THE IRS AND CIVIL LIBERTIES: Powers of Search and Seizure

Ronald Hamowy

The protections afforded each American from arbitrary government action are nowhere more attenuated than in the case of enforcement of the tax laws. Of all federal government agencies, the Internal Revenue Service (IRS) is permitted the greatest latitude in its relations with citizens, to the point where the authority of government directly conflicts with the elementary civil liberties customarily afforded and constitutionally guaranteed to each individual. This area of conflict is so extensive and of such a far-reaching nature that this paper will attempt to offer no more than a general overview of the problem, with specific reference to the investigatory power of the IRS. As a result, I will not try to deal with any specific area in depth nor to offer an examination that, in its particulars, is not more thoroughly treated in the existing legal literature. Instead, I hope to provide only a summary of the federal tax investigatory powers that directly conflict with the rights and privileges of individuals otherwise recognized and protected by the Constitution and the courts, and to indicate the grave threat these powers pose to personal liberty and to the notion of a free society.

No other agency of government charged with the enforcement of a law is so completely at the mercy of information known only to the individuals who are the objects of the law as is the Internal Revenue Service. Evidence that the tax laws have been complied with, or, more importantly, evidence incriminating the taxpayer that would prove pertinent in a prosecution for tax evasion, is almost invariably in the possession of the taxpayer himself. It is in the nature

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The author is Associate Professor of History at the University of Alberta, Edmonton T6G 2H4.

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of an income tax law, and its most pernicious feature, that the most private, voluntary relationships between individuals, when they concern transfers of money, become proper subjects of government scrutiny. The privacy of these acts presents a peculiar burden on the enforcement process and has led Congress and the courts to provide the IRS with extensive and unique powers to investigate and examine private records, powers that in many cases contravene the protections otherwise afforded individuals against illegal searches and seizures, self-incrimination, and the right to counsel provided by the Fourth, Fifth, and Sixth Amendments.

The Requirement to Keep Records

The Internal Revenue Code[1] and the regulations promulgated by the Treasury Department and the IRS thereunder, provide that each individual[2] subject to the income tax must keep permanent records or books of account "sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information." These records must be accurate and in a form suitable for inspection by the IRS in order to determine the amount of any tax liability and are to be retained so long as they may be material to the administration of the tax laws.[3]

No particular form of record keeping is required either by statute or by IRS rules and regulations, but the discretion thus given taxpayers respecting the method they adopt in keeping their books is, at best, a mixed blessing.

For example, one of the methods by which the IRS has successfully prosecuted taxpayers is based on an assessment of net worth.[4] The approach has commonly been employed in instances where insufficient proof exists respecting the source and amount of suspected unreported income. In such cases the IRS has demanded that the taxpayer furnish information concerning his assets and liabilities at the start and at the close of the tax year, together with evidence of all nontaxable receipts, such as gifts, inheritances, the nontaxable portion of capital gains, etc., and all nondeductible expenditures. The amount of these nondeductible expenditures, adjusted by the subtraction of all nontaxable receipts, that are not reflected in the statement of assets and liabilities at the end of the year is considered to be the taxpayer's net income for the year.[5]

In assessing fraud penalties for civil, as distinct from criminal purposes, an IRS determination of unreported income and tax liability is presumptively correct,[6] and the net worth method has been sanctioned by the courts.[7] In criminal prosecutions,[8] on the other

hand, the courts, before the mid-1950s, had allowed the use of the net worth method only in instances where the government was able to establish that a taxpayer's books and records were incomplete and inadequate.[9] In 1954, however, the Supreme Court, in a group of four cases, held that the government need not discredit the defendant's records before employing some indirect method of proving income and that there was no objection to the government's determination of income by the net worth method even in cases where the defendant's records are in agreement with his tax returns.[10]

The dangers to the taxpayer implicit in the net worth method are staggering. Net worth examinations go back many years;[11] indeed, the starting point for such an investigation can conceivably be the year when the taxpayer first reached working age. Individuals, unlike businesses, rarely prepare balance sheets at regular periods, and it is often close to impossible to submit an accurate statement of one's worth at any point in time. The taxpayer who chooses to cooperate with the IRS and submit a net worth statement when one is called for[12] is under the burden of keeping detailed books and records covering every conceivable aspect of his financial life. Additionally, the taxpayer under a net worth investigation would have to be prepared to furnish documentation corroborating all financial transactions upon which a net worth statement is based. The dangers of not doing so have been succinctly analyzed in one comment on tax procedure:

> If the Commissioner [of Internal Revenue] was required to accept all of the information in the net worth statement as correct, should he make use of any part of it, the danger would be less apparent. However, the Commissioner will often accept the taxpayer's statement as to certain assets and liabilities which are subject to documentation, but reject the taxpayer's undocumented statement as to other assets and liabilities. In this way the taxpayer has furnished evidence by which the Commissioner can construct an estimate of unreported income which may be wholly unreasonable. The assets and liabilities at the end of the period are usually susceptible to accurate proof. The IRS then refuses to acknowledge the existence of any assets at the beginning of the period that the taxpayer has not been able to prove. Since the point of time for which the proof of these assets is necessary may be many years in the past, this is often a very difficult or impossible burden of proof. The large number of cases in which the courts have rejected unsupported testimony of cash on hand at the beginning of the period attests to this.[13]

Should the taxpayer refuse to submit a net worth statement, al-

most any such statement prepared by the IRS will suffice in assessing taxes due, since there is a presumption of correctness attaching to the IRS's determination of any deficiency. Additionally, in a criminal prosecution based on the net worth method, "the prosecution relies upon assumptions to meet its burden of proof [while] the defendant is in reality obliged to prove his innocence."[14] There is no effective limitation on the evidence the government may present to support its contentions that the opening net worth figure is as low as it maintains,[15] nor need the government conduct an investigation into the possible nontaxable resources or income of the defendant.[16]

The risks involved in refusing to cooperate with the IRS in a net worth investigation are substantial, both in terms of the assessment of tax deficiencies and of possible criminal prosecution, and it is probably to the taxpayer's advantage to submit net worth statements when requested. But, in order to do so, he must be prepared to keep books and records covering every financial transaction—whether taxable or not—throughout his life. Thus, despite the apparent limitation placed on which records need to be kept under § 6001, the fact that no particular form of record keeping is mandated appears to broaden the requirement to include every conceivable datum bearing on one's income and expenditures.

The statutory requirement that each individual maintain complete and adequate records is enforceable through both civil and criminal sanctions. Noncompliance can result in criminal penalties. If the failure is willful, the taxpayer can be successfully prosecuted under § 7203 of the code, which provides for imprisonment for up to one year and a fine of $10,000.[17] Furthermore, the courts have ruled that failure to keep adequate books and records may be taken into account in a proceeding for criminal tax evasion.[18]

Additionally, taxpayers who neglect or intentionally disregard IRS rules respecting record keeping are subject to a negligence penalty on tax deficiencies.[19] But perhaps the most prevalent consequence of not keeping full and detailed records is that the taxpayer, if audited, would then be confronted with the insuperable task of disproving a tax deficiency that had been assessed against him. The reverse-onus attribute of tax assessments places the burden of proof on the taxpayer and not on the government; and the taxpayer without adequate records is left totally at the mercy of the IRS.

The Power of the IRS to Inspect Books and Records

Just as the Internal Revenue Service can authorize the keeping of books and records, so can it inspect them and, if need be, compel

their production. The Internal Revenue Code empowers agents of the IRS to examine any books, records, or other data relevant or material to any tax liability, to summon the taxpayer or any other person to produce any relevant records, and to take testimony under oath. The power to summon books, records, and witnesses is sweeping and may be undertaken for any of the following purposes: (1) ascertaining the correctness of any return; (2) making a return where none has been made; (3) determining the liability of any person for any internal revenue tax; and (4) collecting any tax liability.[20] The power to summon is extremely broad and includes not only the person liable for tax, but also any officer or employee of such person, any person having possession or custody of such person's business records, or "any other person the Secretary may deem proper."[21] Thus, anyone having even the remotest financial connection with the taxpayer under investigation may lawfully be summoned, together with any relevant records in his possession, and can be compelled to give testimony under oath.

This authorization applies to both civil and criminal investigations[22] and has been likened to the inquisitorial powers of federal grand juries.[23] The summons power is not limited solely to financial records, but has been held to encompass any document that might bear on a taxpayer's income tax liability,[24] wherever it may be found.[25]

So extensive are the powers of the IRS to compel testimony and the production of documents that one tax attorney has been led to comment:

> Draconianism is the succinct judicial description of the statutory scheme endowing the Commissioner with his inquisitorial powers. The basis for the characterization is evident from a comparison of his statutory powers with the statutory information-gathering powers available to any other administrative agency in our federal government.
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> At least on the basis of the statutory language, summary powers of vast magnitude, far exceeding those of the FBI, Secret Service, CIA, Military Intelligence or of any Police Department in the land, are part of the arsenal of each one of the thousands of Revenue Agents and Special Agents employed by the Internal Revenue Service.[26]

Tax investigations customarily begin with an informal request by an agent of the IRS that the taxpayer or some third party make his records available for inspection. In almost all cases, a simple, oral request is all that is necessary for compliance, since most taxpayers are prepared to cooperate with the IRS. However, in instances where the request is refused, the agent may issue a summons pur-

suant to § 7602 of the code.[27] Refusal to comply with a summons may itself constitute a criminal offense. In addition to § 7203, which makes willful failure to provide any requested information a misdemeanor,[28] the code provides criminal penalties for failing to obey a summons. Section 7210 specifies that

> Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(g)(2), 7602, 7603, and 7604(b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.[29]

Failure to comply with a summons duly issued by an agent more commonly results in the institution of proceedings in the United States District Court. The Internal Revenue Code[30] specifies that the federal district court in which the summoned person resides or is found has jurisdiction to compel attendance or the production of records of any person summoned pursuant to the internal revenue laws. The enforcement procedure provides that

> whenever any person summoned . . . neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have the power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.[31]

The weapon available to enforce a summons thus allows the IRS two alternatives. Under § 7604(a), it may request a district court to compel compliance, violation of which would constitute contempt; or, alternatively, under § 7604(b), an agent may immediately resort to an ex parte order for arrest, followed by summary punishment for contempt.[32] In commenting on the procedure permitted under § 7604(b), it has been noted:

> This incongruous procedure subjects a witness, who may have merely availed himself of his Constitutional right against self-

> incrimination or who felt himself silenced by the seal of a confidential communication, to the opprobrium of an arrest on a warrant issued after an inadequate *ex parte* hearing. Based on such a literal interpretation, the commands of a summons have been enforced by body attachment before a court determined whether the summons was even valid.[33]

So odious was this method of enforcing a summons issued by an administrative agency to the procedural rights customarily accorded individuals by the American system of law that, in 1964, the Supreme Court held that the use of § 7604(b) was limited to instances where the taxpayer had either wholly defaulted or contumaciously refused to comply with a summons and could not be employed where the taxpayer had interposed a good faith challenge.[34] The usual procedure adopted by the IRS since that time to enforce a summons is to petition the district court for an order directed against the summoned party to comply or to show cause why he should not be held in contempt.[35] In this way, the affected individual is at least given the opportunity to appear voluntarily at a full hearing without having first been subjected to the stigma of arrest.

Under the terms of the Tax Reform Act of 1976,[36] in cases where the records of certain designated third-party record keepers are summoned by the IRS, the taxpayer himself must be notified of the issuance of the summons.[37] The record keepers specified under the notice requirement consist of: (1) any mutual savings bank, cooperative bank, domestic building and loan association, any bank, or any credit union; (2) any consumer reporting agency; (3) any person extending credit through the use of credit cards; (4) any broker; (5) any attorney; and (6) any accountant.[38] The law specifically does not apply to the taxpayer's employees.[39]

If the taxpayer chooses, he is permitted under present law to stay compliance with the summons by notifying the record keeper not to comply and by informing the IRS of this fact, both within fourteen days.[40] At that point the IRS is required to petition the district court to enforce the summons, and the taxpayer now has standing to intervene in the enforcement proceeding.[41] This intervention suspends both the civil and criminal statutes of limitation.[42] Section 7609 is not intended to expand the substantive rights of a taxpayer nor to provide him with any new defense against the enforcement of a summons, but solely to afford him knowledge that he is the subject of an investigation by the IRS in which information is being obtained from third parties.[43]

In instances where a record keeper does not fall under the catego-

ries specified in § 7609, the taxpayer need not be notified that the IRS is investigating third-party records bearing on his finances. The taxpayer's procedural rights respecting intervention in such cases then reverts to the situation that obtained regarding all third-party summonses prior to February 28, 1977, when the provisions of § 7609 became effective. The controlling case in such instances is *Donaldson* v. *United States*.[44] There the Supreme Court held that the right of intervention in third-party cases was not mandatory, but only permissive,[45] despite the taxpayer's claim that the Federal Rules of Civil Procedure[46] granted intervention as a matter of right. The Court, affirming the lower court's denial of intervention, held that the taxpayer did not have "an interest relating to the property or transaction which is the subject of the action," as provided for in rule 24(a)(2). The taxpayer neither owned the records summoned nor had a legally recognized privilege in them, and therefore did not have a "significantly protectable interest" in such records that would warrant intervention. Further, the Court held that federal rule 24(a)(2) did not guarantee intervention as a matter of right, inasmuch as rule 81(a)(3)[47] provides that the district court may limit the applicability of the federal rules in summary enforcement proceedings.[48]

The term "significantly protectable interest" was not defined by the Court, although it did offer the view that, beyond a proprietary interest in the summoned material, a protectable interest would hold where the material summoned was for the improper purpose of obtaining evidence in a criminal investigation or where it is protected by the attorney-client privilege.[49] The Court made clear that it would disapprove any liberal interpretation of the right to intervene in third-party summonses, since such a policy would overly impede the investigatory activities of the IRS.[50]

Decisions subsequent to the *Donaldson* case have followed the strictures laid down by the Supreme Court and intervention by the taxpayer in third-party enforcement proceedings is seldom permitted.[51]

Restrictions on the Investigative Powers of the IRS

The enormous scope accorded the Internal Revenue Service to examine and compel the production of records is ostensibly limited by the Internal Revenue Code itself and by constitutional guarantees confining the actions of government, guarantees that have been held as necessary requirements of a free society. The remainder of this paper shall treat these limitations in turn, summarizing how they have been interpreted by the courts and what, if any, re-

strictions they have placed on the investigatory authority of the Internal Revenue Service. This analysis will show that, for the most part, the powers of the IRS are bounded by no effective restrictions, not even by that afforded by the constitutional guarantee against unreasonable searches and seizures, and that, in the area of federal tax law, individual rights, in practice, do not take precedence over administrative authority.

