challenges to TRIP by amending both the statutory provisions and regulations of TRIP.¹⁴⁷ The new amendments mandate that states provide preintercept notice to inform taxpayers of their right to challenge the intercept and of potential defenses to the intercept.¹⁴⁸ While these new administrative procedures should reduce the risk of erroneous deprivation, both the added procedures¹⁴⁹ and the expansion of TRIP in 1986¹⁵⁰ have significant implications for the administration of TRIP.

New federal laws mandate that the CHR send a preintercept notice to the absent parent whose name will be submitted to the IRS.¹⁵¹ This notice must include the procedures for contesting the proposed intercept¹⁵² and inform the absent parent and his or her spouse, if any, of the procedures available to protect the portion of the refund belonging to the unobligated spouse.¹⁵³ Since the CHR is responsible for accurately submitting the amount to be intercepted,¹⁵⁴ this agency must allow the absent parent to furnish as much information as possible to avoid making incorrect submittals. A specified time period for contesting the intercept action will ensure the correction of errors before amounts

¹⁴⁶ See, e.g., 555 F. Supp. at 1053 (taxpayer's claim not moot); 600 F. Supp. at 562 (plaintiffs injured by deprivation of refund have standing); 604 F. Supp. at 183 (issue of improper notice not decided).
¹⁴⁷ See notes 7, 20-26 supra and accompanying text; notes 151-57 infra and accompanying text (discussing new amendments).
¹⁴⁹ See 42 U.S.C. § 664(2)(A)-(B); KRS § 205.71 (statutory authority for extension of TRIP to non-AFDC families).
¹⁵⁰ See Interview with J. Brown, supra note 15 (Additional notice and hearing requirements would increase costs.).
are paid to the dependent families. Following federal guidelines should satisfy due process requirements outlined by the Kentucky Court of Appeals in *Horn* and significantly reduce potential taxpayer actions in Kentucky state courts. The CHR also must develop statewide information systems through the media and local social service agencies to expand the scope of TRIP to include all families meeting the necessary requirements.

The ultimate success of the program also depends upon whether a parent whose tax refund is intercepted one year will seek to avoid intercept the next year by increasing the number of exemptions to decrease the amount withheld and subject to intercept. The IRS and state tax boards must closely scrutinize returns to curtail such abuses. Limitations on federal court jurisdiction may also mean an increase in cases challenging TRIP in state courts. Kentucky Courts must decide difficult issues concerning the eleventh amendment, earned income credit and taxpayer challenges to TRIP on other grounds.

**CONCLUSION**

The Tax Refund Intercept Program has proven an effective method of collecting past-due child support for families receiving AFDC benefits. The expansion of this program to include all families will further the important federal policy of improving child support enforcement. Even though revision of the administrative procedures for TRIP should reduce taxpayer challenges, additional congressional clarification is needed to define the scope of TRIP, particularly whether earned income credit can

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115 Id.
117 See Interview with J. Brown, supra note 15 (no specific plans at this time for publicizing TRIP to all families).
118 See Note, supra note 4, at 740.
119 See notes 118-21 supra and accompanying text (discussing jurisdictional limits of I.R.C. § 6402).
120 See, e.g., Jahn v. Regan, 584 F. Supp. 399, 405 (E.D. Mich. 1984), rev'd, 53 U.S.L.W. 2632 (6th Cir. May 21, 1985) (claiming tax refund held as tenants by entirety); Costello v. State, 185 Cal. Rptr. 582, 585 (Cal. App. 1982) (taxpayers claiming state held tax refund as a trust). Courts should expect an increase in challenges to TRIP as the program is extended to all families.
be intercepted. The future success of TRIP depends upon continuing federal and state efforts to refine and revise implementation procedures.

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