Section 21 in part provides that all public departments, agencies and commissions of the State of New Jersey are hereby authorized and empowered to lease, lend, grant or convey to the Authority at its request upon such terms and conditions as the proper authorities of such departments, agencies, or commissions of the State may deem reasonable and fair any real property which may be necessary or convenient to the effectuation of the authorized purposes of the Authority, including public highways and other real property already devoted to public use and including any portion of the State Highway Route 4 Parkway established by the act. At such time as the Authority shall undertake to construct any part of the project described in section 20 of the bill or shall acquire any portion of said State highway route as part of such project, the jurisdiction and authority of the department over such part shall cease and section 2 of chapter 17, laws of 1946 as amended, shall be inapplicable to such part.

Section 23 provides that the foregoing sections of the bill shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby, and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any powers now existing.

It is, therefore, my opinion that until the Authority shall be organized and shall undertake to construct any part of the project authorized by the bill, you are not prohibited from proceeding with the construction of any portion of the Garden State Parkway that may be authorized by the Governor within the limitation of your appropriation.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: SACKETT M. DICKINSON,
Deputy Attorney General.

smd/n

APRIL 8, 1952.

THE HONORABLE ALFRED E. DRISCOLL,
Governor,
State House,
Trenton, New Jersey.

FORMAL OPINION—1952. No. 4.

DEAR GOVERNOR DRISCOLL:

It appears that the Collector of Internal Revenue for the Northern District of New Jersey by letter dated March 24, 1952, copy of which has been forwarded to us, desires the fiscal authorities of the State of New Jersey to honor three "Warrants for Distraint" against the salary of an employee of one of our State hospitals. These warrants aggregate approximately $250.00 and represent delinquent income taxes of the said taxpayer. In order to effect collection of the said warrants, a levy was served upon a parole district supervisor of the Department of Institutions and Agencies, said department having jurisdiction of the State hospital at which the taxpayer was employed, as provided in Title 30, Revised Statutes. It does not appear that any action was taken by the Federal Government against the taxpayer in our State courts.

The question to be resolved is whether service of the levy, by an agent of the Federal Government upon a parole district supervisor, pursuant to said warrants, is sufficient to permit the fiscal authorities of the State of New Jersey to garnishee the salary of this delinquent taxpayer, who is employed in State service, and forward the proceeds to the Collector of Internal Revenue.

For the reasons stated herein, it is our opinion and we so advise that there is no warrant in law for the action and procedure proposed by the Federal Government.

We are not unmindful of the importance of the question involved as pointed out in the Collector's letter of March 24, nor should it be suggested that New Jersey fails to accord to the United States Government rightful comity consistent with the friendly relationships existing between the Federal Government and this jurisdiction.

Of no less importance is the issue which here confronts the State of New Jersey in the proper discharge of its functions of government. The manner in which the collector seeks to levy upon the whole salary of a State employee, rather than upon a percentage proportion thereof, as limited in our statutes, poses a real threat to the "instrumentalities, means and operations whereby the States exert the governmental powers belonging to them." (See *Ohio* vs. *Helvering,* 292 U. S. 360.)

The taxpayer involved in this controversy is an employee of one of our mental hospitals. We are not informed concerning the nature or extent of his duties or the responsibility of his position as it affects the health and welfare of citizens of the State who are hospitalized therein.

Nonetheless, we are permitted to assume that such a levy might be made on any State employee's salary, including that of the medical director and other executive officials of such a hospital. If such levy operated to attach the whole salary of such a State officer, as is proposed hereunder, what incentive would exist for the taxpayer to continue to faithfully discharge his responsibility to the State and to the unfortunate patients under his care? The question permits of but one answer. The taxpayer would be obliged to abandon his post and tour of duty from sheer economic necessity.

Thus the State most effectively would be denied the instrumentality and means of carrying forward this important function of government in caring for its mentally ill. Like examples can be found in other agencies of the State, the net result of which would seriously impair, if not circumvent, the orderly process of State Government. Such interference by an agency of the Federal Government in the affairs of a State is violative of ordinary concepts of the right of a State to govern itself and its citizens. So much for the factual side of the issue.

We now examine the law, for irrespective of the impairment of the discharge by the State of its essential functions of government, as illustrated above, this issue can only be resolved by an application of controlling legal principles to the facts here presented.

Preliminarily, it should be noted that we have carefully examined the decisions in the Federal courts offered by the Collector of Internal Revenue as authority for the proposition that "There are many decisions by the Federal courts which have held that the United States Government has the right to levy upon salaries of State and municipal employees."

The first such decision is *United States* vs. *City of New York,* 82 F. 2d 243. We are obliged to state that the case is completely dissimilar. The New York police arrested a delinquent taxpayer who had in his possession a sizable sum of money which was confiscated and deposited with the clerk of the police court. Thereafter,

a lien was placed thereon by the Federal authorities and a demand made on the property clerk of the police department and the police commissioner for said funds. The clerk ignored the demand and delivered the moneys to a third party, presumably the taxpayer, but, in any event, did not honor the levy. The Federal District Court gave judgment to the Government against the city but the Circuit Court of Appeals reversed on the theory that the moneys were never in the hands of the appropriate fiscal authorities of the city. The case is authority only for the proposition that local law governs with respect to the responsibility of the police clerk to the city and to the Federal authorities with respect to the levy on said funds.