The Statutory Restriction Respecting Relevance and Materiality

The section of the Internal Revenue Code granting authority to the IRS to examine books and records and to compel testimony[52] restricts the service to those materials that are "relevant or material" to an investigation bearing on the accuracy of a tax return or the liability of a taxpayer.[53]

Further, § 7603, providing for the issuance of a summons, states that when the summons calls for the production of books and records, the records sought will be described with "reasonable certainty."[54]

The courts, however, have held that a summons need only be definite enough to allow the person summoned to reasonably identify the material sought. Thus, in *First National Bank* v. *United States*[55] the court noted:

> We do not mean that the revenue agent must be able to describe in minute detail every document and paper that he wishes to inspect, but he must be able to describe them with such reasonable particularity that the officers of the bank will have sufficient information to enable them to produce such records for the inspection of the revenue agent.[56]

The test of materiality and relevancy has been held to go beyond whether the summoned records might or might not accord with the taxpayer's returns, but whether the records "might throw light" on the correctness of the returns.[57] Further, it has been held that it is not the function of the court to determine the propriety of an investigation, which lies solely within the discretionary power of the Internal Revenue Service, but to determine "only whether the documents sought are reasonably likely to relate to such investigation."[58]

Thus, if the summoned documents are described sufficiently to permit the person summoned to identify them, and if the material can be shown to have any relevance at all to an examination of a taxpayer's returns or tax liability, the examination will be upheld, even though it can be characterized as a fishing expedition.[59] As one court has ruled: "Where the records sought on their face relate

to financial transactions of taxpayers whose affairs are under inquiry ... the Government has presented a prima facie case of relevancy."[60]

The criteria for the issuance of a tax summons were set forth by the Supreme Court in *United States* v. *Powell*.[61] There the Court held that the commissioner

> must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed....[62]

Respecting the question of abuses of the summons power, Mr. Justice Harlan stated: "Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute. ..."[63] The Court further ruled that the burden of establishing a failure to fulfill the statutory requirements, together with the burden of proving that the summons was issued for an improper purpose, fell on the taxpayer.[64]

The Statutory Restriction Respecting Unauthorized Usage: Restrictions against the Use of an Agency Summons in a Criminal Investigation

A government subpoena cannot properly be used to obtain evidence in a criminal proceeding, such use constituting violations of both the Fourth Amendment, which prohibits illegal searches and seizures, and the Fifth Amendment, which provides against self-incrimination. An administrative subpoena, such as an IRS summons, has been held equivalent to a search and seizure on the theory that the compulsory production of one's private papers to help establish a criminal prosecution against the summoned party falls within the scope of the Fourth Amendment in all cases where a search and seizure would be.[65]

The problem with the status of IRS summonses arises from the difficulty in determining whether subpoenaed records will be used in a civil proceeding – in which case Fourth and Fifth Amendment protections respecting the production of documents are not available – or to aid in a criminal prosecution. The result has been a vast amount of litigation. In almost all tax audits the IRS has no one distinct purpose in issuing a summons, and tax agents in fact act in a dual capacity. Since civil and criminal sanctions can apply to the same conduct, tax examinations are ambiguous and create significant procedural disadvantages to the taxpayer under investigation.

There is, in fact, no sure way of recognizing a fraud investigation,

that is, an examination that has as its goal the collection of evidence for use in a criminal prosecution. Fraud investigations are ostensibly conducted by special agents, attached to the Intelligence Division of the IRS, while routine audits are undertaken by revenue agents from the Audit Division.[66] In reality, the overwhelming majority of criminal prosecutions result from routine audits[67] undertaken by revenue agents who discover some element that arouses their suspicions.[68] The revenue agent may then prepare a referral report to the Intelligence Division,[69] and a special agent may be assigned to the case to work with the revenue agent. At that point a civil tax investigation will continue alongside a criminal investigation,[70] and a summons will be issued in aid of both, during which the special agent will normally collect evidence to arrive at a determination respecting criminal prosecution. Despite the fact that the sole function of a special agent is to investigate criminal cases, as long as the civil liability of a taxpayer is also being investigated, concurrent criminal investigation does not preclude judicial enforcement of an IRS summons. The use of these "dual purpose" summonses, a procedural hybrid by which the government can circumvent the constitutional guarantees against illegal searches and seizures and self-incrimination,[71] has been sanctioned by the courts.

The courts had originally indicated that the use of a civil summons to gather evidence for use in a criminal prosecution constituted an improper use of the IRS's subpoena power. In *United States* v. *O'Connor*[72] the court quashed an IRS summons on this very ground, holding that such use of an administrative subpoena violated the intent of the federal rules pertaining to criminal discovery.[73] The court stated:

> To encourage the use of administrative subpoenas as a device for compulsory disclosure of testimony to be used in presentments of criminal cases would diminish one of the fundamental guarantees of liberty. Moreover, it would sanction perversion of a statutory power. The . . . [summons power of the IRS] was granted for one purpose, and is now sought to be used in a direction entirely uncontemplated by the lawgivers.[74]

The Ninth Circuit rejected this argument in *Boren* v. *Tucker*,[75] contending that the possibility alone of a taxpayer's records being used in a criminal prosecution did not invalidate an administrative subpoena. Any IRS investigation might disclose evidence of either civil or criminal liability, the court argued, and even in instances where the examiner concluded that criminal liability was possible, there was no assurance that the taxpayer would be prosecuted. The

court further argued that the *O'Connor* case was distinguished inasmuch as O'Connor had already been indicted when the summons was issued, presumably to aid the Justice Department in preparing its case. The distinction was recognized in subsequent cases, where the courts held IRS summonses unenforceable only in instances where the taxpayer was under indictment or prosecution.[76]

The somewhat bizarre argument that, since there is no certainty of criminal prosecution, an IRS summons that is employed to gather evidence for such a prosecution does not constitute a violation of the Fourth Amendment, is particularly ironic in light of the information revealed in *United States* v. *Frank*[77] in 1957, one year after *Boren* v. *Tucker*. The court in that case found dual-purpose summonses enforceable despite a secret set of instructions issued by the IRS to its special agents:

> Be cautious and alert and cultivate the confidence of the taxpayer without tipping your hand as he may cooperate to some degree with you, but if he finds out that you are on his trail as an "R" sleuth, he may clam up, and from then on your job will be much more tedious and a lot of harder work is ahead of you.[78]

Such instructions to special agents to disguise the fact that the taxpayer is under criminal investigation and thus to encourage him to incriminate himself both by oral statements and by production of his documents clearly seem violative of the Fourth and Fifth Amendments as the courts had previously interpreted these protections.

In 1971 the Supreme Court gave its approval to IRS dual-purpose summonses in *Donaldson* v. *United States*.[79] The Court there held that if the summons were issued prior to a recommendation for prosecution[80] there could be no objection to its use, despite the fact that a full-scale tax fraud investigation was under way. That evidence gathered through the use of the summons might later be used in a criminal prosecution was not sufficient to invalidate enforcement.[81] Additionally, the Court held that misuse of the summons power was confined solely to situations where the taxpayer can establish that the only objective of an investigation is to obtain evidence for use in a criminal prosecution,[82] and thereby show a lack of good faith on the part of the investigating agent. Abuse of process, evidenced by a lack of good faith, the Court suggested, would be a valid objection to enforcement of an IRS summons.

The Court thus provided only two criteria – both of them for the most part empty – that the IRS must meet in issuing a summons. The first provided that the summons be issued prior to a recommendation for criminal prosecution. The Court thus gave its

approval to all dual-purpose summonses from which criminal prosecution could result,[83] provided that the case had not yet been turned over to the Justice Department. The second criterion required that any IRS summons be issued in good faith.

After *Donaldson,* there was some confusion among the circuit courts respecting the interpretation of the "good faith" criterion and, related to it, what constituted a "recommendation" for criminal prosecution. The District of Columbia Circuit had interpreted *Donaldson* to proscribe enforcement of a summons if the special agent assigned to an IRS investigation had formed a firm intention to recommend criminal prosecution, even though no formal recommendation had yet been made.[84] And most of the other circuits agreed that whether prosecution had been recommended and thus whether the good faith criterion set down in *Donaldson* had been met could be determined only in light of the specific facts existing at the time the summons was issued.[85] Thus, the Third Circuit, in holding invalid an IRS summons issued following a recommendation for criminal prosecution, also stated that a summons could not be used simply as a method of bypassing the restrictions on criminal discovery imposed on the government.[86]

The Supreme Court finally clarified the circumstances that would evidence an absence of good faith in *United States* v. *LaSalle National Bank.*[87] In *LaSalle,* the IRS had issued a third-party summons to the LaSalle National Bank in the course of a special agent's investigation. This was not a joint investigation undertaken by a revenue agent and a special agent, but one conducted solely by an agent from the Intelligence Division of the IRS to investigate criminal liability. Additionally, at the hearing instituted by the bank to quash the summons, testimony was introduced that the investigation was "strictly related to criminal violations of the Internal Revenue Code."[88] The trial court concentrated its attention on this fact and, after reviewing the special agent's case file in chambers, concluded that the IRS "was conducting [its] investigation solely for the purpose of unearthing evidence of criminal conduct" by the taxpayer.[89] It therefore quashed the summons.

The Seventh Circuit affirmed,[90] holding that "the use of an administrative summons solely for criminal purposes is a quintessential example of bad faith." The Supreme Court, however, did not agree with this formulation. In reversing and remanding the case, Mr. Justice Blackmun, speaking for the Court, argued that the good faith requirement posited in *Donaldson* is to be understood as having reference not to the statements or acts of any single agent but by an examination of the institutional posture of the IRS itself!

To establish bad faith it is necessary to establish "institutional" bad faith, such as an institutional commitment to delay referring the case to the Department of Justice for criminal prosecution in order to gather evidence for the prosecution.[91] The summons issued in *LaSalle,* the Court contended, did not fall into this category and was issued in good faith pursuit of the purposes authorized by Congress in § 7602. "This result," the Court argued, "is inevitable because Congress has created a law enforcement system in which criminal and civil elements are inherently intertwined. When an investigation examines the possibility of criminal conduct, it also necessarily inquires about the appropriateness of assessing the 50% civil tax penalty."[92]

Additionally, the Court held that the burden of proof respecting institutional bad faith rested on the taxpayer. Since this task is virtually impossible, inasmuch as the evidence necessary to prove bad faith is in the hands of the IRS and beyond the reach of the taxpayer, the courts have been most reluctant to recognize instances where bad faith has been present.[93]

The Statute of Limitations

The period of limitation on the assessment and collection of income tax deficiencies is set out in § 6501(a) of the Internal Revenue Code and provides that any assessment must be made within three years after a return is filed.[94] Because of this provision, the courts have ruled that the IRS may not normally compel production of a taxpayer's books and records after the expiration of the three-year period of limitation.[95] Despite the fact that "closed years" are nominally barred from investigation, there are a number of methods by which the Internal Revenue Service may circumvent this restriction.

For example, under its authority to investigate a taxpayer's income tax liabilities for an open year, the IRS may claim it must examine financial documents predating open years. In such instances, there is no legal barrier to an investigation covering books and records for years closed by the statute of limitations.[96] Indeed, in *Dunn, Jr.* v. *Ross,*[97] where the records sought by the IRS dated back thirty years and spanned a twenty-year period, a summons was held enforceable inasmuch as the information sought bore on the taxpayer's liability for open years.

The Internal Revenue Code itself provides another exception to the three-year period of limitations. Under § 6501(e), tax liability may be assessed within six years after the filing of a return if there

has been an omission of more than 25 percent of the gross income on the return.[98] In such cases the courts have ruled that the IRS is under no obligation to set forth any grounds for its claim that the taxpayer had failed to report 25 percent of his gross income; an unsubstantiated suspicion alone has been held sufficient to extend the assessment time from three to six years. Thus in *United States* v. *United Distillers Products Corp.*[99] the court stated: "Obviously, this provision [allowing an extension of time from three to six years in instances where more than 25 percent of gross income has been omitted] would be of no practical effect if the Bureau were barred from making the investigation necessary to ascertain such a misstatement."[100]

Perhaps the most widely used procedure employed by the IRS to escape the restrictions imposed by the statute of limitations on examination of closed years involves a declaration that fraud is suspected. The Internal Revenue Code provides no time limitation whatsoever on the assessment of a deficiency in instances where a false or fraudulent return or where no return at all has been filed;[101] and all such years are subject to the subpoena powers of the government.

The focus of judicial inquiry in such cases has centered on the question of what showing of fraud the IRS need make to permit judicial enforcement of its summonses. Prior to the Supreme Court's decision in *United States* v. *Powell*[102] in 1964, the courts had somewhat conflicting positions on the question. The premises underlying this conflict are best brought out by considering the following cases, which both grappled with the question of what evidence of fraud the IRS was required to produce before a summons to investigate a closed year would be judicially enforced.

In *O'Connor* v. *O'Connell*[103] the First Circuit, reversing a district court order compelling a taxpayer to obey a summons, stated that "when a court order is needed to enforce compliance with a summons to testify as to a 'closed' year, [the IRS] should be required to establish to the court's satisfaction that there is probable cause for an investigation into such a year."[104] In this particular case a summons had been directed to a taxpayer to appear and testify respecting deficiencies for years that, absent fraud, were closed to assessment by the statute of limitations. In support of its subpoena, a special agent had testified that he believed, on the basis of his calculations, that the taxpayer had filed false returns for the years in question. The court held that this purely subjective suspicion of fraud was insufficient to support an order enforcing the summons and noted:

> [B]efore the tax authorities are entitled to a district court order enforcing a summons directing a taxpayer to testify as to a closed year they must establish to the district court's satisfaction that a reasonable basis exists for a suspicion of fraud, or put another way, that there is probable cause to believe that the taxpayer was guilty of fraud in a statute barred year.[105]

In sharp contrast to the *O'Connor* case, the Second Circuit, the year following, refused to vacate a district court order respecting a third-party summons relating to a closed year. In *Foster* v. *United States*[106] the court explicitly rejected the probable cause theory offered in *O'Connor*. "The Commissioner," the court argued,

> as a condition to the issuance of a summons under §§ 7602 and 7604, should not be required to prove grounds for belief that the liability was not time barred "prior to examination of the only records which provide ultimate proof."[107]

The confusion surrounding this question[108] was not finally settled until 1964. In *Powell* v. *United States*[109] the Supreme Court rejected the probable cause argument and accepted almost without reservation the position put forth by the IRS, as summarized by the Third Circuit in *United States* v. *Powell*:[110]

> [T]he government insists that the basis of the Treasury agent's suspicion is not a matter of judicial cognizance. Rather, it is argued, the agent is entitled to judicial enforcement of his demand for the taxpayer's records if he merely submits to the court his affidavit asserting in generality that "he has reason to suspect" that there has been fraud in the taxpayer's computation of his tax for the year in question. In the government's view the agent need not even set out in his affidavit the facts which gave him "reason to suspect" fraud, much less establish by testimony in court that his suspicion is reasonably grounded.[111]

The taxpayer, on the other hand, had contended that the examination not only contravened the statute of limitations but, additionally, the prohibition against "unnecessary" examination contained in § 7605(b) of the Internal Revenue Code,[112] both of which required a showing of probable cause that fraud had been committed. In rejecting this argument, the Court stated:

> We do not equate necessity as contemplated by this provision with probable cause or any like notion.... If, in order to determine the existence or nonexistence of fraud in the taxpayer's returns, information in the taxpayer's records is needed ... we think the examination is not "unnecessary."...[113]

The Court disagreed with the taxpayer's contentions. A preliminary showing of probable cause to suspect fraud, the Court argued,

need not be made, either before or after the expiration of the three-year statute of limitations. The filing of a fraudulent return, it held, creates a tax liability without regard to any period of limitation, and the IRS is empowered to investigate any such liability. To demand a showing of probable cause for the suspicion would too greatly impede the IRS's responsibility in detecting fraud and would force the commissioner "to litigate and prosecute appeals on the very subject which he desires to investigate."[114]

The Court's position thus effectively destroyed any protection afforded a taxpayer from demands to produce his books and records by the statute of limitations. Since no such period of limitation exists for civil fraud, there is no limitation to the period in which the taxpayer may be compelled to produce his records, which may reach years into the future. Yet the fact that fraud alone justifies an examination of time-barred years does not place upon the IRS the requirement that it show some reasonable basis or probable cause for the suspicion. It may investigate capriciously and at its whim any period in the taxpayer's history, thus making the statute of limitations meaningless.[115]

Not only is the statute of limitations an empty restriction respecting civil fraud, but the period of limitation in instances of criminal tax evasion may also be circumvented by administrative procedure. The basic period both for misdemeanor and felony charges is limited by a six-year statute of limitations[116] and is normally invoked for filing a false or fraudulent return. However, the Internal Revenue Code provides that "any person who willfully attempts *in any manner* to evade or defeat any tax" is guilty of the felony of tax evasion.[117] This sweeping language has been held, in *United States* v. *Beacon Brass Co.*,[118] to include making false statements to treasury officials even in the case where the statements made merely substantiate a previously filed return. Thus, if a taxpayer is questioned about a return falling within the six-year statute of limitations and it is later found that the statements that corroborated a false return were themselves false, a new six-year period of limitation can be computed from the date when the false statements were made. It follows that the IRS may at any time circumvent the period of limitation on criminal tax evasion by the simple expedient of questioning a taxpayer about his returns at six-year intervals. Indeed, even in instances where the period of criminal liability has already lapsed, it is possible to resurrect it by questioning the taxpayer concerning a return filed more than six years previously, an action within the scope of the IRS's authority in the absence of any statute of limitations on civil fraud. False statements then made in connec-

tion with these returns themselves constitute the offense of criminal tax evasion with their own six-year period of limitation on criminal prosecution.

It is apparent that under the *Powell* and *Beacon Brass* decisions the statute of limitations in both civil and criminal fraud cases does not confine the authority of the IRS to investigate taxpayers' returns for any years and, in instances where fraud has been committed, to prosecute and to punish. The historical notion that the statute of limitations is in fact a "statute of repose" that operates to end the taxpayer's concern over his tax liability[119] does not effectively exist, as the courts have interpreted the enforcement of powers of the Internal Revenue Service.

The Statutory Restriction against Second Examination

Since 1921 the internal revenue laws have included a limitation on the power of the treasury to inspect a taxpayer's books and records. This restriction is currently contained in § 7605(b) of the Internal Revenue Code and provides that no taxpayer shall be subjected to unnecessary examinations and that only one inspection of a taxpayer's books shall be made for each taxable year.[120]

Neither limitation in fact seriously curtails the powers of the IRS to conduct an examination. The Supreme Court effectively disposed of any restriction on the investigatory powers of the IRS that might have arisen out of the "unnecessary examination" clause of § 7605(b) in *Powell* v. *United States,*[121] and the clause has since been taken to apply solely to "unnecessary" multiple examinations arising out of an attempt to harass the taxpayer.[122]

With respect to the restriction barring second examinations, the code itself provides for circumventing this limitation by granting the IRS the authority to make additional examinations after notifying the taxpayer in writing that an additional inspection is necessary. Indeed, even where the requisite notice is not given and the taxpayer fails to object to a second examination, the courts have ruled that the taxpayer has waived his rights under the statute.[123]

Nor does violation of the notice requirement for second examinations invalidate a tax deficiency discovered as a result of the improper reexamination. The IRS has been able to rely on an early decision of the Court of Claims, *Philip Mangone Co.* v. *United States,*[124] that a deficiency assessment was legal despite the fact that the assessment had been made on the basis of a second examination without requisite notice. This decision was cited with approval in *Field Enterprises Inc.* v. *United States*[125] thirty-four years later,

where the Court of Claims held that not every infraction of the notice requirement of § 7605(b) called for nullification of an assessment flowing from an illegal examination, a view later affirmed by the Sixth Circuit in *Molony* v. *United States.*[126]

The bar to second examinations thus provides the taxpayer with no protection at all. Not only may the IRS circumvent this limitation by the simple expedient of issuing a notice in writing to the taxpayer informing him that they believe a second examination is necessary, but even in instances where they fail to do so, the courts have held that either the taxpayer had waived his right to being notified by allowing the examination or that no remedy existed where the right had been violated.[127] Further, where a timely objection is raised by the taxpayer that no notice was given of a second examination, the IRS need only then issue the notice and thereafter proceed with a further inspection.[128]

The IRS has been able to avoid the notice requirement entirely by classifying further examinations of the same tax year as "ongoing," thereby categorizing its inspections as "continuing," rather than as a series of discrete, separate examinations. In such instances, the courts have held that no notice is required.[129] Nor is notice required if the government claims that no genuine first examination has occurred.[130]

Finally, the statute does not bar multiple examinations when reexamination involves the books and records of third parties. The courts have ruled that the taxpayer himself has no standing to object to examinations of the financial documents of third parties bearing on the taxpayer's liability, even after a prior examination of the taxpayer's own books and records and despite the fact that no notice was given the third party.[131] For example, in *DeMasters* v. *Arend,*[132] the Ninth Circuit held that the express wording of the statute limiting multiple examinations without notice applied solely to the taxpayer and stated that to construe the statute's meaning more broadly would nullify the investigatory powers of the IRS.

The lack of standing to object to third-party examinations under § 7605(b) applies even when the third party is the taxpayer's lawyer[133]or where a corporation's books and records are inspected in connection with an investigation to determine the tax liability of a shareholder whose own books and records had previously been examined.[134] Similarly, a taxpayer whose records have been examined with respect to his own tax liability must submit to reexamination without notice if the purpose of the investigation is alleged to be the tax liability of another taxpayer.[135]

Restrictions Afforded by the Fourth Amendment

The Fourth Amendment protects individuals against "unreasonable" searches and seizures.[136] In theory, the problems of search and seizure are no different in the tax field than in other areas of criminal law.[137] However, the statutory mandate empowering the IRS to compel the production of documents and to examine a taxpayer's books and records is so broad that the courts have found little in the actions of the IRS that can be classified as "unreasonable."

Indeed, as has been observed, "as a practical matter there is little evidence of an incriminating nature that can be withheld under the Fourth Amendment."[138] Effectively, any information in the possession of the taxpayer bearing on his tax liability will be deemed to be "reasonable" for purposes of the Fourth Amendment. Thus, the court, in *In re International Corp.*,[139] argued that since records relevant to a taxpayer's financial affairs in the possession of third parties can reasonably be subpoenaed during an IRS investigation, then all financial records in the possession of the taxpayer himself are subject to scrutiny.[140]

The requirement of specificity and relevance with respect to third-party summonses has been the subject of some litigation, but even here the tendency has been to disregard the relevancy limitation in enforcing third-party summonses despite the Fourth Amendment requirement of reasonableness. The result has been that investigations that are tantamount to "fishing expeditions" have been sanctioned by the courts. Thus, in *Miles* v. *United Founders*,[141] a corporation that was party to a reorganization was compelled to disclose the names of all of its stockholders so that the IRS could explore the tax consequences of the transaction to each of them.[142] Similarly, it has been held not unreasonable for the IRS to examine private hospital records for the purpose of compiling a list of all the patients and the fees paid to a physician suspected of understating his tax liability.[143]

Only in instances where an IRS summons issued to a third party has been so broad in scope that compliance would amount to an intolerable burden have the courts intervened, and then only to modify the summons to make it somewhat more reasonable. For example, in *First National Bank* v. *United States*,[144] the IRS, during an investigation of a corporate taxpayer, had petitioned the court to require the bank to produce "any and all books, papers and records of whatever nature, irrespective of whether such records also pertain to similar transactions with other persons" for a period spanning more than four years. The order would have compelled the bank to produce over six million items. On appeal, the Fifth Circuit

amended the district court order to include only those records that were pertinent to the tax liability of the taxpayer under investigation. The court noted:

> This Court does not intend to hold that the Bank could not be required to produce records, that have been reasonably designated and identified, of transactions between other persons or firms and the taxpayers whose returns are under investigation. But the Bank cannot be required to produce B's accounts in an investigation of A's tax returns unless it be alleged that B's account, checks, etc., bear upon the correctness of A's return or upon matters that should have been included in A's return.[145]

Similarly, in *Schwimmer* v. *United States*[146] the Eighth Circuit, in quashing a subpoena duces tecum directing an attorney to produce all his books accumulated over a ten-year period, upheld a second subpoena that differed from the first only in that the requested records pertained to three specific clients.[147]

Despite these cases, the comprehensive investigatory powers accorded the IRS by the Supreme Court in *United States* v. *Powell*[148] seem to suggest that the Internal Revenue Service is not bound in its examinations by whether its summonses impose an unreasonable burden on the summoned party or, indeed, by whether the scope of its summonses resembles general warrants, lacking in specificity.[149] In *Powell*, the Court approved the conclusions it had earlier reached in a nontax case, *United States* v. *Morton Salt Co.*,[150] that administrative agencies possess investigatory powers far broader than those possessed by the courts.

> [The administrative agency] has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.[151]

Dictum in *Powell* thus provides the IRS with the power to investigate any and all tax years as they pertain to any and all taxpayers, and lack of specificity would not appear to be fatal to judicial enforcement of any IRS summons, regardless of how onerous the burden in complying.

Additionally, the IRS currently has statutory authority to issue "John Doe" summonses to persons possessing information that might lead to identifying a taxpayer, otherwise unknown, who is suspected of failing to disclose his tax liability. The courts had recognized and upheld this procedure even before the authority was granted by the Tax Reform Act of 1976.[152] Thus, in 1975, the

Supreme Court in *United States* v. *Bisceglia*[153] held that the summons powers of the IRS – to investigate "*all* persons" who "*may* be liable" for taxes – was "inconsistent with an interpretation that would limit the issuance of summonses to investigations [focusing] upon a particular named person, or a particular potential tax liability."[154] *Bisceglia* grants the IRS broad powers to issue summonses for large numbers of records pertaining to any number of persons among whom exists an unknown target of investigation.[155] Chief Justice Burger's argument that it was unlikely that such sweeping investigatory powers would be used to conduct fishing expeditions because sufficient protection against abuse was afforded by the federal courts acting as a check on the IRS[156] is totally without merit. The courts have traditionally been extremely reluctant to place any limitation on the IRS's summons power and are unlikely to do so in the future. Additionally, Congress, in authorizing "John Doe" summonses as part of the Internal Revenue Code, explicitly provided that prior to issuance, the IRS is under no obligation to show probable cause for its suspicion that either civil fraud or criminal acts are involved.[157]

In light of the fact that the courts have sanctioned the IRS's comprehensive investigatory powers to summon financial data both from individual taxpayers and from third parties, the chief area of litigation in tax matters relying on the Fourth Amendment protection against unreasonable searches lies in attempts to suppress evidence already in the possession of the IRS, rather than as a means of withholding evidence from the tax authorities. In this regard, the Fourth Amendment has been linked with the Fifth Amendment prohibition against self-incrimination. In *Boyd* v. *United States*[158] the Supreme Court, in 1886, declared that the compulsory production of one's private papers constituted an unreasonable search and seizure if introducing the items seized into evidence would have been precluded on Fifth Amendment grounds. The Fourth Amendment can thus be viewed as supplementary to the right against self-incrimination under the Fifth Amendment; when one's papers that might compel a person to bear witness against himself are the object of a search, then the search is an unreasonable one under the Fourth Amendment.[159]

It was early established, in *Weeks* v. *United States*,[160] that documentary evidence against the accused seized by agents of the federal government in violation of the Fourth Amendment could not be admitted into evidence in federal courts and that to do so constituted prejudicial error. The *Weeks* rule thus allows any person whose Fourth Amendment rights are violated to move to

recover the property seized and to suppress the evidence that has thus been illegally obtained.[161] To invoke this exclusionary rule, the person accused must have a property interest in the premises searched or in the property seized.[162] A person is not in a position to assert his rights under the Fourth Amendment if he has waived them by voluntarily surrendering his records. This restriction is the joker in the deck, for in tax cases the courts have been extremely lenient in determining when a waiver has occurred. Generally, a taxpayer who submits his records to the IRS, in the absence of proof that there were clear and affirmative acts of deceit and fraud on the part of the Internal Revenue Service or its agents, will be held to have waived his Fourth Amendment rights.[163]