The collector relies on *Ohio* vs. *Helvering,* 292 U. S. 360, which likewise is inapplicable to the instant matter. In that case, it was determined that the State of Ohio, which engaged in the sale of alcoholic beverages, was conducting a nongovernmental proprietary function and was required to pay Federal liquor taxes on such an operation. No income tax was involved nor is there the slightest suggestion that a levy was made on the salary of a State employee.

The court said that the conduct of a liquor business by a sovereignty is an exception from the general rule that "The instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are * * * exempt from taxation by the United States." (Citing *Indian Motorcycle Co.* vs. *U. S.,* 283 U. S. 570; *McCulloch* vs. *Maryland,* 4 L. Ed. 578; *Collector* vs. *Day,* 20 L. Ed. 122; and other cases in *Trinityfarm Const. Co.* vs. *Grosjean,* 291 U. S. 466.)

In *Georgia* vs. *Evans,* 316 U. S. 159, proposed by the collector in support of his request, it was determined that a "State" is a "person" within contemplation of the Sherman Anti-Trust Act (Sec. 7, 26 Stat. at L. 209, 15 U. S. C., par. 15). Georgia annually purchases large amounts of asphalt for the reconditioning of its highways and complained that respondents violated the Federal anti-trust statutes to the injury of the sovereign State of Georgia. The decision of the court was to the effect that Georgia could maintain an action for treble damages under the language of the law that "Any person who shall be injured in his business or property" by reason of anything made unlawful by the act may bring such suit.

Additionally, we have made a careful search of all cases annotated under sections 3690 and 3692 of the Internal Revenue Code which the collector claims extends authority for collection of delinquent income tax through the distraint action that he proposes. We have found no decision which squarely holds, or even suggests, that the proposition of the collector is meritorious.

However, in *U. S.* vs. *Long Island Drug Co.,* 115 F. 2d. 983, C. C. A. 2d. Cir., 1940, it was stated by the court: "We find nothing in 3690 or 3710 which varies the general rule that a garnishee process is not to be extended to future earnings, but will only reach an indebtedness which has accrued * * *. Rights which do not exist at the time of the demand upon the taxpayer are not subject to any lien. *U. S. Pacific R. R.,* C. C. Mo. 1 F. 97."

So that, if the levy were properly made, as it was not, and if the law recognized the validity of such a distraint action, which it does not, such levy could only attach to the sum of money earned by the State employee and due to him on the date of the levy. No rights would accrue to the Federal Government in the future earnings of such employee.

Since there is no authority in the Federal decisions to support the request of the collector, we turn to a review of the law of this jurisdiction.

Executions against wages, earnings and salary are authorized and provided for in section 2A:17–50, et seq., New Jersey Statutes. It is provided therein that when a judgment has been recovered in a court of competent jurisdiction, that wages due and owing the judgment debtor, in excess of $18.00 per week, are subject to an order of the court directing execution thereon. Only one execution may obtain at the same time and succeeding executions are satisfied in the order of priority in which presented. A salary less than $2,500.00 per annum is only subject to a levy of 10% and, in the case of larger salaries, the court may order a larger percentage.

The collector proposes to levy upon the full salary due the taxpayer thereby seeking an advantage denied resident judgment creditors who are limited by our law to 10% of any wages of the debtor.

In this jurisdiction we have afforded immunity against an execution on wages of a Federal employee in *Cahn* vs. *Allen,* 124 N. J. L. 159 (Supreme Court, 1940), and the court said: "The salary of a Federal employee * * * was not subject to execution, as a matter of public policy. Neither by legislation nor by judicial ruling has this been changed. The Executions Act expressly deals with the class of State, county and municipal employees. No intention can be inferred, if indeed the power existed, to change the public policy with respect to Federal employees."

There has been a minor change in our legislation since that decision by the provisions of chapter 57, P. L. 1942, which now appears as section 2A:17–64, New Jersey Statutes.

Therein it is provided that if a judgment debtor is entitled to income for services rendered as a Federal employee that he may be required, by order of the court, to make payment therefrom at stated periods in installments, and upon such terms and conditions as the court may direct, on account of the unsatisfied judgment. In such case, however, the employee is entitled to receive notice of the proposed entry of such order and is afforded an opportunity, at any time, to apply for modification thereof, a process which is denied the State employee in these proceedings.

The courts of this State are always available to the Federal Government for the collection of delinquent income taxes due from public employees by garnishment of their wages, but only in the manner provided for in section 2A:17–50 et seq., *supra.* Thus the taxpayer cannot complain that the collector is afforded an advantage denied the taxpayer in the courts of his own State.

We are not called upon to determine the propriety of service of the levy on a district parole supervisor rather than upon the State Treasurer, or his duly accredited representative, for such is not essential to a disposition of the prime question.

Because of the importance of the issue, involving as it does both the Federal and State Government, we have dealt at length with the problem so that it may clearly appear that the decision rests squarely on legal principles rather than upon an absence of desire on the part of New Jersey to co-operate with the Federal agencies in the important task of collecting revenues so essential to the proper discharge of the functions of government.

Sincerely yours,

THEODORE D. PARSONS,
Attorney General.