Failure to disclose that a routine civil audit has progressed into a criminal investigation will not be construed as an affirmative act of fraud by the IRS and will not nullify the presumption that the taxpayer has waived his Fourth Amendment rights. Thus, in *United States* v. *Sclafani*,[164] the taxpayer had been informed by a revenue agent that the IRS was undertaking a routine audit. On a second visit the agent was accompanied by a special agent, who was introduced to the taxpayer as such. The taxpayer submitted further financial data and answered all questions put to him by the special agent. At trial, the taxpayer contended that his original consent to an examination was limited to civil purposes and that the agents had failed to inform him of the altered nature of their investigation in violation of his Fourth Amendment rights. The Second Circuit rejected this contention, arguing that

> a "routine" tax investigation openly commenced as such is devoid of stealth or deceit because the ordinary taxpayer surely knows that there is inherent in it a warning that the government's agents will pursue evidence of misreporting without regard to the shadowy line between avoidance and evasion, mistake and willful omission.
>
> The Fourth Amendment does not require more than this, that when his consent is sought the taxpayer be apprised of the government's concern with the accuracy of his reports, and therefore of such hazards as may be incident to a voluntary disclosure. We hold that Sclafani was so apprised by the warning inherent in the request when Agent Sorkin [special agent] identified himself and disclosed his purpose to audit certain returns of the corporation.[165]

In *United States* v. *Tonahill*[166] the Fifth Circuit went further and explicitly condoned the practice of concealing the criminal nature of a tax investigation. In this instance, neither the defendant nor his accountant knew the significance of the term "special agent" and on several occasions during the course of the audit inquired whether

fraud was involved. The agents deliberately concealed the criminal aspect of their examination and replied that "their function was to reconcile the large discrepancies, to see if they were the result of innocent errors."[167] The court held that this misrepresentation was immaterial and did not clearly show fraud on the part of the agents. Therefore, the taxpayer was held to have waived his Fourth Amendment rights by "voluntarily" surrendering his books and records for examination.[168]

Indeed, positive deceit and trickery on the part of the IRS in securing "voluntary" evidence seems to have been sanctioned by the courts. Thus, in *Chieftain Pontiac Corp.* v. *Julian*[169] IRS agents had assured the taxpayer that he was immune from prosecution and that the purpose of their examination was solely to secure evidence against a third party. Neither statement was true. Despite this, the First Circuit held that the search did not violate the taxpayer's Fourth Amendment rights!

The courts have ruled that, since a summons is personal to the person to whom it is directed, a taxpayer has no Fourth Amendment standing to quash an IRS subpoena to a third party, nor can a third party refuse production of its records by raising the Fourth Amendment on behalf of the taxpayer.[170] With respect to civil subpoenas compelling the production of business records, the Supreme Court in *Oklahoma Press Publishing Co.* v. *Walling*[171] held that the Fourth Amendment "at most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized to make and the materials specified are relevant."[172] And, in *Jones* v. *United States*,[173]the Court indicated that the prohibition against unreasonable searches and seizures protected a person "against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."

As a result of these decisions, taxpayers are in a particularly vulnerable position with respect to records of their financial transactions held by banks and other financial institutions. Most taxpayers are under the mistaken impression that banks are under an obligation to respect the financial privacy of their customers and that this confidential relationship will be respected by the government. However, under the Bank Secrecy Act[174] banks are required to maintain records of almost all their customer transactions and these records are subject to government subpoena.

In *United States* v. *Miller*[175] treasury agents served two Georgia

banks with grand jury subpoenas issued in blank requiring the banks to produce all records of account respecting Miller or his firm. Miller was subsequently charged with violations of the alcohol tax statutes. The defendant made a pretrial motion to suppress microfilms of his checks, deposit slips, and other records relating to his accounts, contending that the material had been obtained in violation of his Fourth Amendment rights.[176] The motion was denied and Miller was tried and convicted. The Fifth Circuit, however, reversed on Fourth Amendment grounds.[177] The Supreme Court, on the other hand, held that a taxpayer's bank records do not come within the area of privacy protected by the Fourth Amendment, since the taxpayer neither owned nor possessed the records held by the bank. A depositor has no "legitimate expectation of privacy" in the contents of his bank records, the Court declared.

> The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. . . .
>
> The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government.[178]

The Court's position in *Miller* was specifically applied to IRS summonses in *United States* v. *Sand*[179] where a taxpayer was denied standing to challenge a summons directed to his bank.

Prior to the Tax Reform Act of 1976, taxpayers under investigation had been denied the right of even being notified when a third-party summons was issued by the IRS.[180] Thus, unless a taxpayer somehow became aware that a subpoena had been issued to a third party, he was denied any opportunity to register a challenge to the summons. Additionally, the Supreme Court, in *Donaldson* v. *United States,*[181] denied taxpayers standing to challenge third-party summonses except at the discretion of the district court, and then only in instances where the summons was issued for an improper purpose.[182] With the passage of amendments to the Internal Revenue Code in 1976, provision was made for notifying the taxpayer under investigation that a third-party summons had been issued and permitting the taxpayer to stay compliance and to intervene in any enforcement proceeding. The amended code, however, did not increase the substantive rights and defenses of the taxpayer and, therefore, does not reverse the position taken by the courts preventing a Fourth Amendment objection to the seizure of records belonging to a third party.[183]

Despite the notification provisions of the Tax Reform Act, the Internal Revenue Service continues to gain informal access to bank records without providing notice to the taxpayer that he is under investigation.[184] Banks are usually prepared to cooperate with the IRS on an informal basis and to disclose customer records in their possession without first being served with a summons. Indeed, IRS agents are encouraged to employ this procedure in their investigations rather than going through the formality of issuing a subpoena and thereby notifying the taxpayer that he is being investigated.[185]

This procedure of circumventing the notification requirement of the Internal Revenue Code has been upheld by the courts. Thus, in *United States* v. *Prevatt,*[186] the Fifth Circuit held that a bank's voluntary compliance with an IRS request for customer records vitiated any legal requirement that the IRS notify the taxpayer that he was being investigated. The court argued that to suppress such third-party records gained through informal channels was inconsistent with the aims of the Bank Secrecy Act, which was intended to preserve records that had a "high degree of usefulness in criminal, tax or regulatory investigations or proceedings."[187] Thus the courts have effectively done away with the limited protection afforded a taxpayer by the Tax Reform Act and once again placed the taxpayer in the position of being unable to stay compliance with an IRS request for third-party records for lack of notice that an investigation is underway.

The common law does not recognize an accountant-client privilege, and no such privilege has been enacted into federal law. Some states have enacted statutes creating an accountant-client privilege, but these have not been recognized by the courts as applicable to federal tax matters.[188] Thus, the general rule, that in order to suppress evidence obtained in violation of the Fourth Amendment one must have been the owner or possessor of the records seized, applies as much to records in the hands of one's accountant as to one's bank records.

In *United States* v. *Re*[189] an accountant was served with a grand jury subpoena pertaining to a tax investigation of his client. The accountant, being ill, agreed to turn over his work sheets together with copies of the taxpayer's returns, cancelled checks, brokerage statements, and the taxpayer's partnership tax returns in return for a waiver of his grand jury appearance. The taxpayer, in attempting to suppress the documents obtained from his accountant, argued that, under the terms of an agreement with the accountant, the items in question belonged to the taxpayer and were therefore protected by the Fourth Amendment. The court, on the other hand,

found that no such agreement existed and held that the taxpayer had no standing to intervene on Fourth Amendment grounds by attacking the manner in which the evidence had been obtained.

The determining case respecting the Fourth Amendment protection afforded tax records in the possession of one's accountant is *Couch* v. *United States,*[190] decided by the Supreme Court in 1973. In that case, the taxpayer had, over a fourteen-year period, turned her financial records, including bank statements, payroll records, and sales and expenditure reports, over to her accountant for the purpose of filling out her tax returns. While the accountant, who was an independent contractor, routinely retained these documents, ownership remained with the taxpayer. The IRS issued a subpoena to Couch's accountant and brought an enforcement action in the district court when he refused to comply. The taxpayer thereupon intervened, contending that the summons constituted an unreasonable search and seizure and would require that she incriminate herself. Couch's Fourth Amendment argument rested on the issue of whether she had a justifiable expectation of privacy with respect to the records held by her accountant. She contended that her tax and business records remained within her proper sphere of privacy since the relationship with her accountant was a confidential one. The Court rejected this argument, observing that any right to privacy had been waived when the records had been turned over to the taxpayer's accountant.

> [T]here can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return.... [The accountant's] own need for self-protection would often require the right to disclose the information given him. Petitioner seeks extensions of constitutional protections ... in the very situation where obligations of disclosure exist and under a system largely dependent upon honest self-reporting even to survive. Accordingly, petitioner here cannot reasonably claim ... an expectation of protected privacy or confidentiality.[191]

Couch thus unequivocally establishes that taxpayers' records in the hands of accountants are not protected by the Fourth Amendment. The *Couch* decision has been extended by analogy to other instances where the courts have ruled that there is no reasonable expectation of privacy.[192]

An illegal seizure of records, in those rare instances where it is recognized by the courts in tax cases,[193] does not in itself prevent the government from later using the information contained in the seized documents against the taxpayer. The Supreme Court, in

Silverthorne Lumber Co. v. *United States,*[194] early noted that

> the essence of a provision forbidding the acquisition of evidence in a certain way is not merely that evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others. . . .[195]

This ability to use evidence against a taxpayer that had been discovered through leads provided by illegally seized evidence provides a particularly potent weapon to the IRS. Thus, in *Turner* v. *United States*[196] IRS agents were able to uncover unreported sales by a taxpayer by interviewing his customers, the names of whom had been uncovered through an illegal search. And, in *United States* v. *Lipshitz,*[197] the IRS was enabled to collect evidence against a taxpayer by comparing the taxpayer's books with those of his customers, a list of whom was acquired through an illegal seizure of the taxpayer's records.

Further, the IRS may not be prevented from subpoenaing records previously known to the IRS, even after the records were the subject of an illegal search. In *Lord* v. *Kelly*[198] IRS agents had obtained the taxpayer's records by threatening his accountant, who had no authority to surrender the records. Although the court enjoined the government from using the information obtained during the time the records were illegally in the possession of the IRS, the same records were explicitly made subject to a new summons on the grounds that their existence was known to the IRS prior to the illegal search. Similarly, in *McGarry's Inc.* v. *Rose,*[199] the court enforced a summons for documents earlier illegally seized, where the government had prior knowledge of their existence. The First Circuit later upheld the taxpayer's conviction on the basis of evidence obtained through this summons, holding that

> to impose the greater sanction of permanent immunization whenever a seizure of ordinary business and corporate records has been invalidated would place an incommensurate burden on the government, unnecessary for the protection of commercial privacy. Indeed, such a sanction could lead taxpayers to play a game, inviting seizure on the chance that it could arguably be converted into an effective vaccination against any future use of such routine records.[200]

It is only a slight exaggeration to say that, in tax cases, the constitutional safeguard against unreasonable searches and seizures is attenuated to the point where it has no bearing on the activities of the IRS. A duly issued summons is all that is required to compel any-

one to produce masses of financial data. There need be no showing of probable cause, no specific description of the documents to be examined, and no warning that possible criminal prosecution may grow out of the examination of the summoned records. And, with respect to one's records in the hands of third parties such as banks and accountants, the courts have ruled that there can be no expectation of privacy. Further, misrepresentation of the nature of the investigation by agents of the IRS will not vitiate the assumption that the taxpayer had voluntarily waived his Fourth Amendment rights. Yet the courts have claimed that the investigatory authority thus afforded the IRS—reminiscent of the general warrants issued by the court of the Star Chamber—is reconcilable with the traditional restraints on government embodied in the Bill of Rights!

One need only compare the comprehensive authority to examine documents possessed by the IRS with the statement attributed to Pitt the elder respecting the search and seizure powers associated with a free society to see that the tyranny of unbridled government is not solely a theoretical fear. In 1753 Pitt is reputed to have said:

> The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.[201]

The king of England may not enter, but the Internal Revenue Service has free access.

NOTES

[1]*Internal Revenue Code,* 1954, as amended (hereafter cited as I.R.C.): § 6001. The section provides that "every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary may from time to time prescribe."

[2]The term "individual," as used in this context, is meant to include trusts, estates, partnerships, associations, companies, and corporations.

[3]Regs. § 1.6001-1. T.D. 6500, 25 F.R. 12108, Nov. 26, 1960, as amended by T.D. 7122, 36 F.R. 11025, June 3, 1971.

[4]For a discussion of net worth proceedings, see, e.g., Spurgeon Avakian, "Rights and Remedies of Taxpayers Suspected of Fraud," *Taxes—The Tax Magazine* 33 (1955): 889-91; Thomas W. Hill, Jr., "The Defense of a Criminal Net Worth Tax Case in the Light of Recent Supreme Court Decisions," *Cornell Law Quarterly* 41 (1955): 106-25; and Leonard Bailin, "How the IRS Intelligence Unit Attacks and Builds Up a Net Worth Case," *Journal of Taxation* 13 (1960): 17-21.

[5]"The application of the theory rests on the premise that if the Government can prove how much a taxpayer was worth at the beginning of the tax period and how much he is worth at the end, and if, after striking a difference and adding back non-

deductible living expenses, the total exceeds the net income reported for income tax purposes plus any reported or known non-taxable receipts, the excess, if any, represents unreported taxable net income." Thomas Hill, Jr., p. 108 (see note 4 above).

[6]*Tax Court Rules of Practice,* Rule 32. See *Deieborg* v. *Commissioner,* 225 F.2d 216 (6th Cir. 1955); *Burka* v. *Commissioner,* 179 F.2d 483 (4th Cir. 1950). See also *Botany Worsted Mills* v. *U.S.,* 278 U.S. 282 (1929).

[7]See, for example, *Bryan* v. *Commissioner,* 209 F.2d 822 (5th Cir. 1954). In this instance a civil fraud penalty was affirmed even though a conviction for criminal tax fraud for the same years was reversed on the ground that the government had failed to make out a prima facie case.

[8]I.R.C. § 7201 provides that "any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution." A prosecution under § 7201 thus requires that the government prove both that a tax was due for a particular year and, in addition, that the defendant's failure to disclose this fact was the result of a willful attempt to evade the tax.

[9]*United States* v. *Riganto,* 121 F.Supp. 158 (E.D. Va. 1954); *United States* v. *Williams,* 208 F.2d 437 (3rd Cir. 1953); *Remmer* v. *United States,* 205 F.2d 277 (9th Cir. 1953), judgment vacated on other grounds, 347 U.S. 227 (1954).

[10]*Holland* v. *United States,* 348 U.S. 121 (1954); *Friedberg* v. *United States,* 348 U.S. 142 (1954); *Smith* v. *United States,* 348 U.S. 147 (1954); *United States* v. *Calderon,* 348 U.S. 160 (1954).

[11]See Leonard Bailin (note 4 above).

[12]The taxpayer undergoes severe risks by not cooperating with an IRS agent, not the least of which is arousing the agent's suspicions and strengthening his resolve that the taxpayer has evaded taxes. Consider, for example, the following: "The agents construed plaintiff's resentment as reflecting a lack of cooperation on his part, and forthwith launched a full investigation which ultimately was extended to cover his income tax returns for the years 1945–1950." *Armstrong* v. *United States,* 354 F.2d 274, at 279 (Ct. Cl. 1965).

Alienating an agent might well result in an escalation of the sanctions imposed on a taxpayer charged with a deficiency. In this regard, the IRS is equipped with a whole arsenal of penalties, both civil and criminal, incident to tax evasion. Among the penalty provisions of the I.R.C. are:

Civil: § 6653(a): "If any part of any underpayment . . . of any tax . . . is due to negligence or intentional disregard of rules and regulations (but without intent to defraud), there shall be added to the tax an amount equal to 5 percent of the underpayment."

Civil: § 6653(b): "If any part of any underpayment . . . of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment."

Criminal: § 7203: "Any person required . . . to pay any estimated tax or tax, or required . . . to make a return . . . , keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

Criminal: § 7206: "Any person who – (1) . . . willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written dec-

laration that it is made under penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

Criminal: § 7201: "Any person who willfully attempts in any manner to evade or defeat any tax . . . or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Section 6531 of the code provides that the statute of limitations on criminal prosecutions is three years, except for certain specified offenses, including those stipulated in § 7201, § 7203, and § 7206(1), where the period of limitation is six years.

Under § 6501(c)(1), there is no statute of limitations for a civil offense where a taxpayer has filed a false or fraudulent return with intent to evade taxes, and the IRS is empowered to assess the tax, together with the 50 percent civil fraud penalty, plus interest, at any time. This also holds true in instances of willful attempts to defeat or evade a tax [§ 6501(c)(2)] and where the taxpayer has filed no return at all [§ 6501(c)(3)].

The courts have ruled that there is no violation of the constitutional prohibition against double jeopardy where the IRS has imposed the 50 percent civil fraud penalty for the same years covered by a criminal prosecution against a taxpayer, even when the criminal case has resulted in acquittal. *Helvering* v. *Mitchell,* 303 U.S. 391 (1938); *Hanby* v. *Commissioner,* 67 F.2d 125 (4th Cir. 1933); *Neaderland* v. *Commissioner,* 424 F.2d 639 (2d Cir.), *cert. denied,* 400 U.S. 827 (1970).

Additionally, where a taxpayer has been convicted of criminal tax fraud, he is collaterally estopped from denying the fraud in a civil action. *Tomlinson* v. *Lefkowitz,* 334 F.2d 262 (5th Cir. 1964), *cert. denied,* 379 U.S. 962 (1965); *Amos* v. *Commissioner,* 360 F.2d 358 (4th Cir. 1965); *United States* v. *Carlino,* 400 F.2d 56 (2d Cir. 1968), *cert. denied,* 394 U.S. 1013 (1969).

Inasmuch as the IRS possesses enormous discretionary powers with respect to tax violators in seeking redress – and in the absence of any statute of limitations on assessments for tax deficiencies, where the findings of the IRS are presumptively correct, and the imposition of civil fraud penalties – a taxpayer under audit would, in most instances, be foolhardy to refuse to comply with an agent's request for information.

For a discussion of the problem of whether or not a taxpayer should cooperate with the IRS see Joseph S. Platt, "Cooperation vs. Non-Cooperation in Tax Fraud Cases," in *New York University, Tenth Institute on Federal Taxation* (1952), 1305–18; and "Don't Cooperate With IRS Agent: Reliance on Constitutional Rights is Better Tactic," *Journal of Taxation* 6 (1957): 293–94.

[13]Richard E. Hobbet and J. Bruce Donaldson, "The IRS' Right to Examine: What and Whose Records, When and How Often," *Journal of Taxation* 15 (1961): 179.

[14]Paul P. Lipton, "The Taxpayer's Rights: Investigations of Tax Fraud Cases," *American Bar Association Journal 42* (1956): 328. See also, Harry Graham Balter, "A Ten Year Review of Fraud Prosecutions," *New York University, Nineteenth Institute on Federal Taxation* (1961), 1141–47.

[15]See, e.g., *Blumberg* v. *United States,* 222 F.2d 496 (5th Cir. 1955); *Hartman* v. *United States,* 215 F.2d. 386 (8th Cir. 1954).

[16]*Scanlon* v. *United States,* 223 F.2d 382 (1st Cir. 1955); *Holland* v. *United States,* 348 U.S. 121 (1954); *United States* v. *Altruda,* 224 F.2d 935 (2d Cir. 1955); *United States* v. *Rully,* 143 F.Supp. 283 (D.C. Conn. 1956).

Although the Supreme Court in the *Holland* case (at 134–35) suggested that the government had a duty to follow up any information respecting a taxpayer's opening

net worth, subsequent court cases have drastically limited this obligation. It has been held that such information must be furnished by the taxpayer [*Scanlon* v. *United States,* 223 F.2d 382 (1st Cir. 1955)] and that there is no duty to follow up "vague or unreliable" leads [*Kampmeyer* v. *United States,* 227 F.2d 313 (8th Cir. 1956); *Smith* v. *United States,* 236 F.2d. 260 (8th Cir. 1956); *United States* v. *Ford,* 237 F.2d 57 (2d Cir. 1956); *Mighell* v. *United States,* 233 F.2d 731 (10th Cir. 1956)]. To the extent that any information supplied by the taxpayer is checked, the duty to investigate is limited to a "reasonable" effort [*United States* v. *Penosi,* 452 F.2d 217 (5th Cir. 1971; see also *Friedman* v. *Commissioner,* 421 F.2d 658 (6th Cir. 1970)].

[17]See note 12 above.

[18]*Spies* v. *United States,* 317 U.S. 492, at 499 (1943). See also, *Helms* v. *United States,* 340 F.2d 15 (5th Cir. 1964), *cert. denied,* 382 U.S. 814 (1965).

[19]I.R.C. § 6653(a). See *Marcello* v. *Commissioner,* 43 T.C. 168 (1965).

[20]I.R.C. § 7602.

[21]Ibid. The authority to summon is not personal to the secretary of the treasury. § 7701(a)(11)(B) defines the term "Secretary" as the secretary of the treasury or his delegate, while § 7701(a)(12)(A)(i) provides that the term encompasses "any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the context." Treasury regulations designate the commissioner of internal revenue and authorized officers and employees of the Internal Revenue Service as competent to both issue and serve a summons. Regs. § 301-7602-1(b), § 301-7603-1(b). T.D. 7188, 37 F.R. 12796, June 29, 1972, as amended by T.D. 7297, 38 F.R. 84803, Dec. 19, 1973.

[22]*DeMasters* v. *Arend,* 313 F.2d 79 (9th Cir. 1963), *petition for cert. dismissed,* 375 U.S. 936 (1963); *Application of Howard,* 210 F.Supp. 301 (W.D. Pa. 1962).

[23]*United States* v. *Bisceglia,* 420 U.S. 141 (1975); *United States* v. *Powell,* 379 U.S. 48, at 57 (1964); *Falsone* v. *United States,* 205 F.2d 734 (5th Cir. 1953); cf. *United States* v. *Morton Salt Co.,* 338 U.S. 632, at 642-43 (1950); *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, at 216 (1946).

[24]The courts have ruled that any records which "might throw light" upon a taxpayer's returns are within the scope of the IRS's summons power. *Foster* v. *United States,* 265 F.2d 183, at 186-87 (2nd Cir. 1959), *cert. denied,* 360 U.S. 912 (1959). According to one authority, "the summons by an agent usually contains only a general description which describes the types of documents and the years involved in such a way as to encompass virtually every record which might be in existence relating to income and deductions." Spurgeon Avakian, "Searches and Seizures," *New York University, Seventeenth Institute on Federal Taxation* (1959), 533, n. 2.

[25]*United States* v. *Cohen,* 263 F.2d 466 (3rd Cir. 1959), *cert. denied,* 359 U.S. 989 (1959) (inspection of taxpayer's records in the hands of a congressional committee allowed); *Geniviva* v. *Bingler,* 206 F.Supp. 81 (W.D. Pa. 1961) (inspection of records in the possession of the police permitted).

[26]Jules Ritholz, "The Commissioner's Inquisitorial Powers," *Taxes—The Tax Magazine* 45 (1967): 782.

[27]The authority to summon books and records under § 7602 has been held to include the right to copy such documents. *United States* v. *Davey,* 543 F.2d 996 (2nd Cir. 1976); *Boren* v. *Tucker,* 239 F.2d 767 (9th Cir. 1957); *Riley* v. *McGarry,* 248 F.Supp. 545 (D. Mass. 1966), *aff'd,* 363 F.2d 421 (1st Cir. 1966), *cert. denied,* 385 U.S. 969 (1967).

[28]The possibility of punishment under § 7203 has been diminished by the decision

in *United States* v. *Murdock* [290 U.S. 339 (1933)]. There, the Supreme Court indicated that "willfully" meant more than simply "voluntary," and that, to constitute an offense under § 7203, refusal must have been prompted by bad faith, evil motive, or evil intent. Thus, a mere omission caused by a bona fide misunderstanding, even when intentional and without legal justification, cannot be punished under the statute. Ten years later the Court reiterated this view in *Spies* v. *United States* [317 U.S. 492 (1943)].

The definition of "willfully" supplied by the Court in *Murdock* has, at times, been considerably weakened. Thus, in *Abdul* v. *United States* [254 F.2d 292 (9th Cir. 1958), *reversed on other grounds*, 278 F.2d 234 (9th Cir. 1958), *cert. denied*, 364 U.S. 832 (1960)] it was held that the term could connote merely "voluntary" or "purposely," and, in *United States* v. *Fullerton* [189 F.Supp. 211 (D. Md. 1960)], the court ruled that "willful failure" was equivalent to "without justifiable excuse."

Generally, a good faith misconception or gross negligence of the law will suffice as a defense under § 7203 [*United States* v. *Murdock*, 290 U.S. 339 (1933); *United States* v. *Palermo*, 259 F.2d 872 (3rd Cir. 1958)], but this will not hold true where the defendant is well educated. *United States* v. *Gorman*, 393 F.2d 209 (7th Cir. 1968), *cert. denied*, 393 U.S. 832 (1968); *United States* v. *Perna*, 197 F.Supp. 853 (D. Conn. 1961) (attorneys). *United States* v. *Doelker*, 327 F.2d 343 (6th Cir. 1964); *Eustis* v. *United States*, 309 F.2d 28 (9th Cir. 1969) (certified public accountants). *United States* v. *Cirillo*, 251 F.2d 638 (3rd Cir. 1957), *cert. denied*, 356 U.S. 949 (1958) (government officials). *Pappas* v. *United States*, 216 F.2d 515 (10th Cir. 1954) (businessmen). *United States* v. *Johnson*, 386 F.2d 630 (3rd Cir. 1967) (architects). *Martin* v. *United States*, 317 F.2d 753 (9th Cir. 1963) (college graduates).

For an extensive examination of the treatment of § 7203 by the courts, see Samuel P. Orlando, "'Willfully' Under Section 7203 of the Internal Revenue Code of 1954," *Dickinson Law Review* 74 (1970): 563–98.

[29]I.R.C. § 7210. This section is rarely invoked inasmuch as the IRS normally would institute enforcement proceedings covering all instances of disobedience. No proceeding seems to have been brought under § 7210 prior to 1958, when the IRS utilized the section against a taxpayer [James D. Burroughs, "The Use of the Administrative Summons in Federal Tax Investigations," *Villanova Law Review* 9 (1964): 377]. In *United States* v. *Becker* [1 Am. Fed. Tax R. 2d 1437 (S.D. N.Y. 1958), *aff'd*, 259 F.2d 869 (2d Cir. 1958), *cert. denied*, 358 U.S. 929 (1959)], a taxpayer was found guilty of the offense in that he treated a summons in a casual manner and made no effort either to produce his books and records or to determine whether they existed. After the taxpayer had stated under oath that his records had been destroyed in a fire, the records were later produced pursuant to a grand jury subpoena. In holding the taxpayer guilty, the court stated that the defendant "willfully failed to comply with the summons with knowledge that a reasonable man should have had that he was failing to do what the summons required him to do" and that the defendant's actions constituted something more than mere inadvertence.

In *Brody* v. *United States* [243 F.2d 378, at 381 (1st Cir. 1957)], the court, in an aside, commented that a conviction under this section could be had only upon a regular criminal prosecution with the right of trial by jury. In 1964, in *Reisman* v. *Caplin* [375 U.S. 440 (1964), *aff'g* 317 F.2d 123 (D.C. Cir. 1963), *aff'g* 8 Am. Fed. Tax R. 2d 5565 (D. D.C. 1961)], the Supreme Court held that a good faith defense to a summons could not be interpreted as violating § 7210, which applied only in instances where a witness "willfully" neglects either to appear or to produce the records summoned [375 U.S. at 447 and n. 6].

[30]I.R.C. § 7402(b) and § 7604(a). The wording of these two sections is almost identical. § 7604(a) reads: "If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United

States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data."

[31]I.R.C. § 7604(b).

[32]Attachment was approved as an "appropriate process" for enforcement of a summons in *Sale* v. *United States,* 228 F.2d 682 (8th Cir. 1956), *cert. denied,* 350 U.S. 1006 (1956). The decision of the court in *Application of Colton* [291 F.2d 487 (2d Cir. 1961)] also indicates that sanctions without a prior enforcement proceeding might be appropriate in instances where summoned parties do not comply. See "Administrative Law—Judicial Control—Motion to Quash or Modify Internal Revenue Subpoena is Proper Since Criminal Penalties are Directly Imposed for Noncompliance—*Application of Colton* (2d Cir. 1961)," *Harvard Law Review* 75 (1962): 1222-25.

[33]"Internal Revenue Code Summons Enforcement and the Accountant," *Duquesne University Law Review* 2 (1964): 265-66.

[34]*Powell* v. *United States,* 279 U.S. 48 (1964), *rev'g and rem'g* 325 F.2d 914 (3rd Cir. 1963); *Reisman* v. *Caplin,* 375 U.S. 440 (1964).

[35]James D. Burroughs, "How Broad is the IRS' Authority to Investigate Your Client's Tax Returns and Records?" *Journal of Taxation* 23 (1965): 309-10.

The contempt proceeding arising out of a refusal to obey a court order directing compliance may be either civil or criminal. In instances of civil contempt the defendant is allowed the opportunity to purge himself by compliance, whereas punishment for criminal contempt is normally not conditional. In *McCrone* v. *United States* [307 U.S. 61, at 64 (1939)], the Supreme Court ruled that a conditional commitment to jail for refusal to comply with an IRS summons was a judgment of civil contempt, inasmuch as "the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public." See also *Sauber* v. *Whetstone,* 109 F.2d 520 (7th Cir. 1952). Criminal contempt proceedings are seldom invoked for noncompliance with an IRS summons but are not unknown. See, for example, *Brody* v. *United States,* 243 F.2d 378 (1st Cir. 1957). Contempt proceedings for noncompliance with an IRS summons are discussed in Paul P. Lipton, "Procedural Aspects of the Subpoena Power," *New York University, Sixteenth Institute on Federal Taxation* (1958): 1103-7.

Prior to the Supreme Court's decision in *Reisman* v. *Caplin* [375 U.S. 440 (1964)], in which the Court interpreted the meaning and scope of § 7210 and § 7604(b), an individual affected by an IRS summons faced the dilemma that no judicial review existed unless the summons were tested by a failure to comply. Failure to comply, however, occasioned the risk, on the one hand, of fine and imprisonment under § 7210, or, on the other, of arrest under § 7604(b). As a result, the lower courts had held that summoned parties were entitled to obtain an advance judicial ruling through the use of an injunction and motion to quash the summons. [*Application of Colton,* 291 F.2d 487 (2d Cir. 1961); *DeMasters* v. *Arend,* 313 F.2d 79 (9th Cir. 1963), *cert. denied,* 375 U.S. 936 (1964); *Hinchcliffe* v. *Clarke,* 205 F.Supp. 1 (N.D. Ohio 1961); *Application of Howard,* 210 F.2d 301 (W.D. Pa. 1962)]. A final determination of this question was not made until 1964, in *Reisman* v. *Caplin.* There the Supreme Court ruled that the validity of an IRS summons may be tested only in the judicial proceedings authorized by the Internal Revenue Code. Since no power existed in the IRS alone to either force compliance or to levy sanctions, a summons may not be tested by a preliminary injunction and motion to quash. The Court further ruled that a district court order compelling compliance was appealable, thus settling a conflict that had previously existed among the circuit courts. Appealable: *O'Connor* v. *O'Connell,* 253 F.2d 365 (1st Cir. 1958); *In Re Albert Lindley Lee Memorial Hospital,* 209 F.2d 122 (2d Cir. 1953); *Falsone* v. *United States,* 205 F.2d 734 (5th Cir. 1953); *Bouschor* v.

United States, 316 F.2d 451 (8th Cir. 1963); *Martin* v. *Chandis Securities Co.*, 128 F.2d 731 (9th Cir. 1942); *D. I. Operating Co.* v. *United States*, 321 F.2d 586 (9th Cir. 1963). Nonappealable: *Application of Davis*, 303 F.2d 601 (7th Cir. 1962), *judgment vacated and complaint ordered dismissed as moot*, 374 U.S. 495 (1963); *Jarecki* v. *Whetstone*, 192 F.2d 121 (7th Cir. 1951).

For a discussion of *Reisman* v. *Caplin*, see Donald J. Gavin, "Internal Revenue–Supreme Court Indicates Procedure to be Followed in Challenging the Validity of an Internal Revenue Summons," *Illinois Bar Journal* (June 1964): 874–84.

[36]P.L. 94–455, § 1205(a).

[37]I.R.C. § 7609(a)(1).

[38]I.R.C. § 7609(a)(3).

[39]I.R.C. § 7609(a)(4)(A).

[40]I.R.C. § 7609(b)(2).

[41]I.R.C. § 7609(d)(2), § 7609(b)(1).

[42]I.R.C. § 7609(e).

[43]Robert A. Warden, "Rules for Administrative Summonses Completely Revamped Under 1976 Act," *Journal of Taxation* 46 (1977): 33–34, quoting the House and Senate Committee reports on the Tax Reform Act.

[44]400 U.S. 517 (1971), *aff'g sub nom, United States* v. *Mercurio*, 418 F.2d 1213 (5th Cir. 1969).

[45]Ibid., at 529.

[46]*Federal Rules of Civil Procedure*, 24(a)(2) provides: "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

[47]*Federal Rules of Civil Procedure*, 81(a)(3) states: "These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States . . . except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings."

[48]In analyzing the *Donaldson* case, one commentator noted: "Seemingly, the district courts will have to rule on whether the materials are privileged to determine whether the taxpayer will be allowed to intervene. Such a procedure will prevent the taxpayer from appealing adverse decisions on the privileged nature of the materials." Mike Rollyson, "Criminal Tax Fraud Investigations: Limitations on the Scope of the Section 7602 Summons," *University of Florida Law Review* 114 (1972): 118, n. 28.

[49]In referring to the language of the Court in *Reisman* v. *Caplin* [375 U.S. 440 (1964)], which appeared to support the taxpayer's right to intervene in enforcement proceedings respecting third-party summonses, the Court in *Donaldson* stated: "[T]he *Reisman* language does not guarantee intervention for the taxpayer.... The language recognizes that the District Court, upon the customary showing, may allow the taxpayer to intervene. Two instances where intervention is appropriate were specified, namely, where 'the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution' or where 'it is protected by the attorney-client privilege.' Thus, the Court recognized that intervention by a taxpayer in an enforcement proceeding might well be allowed when the circumstances are proper." 400 U.S. at 529–30.

[50]"Were we to hold otherwise," the Court noted, "we would unwarrantedly cast doubt upon and stultify the Service's every investigatory move." 400 U.S. at 531.

[51]See, e.g., *United States* v. *Continental Bank and Trust Co.*, 503 F.2d 45 (10th Cir. 1974); *Scarafiotti* v. *Shea*, 456 F.2d 1052 (10th Cir. 1972); *United States* v. *Diracles*, 439 F.2d 795 (8th Cir. 1971); *United States* v. *Newman*, 441 F.2d 165 (5th Cir. 1971); *United States* v. *Lococo*, 440 F.2d 1067 (5th Cir. 1971); *United States* v. *White*, 326 F.Supp. 459 (S.D. Tex. 1971).

Taxpayers' efforts to intervene in an enforcement proceeding respecting a summons to a third party under § 7602 had been encouraged by the Supreme Court's decision in *Reisman* v. *Caplin* [375 U.S. 440 (1964)]. In that case, Mr. Justice Clark stated: "[T]he Government concedes that a witness or any interested party may attack the summons before the hearing officer. There are cases among the circuit which hold that both parties summoned and those affected by a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims.... We agree with that view...." 375 U.S. at 445. The Court then explicitly noted that "in the event the taxpayer is not a party to the summons ... he, too, may intervene." Ibid., at 449.

The courts relied on this dictum in *Reisman* in determining whether a taxpayer could rightfully intervene in a third-party summons. The Third, Sixth, and Seventh Circuits interpreted *Reisman* as conferring on the taxpayer the right to intervene and challenge any third-party summons. *United States* v. *Benford*, 406 F.2d 1192 (7th Cir. 1969); *United States* v. *Monsey*, 429 F.2d 1348 (7th Cir. 1970); *United States* v. *Bank of Commerce*, 405 F.2d 931 (3rd Cir. 1969); *Justice* v. *United States*, 365 F.2d 312 (6th Cir. 1966). The First, Second, and Fifth Circuits, on the other hand, permitted intervention only in instances where the taxpayer was able to show a definite legal privilege or a proprietary interest in the summoned records. *United States* v. *Mercurio*, 418 F.2d 1213 (5th Cir. 1969), *aff'd sub nom, Donaldson* v. *United States*, 400 U.S. 517 (1971); *O'Donnell* v. *Sullivan*, 364 F.2d 43 (1st Cir. 1966); *In re Cole*, 342 F.2d 5 (2d Cir. 1965), *cert. denied*, 381 U.S. 950 (1965).

An extensive discussion of the cases leading up to and following *Donaldson* is provided in "Taxpayer Intervention at Summary Proceedings to Enforce an Internal Revenue Service Summons," *Maryland Law Review* 32 (1972): 143-55.

[52]I.R.C. § 7602.

[53]Additionally, I.R.C. § 7605(b) in part states: "No taxpayer shall be subjected to unnecessary examination or investigation...."

[54]I.R.C. § 7603: "When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty."

[55]160 F.2d 532 (5th Cir. 1947).

[56]Ibid., at 535.

[57]*Foster* v. *United States*, 265 F.2d 183, at 186-87 (2d Cir. 1959), *cert. denied*, 360 U.S. 912 (1959). See also *United States* v. *Harrington*, 388 F.2d 520 (2d cir. 1968); *United States* v. *Shlomm*, 420 F.2d 263 (2d Cir. 1969), *cert. denied*, 397 U.S. 1074 (1970); *United States* v. *Williams*, 470 F.2d 915 (2d Cir. 1972).

[58]*United States* v. *First National Bank of Fort Smith*, 173 F.Supp. 716, at 719 (W.D. Ark. 1959). Even if the taxpayer is exempt from federal taxation, provided the materials sought by the IRS are relevant to the taxpayer's financial affairs, the courts will enforce the summons. *United States* v. *Joyce*, 498 F.2d 582 (7th Cir. 1974).

[59]"Some exploration or fishing necessarily is inherent and entitled to exist in all documentary productions." *Schwimmer* v. *United States*, 232 F.2d 855, at 862-63 (8th Cir. 1956), *cert. denied*, 352 U.S. 833 (1956).

The courts have traditionally been extremely lenient in interpreting the relevancy requirement of summonses issued by administrative agencies. The leading case is *Oklahoma Press Publishing Co.* v. *Walling* [327 U.S. 186 (1946)], in which the Supreme Court upheld enforcement of a summons duces tecum issued by the administrator of the Wage and Hour Division of the Labor Department, calling for the production of the corporate records of a newspaper. In seeking enforcement, the administrator asserted only that he believed the corporation was covered by the Fair Labor Standards Act and that the corporation might be in violation of its provisions. The Court ruled that a court order enforcing an agency summons constituted, at most, a figurative search and seizure and that the Fourth Amendment was applicable only to the extent that the disclosure sought was not unreasonable, that is, that the agency has been authorized by law to make such inquiries and that the materials sought were relevant [327 U.S. at 202].

The Court went even further in *United States* v. *Morton Salt Co.* [338 U.S. 632 (1950)]. The Federal Trade Commission issued an order directing the Morton Salt Company and other salt producers to file highly detailed periodic reports designed to assist the FTC in determining whether these producers were engaging in certain pricing, producing, and marketing practices that the FTC had earlier demanded they desist from. In the Supreme Court, the FTC admitted that no violations were suspected. Nonetheless, the Court, conceding that the FTC was engaged in a mere fishing expedition to turn up possible evidence of guilt, held that the investigative powers of administrative agencies are considerably broader than those possessed by the courts and are akin to the powers of grand juries, which "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not" [338 U.S. at 642].

An extensive discussion of the courts' treatment of the intelligence-gathering powers of administrative agencies and, in particular, the IRS, is contained in Richard S. Miller, "Administrative Agency Intelligence-Gathering: An Appraisal of the Investigative Powers of the Internal Revenue Service," *Boston College Industrial and Commercial Law Review* 6 (1965): 657–716.

[60] *United States* v. *First National Bank of Fort Smith,* 173 F.Supp. 716, at 720 (W.D. Ark. 1959). See also *First National Bank of Mobile* v. *United States,* 160 F.2d 532 (5th Cir. 1947).

[61] 379 U.S. 48 (1964).

[62] Ibid., at 57–58.

[63] Ibid., at 58.

[64] *Ibid.* An abuse of the statutory requirements is not met, the Court held, "by a mere showing . . . that the statute of limitations for ordinary deficiencies has run or that the records in question have already been once examined," even though the Internal Revenue Code appears to prevent examinations in both cases.

So extensive is the scope of the IRS's investigatory powers that the Second Circuit, relying on the provisions of a treaty with Canada, has enforced a summons for information relevant only to the taxpayer's Canadian tax liability. *United States* v. *A. L. Burbank & Co.,* 525 F.2d 9 (2d Cir. 1975), *cert. denied,* 426 U.S. 934 (1976).

[65] *Boyd* v. *United States,* 166 U.S. 616 (1886). This landmark case involved the constitutionality of a customs statute that required the compulsory production of business invoices. Under the statute, failure to produce certain designated records was to be considered an admission of the government's allegations and would lead to forfeiture of property for fraud against the federal customs laws. The Supreme Court, in suppressing the evidence thus obtained, held that the compulsory production of documents under an administrative process constituted an unreasonable

search within the meaning of the Fourth Amendment and the admission of such evidence would be tantamount to compelling the witness to testify against himself.

[66]John C. Chommie, *The Law of Federal Income Taxation,* 2d ed. (St. Paul, Minn.: West Publishing Co., 1973), pp. 857–62. A discussion of the structure of the IRS is also contained in Louis Bender, "Taxpayers' Rights in Special Investigations," *New York University, Fifteenth Institute on Federal Taxation* (1957): 1285–1308. The Audit Division is currently designated the Examination Division, and the Intelligence Division, the Criminal Investigation Division, in the commissioner's latest annual report.

[67]In 1979, almost 105,000,000 income tax returns were filed, of which 91,000,000 were individual returns. Of the more than 87,000,000 returns filed by individuals in 1978, 1,845,000 were audited, approximately 2.1 percent. *Commissioner of Internal Revenue: 1979 Annual Report* (Washington: United States Government Printing Office), pp. 4, 60.

[68]William A. Barnett, "Procedures in Tax Fraud Investigations," *Taxes—The Tax Magazine* 47 (1969): 808.

"The discovery and development of fraud cases is a normal result of effective examination. Auditing techniques developed by revenue agents, if they are to be effective, should be designed to disclose not only errors in accounting and application of tax law, but also irregularities that indicate the possibility of fraud. . . .

"Fraud. . . will not ordinarily be discovered when an agent readily accepts the completeness and accuracy of the records presented and the explanation offered by the taxpayer. The audit should not consist of a casual verification of a few of the items listed on the return. To discover fraud it is usually necessary to go behind the books and to probe beneath the surface. Just when an agent should use these techniques, how far he/she should follow them, and how far he/she should extend his/her examination will depend on the agent's judgment in a particular case." *The Audit Technique Handbook for Internal Revenue Agents,* p. 4231-126, § (10)71 [9-13-79], "Discovery and Development of Fraud Cases."

The Audit and Technique Handbook details what activities should be regarded as suspicious:

"The first symptoms alerting the agent to the possibility of fraud will frequently be provided by the taxpayer. His/her conduct during the examination and his/her method of doing business may be symptomatic of improper returns being filed. The agent should look for the following regarding the possibility of fraud.

"(a) Repeated procrastination on the part of the taxpayer in making and keeping appointments with the agent for the examination.

"(b) Uncooperative attitude displayed by not complying with requests for records and not furnishing adequate explanations for discrepancies or questionable items. . . .

"(k) Using currency instead of bank accounts. . . .

"(n) Hasty agreement to adjustments and undue concern about immediate closing of the case may indicate a more thorough examination is needed." Ibid., p. 4231-128, § (10)75 [8-30-76], "Attitude and Conduct of Taxpayer."

[69]Ibid., p. 4231-132, § (10)92 [8-30-76], "Referral Report."

[70]"A joint investigation is a mutual undertaking by Audit and Intelligence to establish all pertinent facts for determining the taxpayer's correct tax liability, his/her liability for civil penalties, and whether criminal prosecution should be initiated against him/her. Its success depends upon the close cooperation between the cooperating agent and the special agent. . . .

"Since a joint investigation is a team effort, many of the duties and responsibilities of the revenue agent and the special agent will overlap. It is not possible to clearly define all of the Audit and Intelligence Divisions' responsibilities in joint investiga-

tions. This is due to the many criminal charges that may be attached to taxpayers' actions involving Audit activities and the varying nature of criminal investigations made by Intelligence in such matters." Ibid., p. 4231-134, § (10)95.1 [8-30-76], "Joint Investigations: General."

[71] See Steven Duke, "Prosecutions For Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid," *Yale Law Journal* 76 (1966): 1–76, and, William H. Ise, "The Relationship Between Civil and Criminal Tax Fraud and Its Effect on the Taxpayer's Constitutional Rights," *Boston College Industrial and Commercial Law Review* 12 (1971): 1176–99.

[72] 118 F.Supp. 248 (D. Mass. 1953).

[73] *Federal Rules of Criminal Procedure,* rule 16(c) excludes from discovery by the government all internal documents prepared by an attorney or his agent, together with statements made by the accused, his attorney or agent. In certain instances, the court may permit government discovery of books and records provided like discovery is permitted on behalf of the accused.

[74] 118 F.Supp. at 251. See also *Application of Myers,* 202 F.Supp. 212 (E.D. Pa. 1962). The Supreme Court, in *Abel* v. *United States* [362 U.S. 217 (1960)], seems to have supported the position announced in the *O'Connor* case, at least in the abstract. Although the Court held that the record did not support the defendant's contention that the Immigration and Naturalization Service had served as a tool for the FBI in building a criminal prosecution for espionage, it did reaffirm the principle that the administrative process may not properly be used as an instrument of criminal law enforcement. The Court stated: "The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts. The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States." 362 U.S. at 226.

[75] 239 F.2d 767 (9th Cir. 1956).

[76] See, e.g., *Howfield, Inc.* v. *United States,* 409 F.2d 694 (9th Cir. 1969); *McGarry* v. *Riley,* 363 F.2d 421 (1st Cir. 1966); *United States* v. *Ruggeiro,* 300 F.Supp. 968 (C.D. Cal. 1969), *aff'd,* 425 F.2d 1069 (9th Cir. 1970), *cert. denied,* 401 U.S. 922 (1971).

In *United States* v. *Rutland Hospital, Inc.* [320 F.Supp. 583 (D. Vt. 1970)], IRS agents sought a number of hospital records indicating the names of patients who had been treated by the taxpayer. In summoning the records, the IRS did not indicate whether the investigation was civil or criminal. The taxpayer's request for discovery was denied on the ground that the motives of the IRS in seeking the records were not relevant.

[77] 245 F.2d 284 (3rd Cir. 1957), *cert. denied,* 355 U.S. 819 (1957).

[78] Ibid., at 286.

[79] 400 U.S. 517 (1971), *aff'g* 418 F.2d 1213 (5th Cir. 1970).

[80] Decisions before *Donaldson* had held that the line should be drawn at the indictment stage [*United States* v. *Monsey,* 429 F.2d 1348 (7th Cir. 1970)] or after a criminal prosecution had already begun [e.g., *Wild* v. *United States,* 362 F.2d 206 (9th Cir. 1966)].

[81] A third-party summons issued after indictment of the taxpayer had been approved in *United States* v. *Mercurio,* 418 F.2d 1213 (5th Cir. 1969). An IRS summons has been held enforceable even if the sole purpose of the summons is to uncover crime. See, e.g., *United States* v. *Erdner,* 422 F.2d 835 (3rd Cir. 1970); *Howfield, Inc.* v. *United States,* 409 F.2d 694 (9th Cir. 1969).

[82] In *Reisman* v. *Caplin* [375 U.S. 440, at 449 (1964)], the Supreme Court had stated in

dictum that an administrative summons may be challenged on the grounds that "the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution." The Court in *Donaldson* made clear that this dictum was applicable only to situations where there was a pending criminal charge or, at most, an investigation solely for criminal purposes [400 U.S. at 533].

[83]See also *United States* v. *Couch,* 309 U.S. 322 (1973); *United States* v. *Hansen Niederhauser Co.,* 522 F.2d 1037 (10th Cir. 1975); *United States* v. *Theodore,* 479 F.2d 749 (4th Cir. 1973); *United States* v. *Weingarden,* 473 F.2d 454 (6th Cir. 1973); *United States* v. *Egenberg,* 443 F.2d 512 (3rd Cir. 1971); *United States* v. *Troupe,* 438 F.2d 117 (8th Cir. 1971). Even in instances where the only government agent involved in a tax investigation is a special agent, a determination that the summons is being employed solely for the purpose of aiding a criminal prosecution will not be reached in the absence of further evidence. See *United States* v. *Fisher,* 500 F.2d 683 (3rd Cir. 1974), *aff'd,* 425 U.S. 391 (1976). See also *United States* v. *Stribling,* 437 F.2d 765 (6th Cir. 1971). In *United States* v. *Cleveland Trust Co.* [474 F.2d 1234 (6th Cir. 1973)], the court held that an IRS summons issued pursuant to an investigation by the Justice Department's strike force to investigate organized crime was enforceable.

[84]*United States* v. *Wall Corp.,* 475 F.2d 893 (D.C. Cir. 1972).

[85]*United States* v. *Couch,* 409 U.S. 322 (1973); *United States* v. *Cromer,* 483 F.2d 99 (9th Cir. 1973); *United States* v. *White,* 477 F.2d 757, *aff'd en banc,* 487 F.2d 1335 (5th Cir. 1973); *United States* v. *Weingarden,* 473 F.2d 454 (6th Cir. 1973); *United States* v. *Lyons,* 442 F.2d 1144 (1st Cir. 1971). The Second Circuit, however, interpreted *Donaldson* as laying down an objective standard focusing solely on the question of whether a recommendation for prosecution had been made. *United States* v. *Morgan Guaranty Trust Co.,* 572 F.2d 36 (2nd Cir. 1978).

[86]*United States* v. *Lafko,* 520 F.2d 622 (3rd Cir. 1975). See also *United States* v. *McCarthy,* 514 F.2d 368 (3rd Cir. 1975); *United States* v. *Friedman,* 532 F.2d 928 (3rd Cir. 1976).

[87]437 U.S. 298 (1978), *rev'g and rem'g* 554 F.2d 302 (7th Cir. 1977). This case is discussed at length in Michael Saltzman, "Supreme Court's *LaSalle* Decision Makes It Harder to Successfully Challenge a Summons," *Journal of Taxation* 49 (1978): 130–35.

[88]437 U.S. at 300.

[89]Ibid., at 304.

[90]554 F.2d 302, at 309 (7th Cir. 1977).

[91]437 U.S. at 316–17. In addition, the Court indicated that the IRS must meet the good faith standards set forth in *United States* v. *Powell,* 379 U.S. 48 (1964).

[92]437 U.S. at 309. It is interesting to compare the Court's argument in *LaSalle* to Mr. Justice Cardozo's dissent in *Jones* v. *Securities and Exchange Commission* [298 U.S. 1 (1936)] forty-two years earlier. In that case the Court ruled that the SEC did not have general authority to carry on investigations to determine whether any criminal laws had been violated. The commission had issued a subpoena for the purpose of investigating alleged misstatements in a registration statement. The Supreme Court, reversing an order directing compliance with the subpoena, held that the commission's authority ended at the point the registration statement was withdrawn on the return date of the subpoena and declared that the grand jury abides "as the appropriate constitutional medium for the preliminary investigation of crime and the presentment of the accused for trial." [Ibid., at 27.] To this argument, Mr. Justice Cardozo replied: "The objection is inadequate that an investigation directed to the discovery of a crime is one not for the Commission, but for the prosecuting officer. There are times when the functions of the two will coincide or overlap. Congress has made it plain that any inquiry helpful in the enforcement of the statute may be

pursued by the Commission, though conduct punishable as a crime may thereby be uncovered. Indeed . . . a witness is not excused from testifying on the ground that the testimony required of him may tend to incriminate him. . . ." [Ibid., at 31.]

[93]In *United States* v. *Hodgson* [492 F.2d 1175 (10th Cir. 1974)], the court held that information sought by the IRS was not for use solely in a criminal prosecution, despite the fact that the taxpayer had been before the court on four charges of criminal offenses and had a default judgment rendered against him for unpaid taxes. See also *United States* v. *Zack,* 375 F.Supp. 825 (D. Nev. 1974). In that case, the court refused to enforce a summons when a search warrant was issued prior to the issuance of a summons, inasmuch as a search warrant is issued only upon a showing of probable cause that a crime has been committed. The Ninth Circuit, however, reversed and remanded the case [521 F.2d 1366 (9th Cir. 1975)], arguing that the search warrant was only one factor to be reviewed in determining whether a summons was issued solely for a criminal investigation. See also *United States* v. *Church of Scientology of California,* 510 F.2d 818 (9th Cir. 1975), in which the court claimed that the record did not support allegations of harassment.

[94]I.R.C. § 6501(a) provides in part that "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) . . . and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period."

[95]*Farmers & Mechanics National Bank of Philadelphia* v. *United States,* 11 F.2d 348 (3rd Cir. 1926); *Pacific Mills* v. *Kenefick,* 21 F.Supp. 925 (D. Mass. 1938), *rev'd* 99 F.2d 188 (1st Cir. 1938); *Moraine Hotel Co.* v. *United States,* 41 F.2d 725 (7th Cir. 1930).

[96]See, for example, *Norda Essential Oil & Chemical Co., Inc.* v. *United States,* 230 F.2d 764 (2d Cir. 1956), *cert. denied,* 351 U.S. 964 (1956). In that case, the IRS sought to examine the taxpayer's books and records for the years 1950 and 1951, years for which tax liability had previously been fully examined and settled, for the purpose of determining the propriety of certain depreciation deductions claimed on the 1952 return. The statute of limitations had already run for 1950 and 1951, but the court held that examination of closed years for the purpose of assessing an open year was legitimate. See also *Falsone* v. *United States,* 205 F.2d 734 (5th Cir. 1953), *cert. denied,* 346 U.S. 864 (1953); *United States* v. *United Distillers Products Corp.,* 156 F.2d 872 (2d Cir. 1946), *aff'g* 64 F.Supp. 978 (D. Conn. 1946).

[97]356 F.2d 664 (5th Cir. 1966).

[98]I.R.C. § 6501(e)(1)(A) provides that "if the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed." See John C. Chommie, p. 929 (note 66, above), for a discussion of this provision.

[99]156 F.2d 872 (2d Cir. 1946), *aff'g* 64 F.Supp. 978 (D. Conn. 1946).

[100]Ibid., at 874. See also *Simmons* v. *Tolley,* 64-1 USTC 9281 (D. Ind. 1964), *aff'd per curiam,* 340 F.2d 604 (7th Cir. 1965).

[101]I.R.C. § 6501(c) provides:

"(1) False Return—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

"(2) Willful Attempt to Evade Tax—In the case of a willful attempt in any manner to defeat or evade tax imposed by this title . . ., the tax may be assessed, or a pro-

ceeding in court for the collection of such tax may be begun without assessment, at any time.

"(3) No Return – In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

The absence of a statute of limitations in civil fraud cases has provided the IRS with a particularly potent weapon and has resulted in some startling cases. See, for example, *Reuben D. Silliman,* 11 T.C.M. 921, 12 T.C.M. 707, *aff'd sub nom, Silliman* v. *Commissioner,* 220 F.2d 282 (2d Cir. 1955), *cert. denied,* 350 U.S. 828 (1955). In 1952, when Silliman was seventy-seven years old, the Internal Revenue Service assessed deficiencies against him for the years 1924 and 1926. The IRS calculated the deficiency at $235,000, but with the addition of the civil fraud penalty of 50 percent and accrued interest over twenty-eight years at 6 percent, the total assessment came to $732,000. Silliman, formerly a judge of the Territory of Hawaii and at one time a judge on the Hawaiian Tax Appeal Court, moved to New York in 1905, where he practiced law. He had filed tax returns for 1924 and 1926 and in both years was audited by the Bureau of Internal Revenue, as the IRS was then called. The controversy with the IRS surrounded whether a certain portion of the fees charged two clients during the years in question could legitimately be classed as gifts. The maximum fee that attorneys were then permitted to charge when representing a client before the office of the alien property custodian was 3 percent of the value of the property recovered. Silliman claimed that he was not prepared to handle such cases for less than 13 percent and that agreements reached with each of the two clients provided that an additional 10 percent was to be made over to Silliman in the form of gifts. Silliman further claimed that this arrangement was discussed with officials and auditors of the Bureau of Internal Revenue, who informed him that, as gifts, the additional 10 percent payments were not taxable. In 1952, when the IRS charged Silliman with a tax deficiency for these years, the principals involved in the case were either dead or unavailable and Silliman had, long before, destroyed his records covering the period. The tax court found for the IRS and this judgment was sustained by the Second Circuit. Thus, despite his having been audited at the time, the IRS over a quarter of a century later was able to successfully prosecute a civil tax fraud suit against Silliman.

The absence of a statute of limitations for civil fraud cases even permits the IRS to assess the civil penalty against a taxpayer's estate. See *Estate of Louis L. Briden,* 11 T.C. 1095 (1948), *aff'd sub nom, Kirk* v. *Commissioner,* 179 F.2d 619 (1st Cir. 1950).

[102]379 U.S. 48 (1964).

[103]253 F.2d 365 (1st Cir. 1958).

[104]Ibid., at 370.

[105]Ibid. The court further held that its decision was "in accord with the limitations upon the inquisitorial powers of government which have become traditional in this country. We agree with Judge Moscowitz' statement in In Re Brooklyn Pawnbrokers, Inc. . . . that 'to permit the government to examine as to statute barred years upon a mere conclusory allegation of fraud is to deprive the taxpayer of that freedom from unreasonable harassment which he has a right to expect under a democratic form of government.'"[Ibid.]

[106]265 F.2d 183 (2nd Cir. 1959), *cert. denied,* 360 U.S. 912 (1959).

[107]Ibid., at 187.

[108]The First Circuit reaffirmed the probable cause requirement in *Lash* v. *Nighosian* [273 F.2d 185 (1st Cir. 1959), *cert. denied,* 362 U.S. 904 (1960)], and the same test was applied by the Third Circuit in *United States* v. *Powell* [325 F.2d 914 (3rd Cir. 1964), *rev'd and rem'd,* 379 U.S. 48 (1964)]. On the other hand, the Fifth Circuit appears to

have rejected a probable cause standard. In *Globe Construction Co.* v. *Humphrey* [229 F.2d 148 (5th Cir. 1956)], the court held that a revenue agent's affidavit alleging fraud was sufficient to require judicial enforcement of an IRS summons for records barred by the statute of limitations. The standard was also rejected by the Sixth Circuit in *Peoples Deposit Bank & Trust Co.* v. *United States* [212 F.2d 86 (6th Cir. 1954), *cert. denied,* 348 U.S. 838 (1954)], *Eberhart* v. *Broadrock Development Corp.* [296 F.2d 685 (6th Cir. 1961), *cert. denied,* 369 U.S. 871 (1961)], *Corbin Deposit Bank* v. *United States* [244 F.2d 177 (6th Cir. 1957)], and *United States* v. *Ryan* [320 F.2d 500 (6th Cir. 1963)].

The Fourth Circuit, in *Wall* v. *Mitchell* [287 F.2d 31 (4th Cir. 1961)], stated in dictum that "a bona fide suspicion of fraud justifies the investigation of appropriate records," but found it unnecessary to resolve the difference in view among the circuit courts. The Ninth Circuit, in *DeMasters* v. *Arend* [313 F.2d 79, at 90 (9th Cir. 1963)], held that the only question for the court was whether the IRS's decision to investigate was reached "as a matter of rational judgment based on the circumstances of the particular case." Thus, despite a district court's finding that the IRS had no reasonable grounds or probable cause to suspect fraud, the Ninth Circuit reversed an order enjoining an examination of barred years. The court thus reversed itself from the position it had earlier taken in *Boren* v. *Tucker* [239 F.2d 767 (9th Cir. 1956)] and in *Martin* v. *Chandis Securities Co.* [128 F.2d 731 (9th Cir. 1942)], where it had required a showing of probable cause for enforcement of an IRS summons for time-barred years.

[109]379 U.S. 48 (1964).

[110]325 F.2d 914 (3rd Cir. 1963).

[111]Ibid., at 916.

[112]I.R.C. § 7605(b) provides that "no taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary, after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

[113]379 U.S. at 52 (1964).

[114]Ibid., at 53.

[115]For a discussion of *Powell,* see Robert H. Feldman, "Federal Income Taxation–Examination of Records–Government May Examine 'Closed' Years for Fraud Without Showing Probable Cause for Suspicion–*United States* v. *Powell,*" *Arizona Law Review* 7 (1965): 143–48. See also James E. Fahey and David W. Gray, "Supreme Court Extends IRS' Power in Fraud Investigations to Examine 'Closed' Years," *Journal of Taxation* 22 (1965): 102–4.

The decision in *Powell* was taken one step further in *United States* v. *Wozniak* [381 F.2d 764, at 765 (6th Cir. 1967)]; there the Sixth Circuit held that the affidavit of a revenue agent accompanying a summons issued for a closed year need not even allege suspicion of fraud but need only state that the examination is necessary in order to ascertain the correctness of the taxpayer's returns.

[116]I.R.C. § 6531. The penalty and statute of limitations provisions of the Internal Revenue Code are presented in note 12, above.

[117]I.R.C. § 7201; emphasis added.

[118]344 U.S. 43 (1952). See also *United States* v. *Sclafani,* 126 F.Supp. 654 (S.D. N.Y. 1954), 265 F.2d 408 (2d Cir. 1959), *cert. denied,* 360 U.S. 918 (1959). In this case, the taxpayer was prosecuted for false statements made subsequent to the filing of a return on which the six-year period of limitation had expired. The trial court noted that "it is correct to say that prosecution for the alleged crime of attempted evasion of

taxes by the filing of false tax returns was outlawed in 1954, but it was possible for the defendant to violate the statute in more than one way and on more than one occasion, and that is precisely what the government accuses the defendant of doing." 126 F.Supp. 654, at 656 (S.D. N.Y. 1954).

Both the *Beacon Brass* and *Sclafani* cases are treated at length in "The Statute of Limitations for Tax Evasion: The Possibilities of Circumvention by Administrative Procedures," *Northwestern University Law Review* 55 (1960): 97–110.

[119]See Mr. Justice Douglas's dissent in *United States* v. *Powell,* 379 U.S. 48, at 58–59 (1964).

[120]I.R.C. §7605(b), quoted in note 112, above. The legislative history of this section is discussed in *United States* v. *Powell,* 379 U.S. 48, at 54–56 (1964).

[121]379 U.S 48(1964). The Court's treatment of this section is discussed at page 240, above.

[122]One commentator has argued that this interpretation is the only one consistent with the intent of Congress in passing § 7605(b):

"The legislative history of section 7605 reveals that Congress was concerned with a very specific meaning of unnecessary. The legislators were interested in protecting taxpayers from harassment by barring repeated examinations without basis. This limitation was first passed in the Revenue Act of 1921, and House and Senate reports indicate that the provision was conceived in response to complaints received from taxpayers that they had been subjected to 'onerous and unnecessarily frequent' investigations. Since the fourth amendment's prohibition against unreasonable searches and seizures protects the taxpayer from onerous or oppressive examinations, it would appear that section 7605 has survived solely to guard against harassment in the form of unnecessarily frequent examinations." "IRS Re-examination of Records Held Unnecessary Absent Proof of Fraud After Statute of Limitations Has Run," *New York University Law Review* 39 (1964): 880.

[123]*United States* v. *Baker,* 451 F.2d 352 (6th Cir. 1971); *O'Connor* v. *Commissioner,* 26 T.C.M. 820, *aff'd in part, rev'd in part,* 412 F.2d 304 (2d Cir. 1969), *cert. denied,* 397 U.S. 921 (1970); *Rife* v. *Commissioner,* 356 F.2d 883 (5th Cir. 1966); *Lessmann* v. *Commissioner,* 327 F.2d 990 (8th Cir. 1964); *Cefalu* v. *Commissioner,* 17 T.C.M. 155 (1958), *aff'd,* 276 F.2d 122 (5th Cir. 1960); *United States* v. *O'Connor,* 237 F.2d 466 (2d Cir. 1956); *Glassell* v. *Commissioner,* 42 F.2d 653 (5th Cir. 1930); *United States* v. *Florida,* 252 F.Supp. 806 (E.D. Ark. 1965); *United States* v. *Young,* 215 F.Supp. 202 (E.D. Mich. 1963); *Parsons* v. *Commissioner,* 43 T.C. 378 (1964); *Flynn* v. *Commissioner,* 40 T.C. 770 (1962).

[124]54 F.2d 168 (Ct. Cl. 1931).

[125]348 F.2d 485 (Ct. Cl. 1965), *cert. denied,* 382 U.S. 1009 (1970).

[126]521 F.2d 491 (6th Cir. 1975), *cert. denied,* 423 U.S. 1017 (1975). In *Rife, Jr.* v. *Commissioner* [41 T.C. 732, at 751 (1964), *aff'd in part, rev'd in part,* 356 F.2d 883 (5th Cir. 1966)], the Tax Court refused to consider the question of the invalidity of a deficiency assessment determined in violation of § 7605(b), holding that the taxpayer, by submitting his records to the IRS, had shown consent to the examination. But in the concurring opinion of Judge Bruce, the minority went further and stated that the violation of the statute does not invalidate the deficiency determined. The Tax Court, in *Collins* v. *Commissioner* [61 T.C. 693, at footnote 4 (1974)] indicated in dictum that it viewed with favor that failure to comply with § 7605(b) does not invalidate a deficiency.

[127]The only exception seems to be where the taxpayer is unaware of the second examination of his books and records and has not been notified of such examination by the IRS. See *United States* v. *Young,* 215 F.Supp. 202 (E.D. Mich. 1963).

For an analysis of the courts' treatment of § 7605(b), see Philip J. Erbacher, "Does Section 7605(b) Create a Right Without a Remedy in a Civil Tax Refund Proceeding?" *Journal of Taxation* 38 (1973): 172–76.

[128]In *In re Paramount Jewelry Co.* [80 F.Supp. 375 (S.D. N.Y. 1948)], the IRS had made several examinations of the taxpayer's books and records over a two-year period. Despite this, the IRS issued a summons for yet another examination. The taxpayer sought to quash an order enforcing the summons on the grounds that no notice had been issued. The court granted the taxpayer's motion but specifically ruled that the IRS could proceed to serve the taxpayer with the required notice and then proceed to examine the taxpayer's records once again.

[129]*United States* v. *Crespo,* 281 F.Supp. 928 (D. Md. 1968); *United States* v. *Schwartz,* 469 F.2d 977 (5th Cir. 1972), *rev'g and rem'g* 332 F.Supp. 820 (N.D. Ga. 1971); *United States* v. *Moriarity,* 311 F.Supp. 144 (E.D. Wis. 1969), *aff'd,* 435 F.2d 347 (7th Cir. 1970); *United States* v. *Kendrick,* 518 F.2d 842 (7th Cir. 1975) (excise tax); *United States* v. *Williams,* 381 F.Supp. 492 (S.D. Ala. 1974); *Gambino* v. *United States,* 386 F.Supp. 566 (E.D. N.Y. 1974).

[130]See, for example, *National Plate & Window Glass Co.* v. *United States,* 254 F.2d 92 (2d Cir. 1958), *cert. denied,* 358 U.S. 822 (1958); *United States* v. *Bell,* 448 F.2d 40 (9th Cir. 1971); *Hall* v. *Commissioner,* 50 T.C. 186 (1968); *United States* v. *Giordano,* 419 F.2d 564 (8th Cir. 1969), *cert. denied,* 397 U.S. 1037 (1970).

[131]*Hall* v. *Commissioner,* 406 F.2d 706 (5th Cir. 1969); *United States* v. *Bank of Commerce,* 405 F.2d 931 (3rd Cir. 1969); *United States* v. *Dawson,* 400 F.2d 194 (2d Cir. 1968), *cert. denied,* 393 U.S. 1023 (1969); *Hinchfield* v. *Clarke,* 371 F.2d 697 (6th Cir. 1967), *cert. denied,* 387 U.S. 941 (1967); *United States* v. *Howard,* 360 F.2d 373 (3rd Cir. 1966); *Guerkink* v. *United States,* 354 F.2d 629 (7th Cir. 1965); *Bouschor* v. *United States,* 316 F.2d 451 (8th Cir. 1963); *In re Magnus,* 299 F.2d 335 (2d Cir. 1962), *cert. denied,* 370 U.S. 918 (1962); *United States* v. *Crespo,* 281 F.Supp. 928 (D. Md. 1968).

See also "How Well Are Taxpayers Protected Against Unnecessary Tax Examinations?" *Journal of Taxation* 26 (1967): 299–303.

[132]313 F.2d 79 (9th Cir. 1963), *cert. denied,* 375 U.S. 936 (1963).

[133]See, for example, *Bouschor* v. *United States,* 316 F.2d 451 (8th Cir. 1963).

[134]*Guerkink* v. *United States,* 354 F.2d 629 (7th Cir. 1965); *In re Magnus, Mabee & Reynard, Inc.,* 311 F.2d 12 (2d Cir. 1962), *cert. denied,* 373 U.S. 902 (1962).

[135]*Hubner* v. *Tucker,* 245 F.2d 35 (9th Cir. 1957).

[136]*United States Constitution,* Amendment IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

[137]Norman Redlich, "Searches, Seizures, and Self-Incrimination in Tax Cases," *Tax Law Review* 10 (1954): 202.

[138]Gersham Goldstein, Robert L. Lofts, and James E. Fahey, *IRS Procedures—Production of Documents* (T.M. 123-3rd; Washington, D.C.: Tax Management, Inc., 1978), p. A-28.

[139]5 F.Supp. 608 (S.D. N.Y. 1934).

[140]Ibid., at 611.

[141]5 F.Supp. 413 (D. N.J. 1933).

[142]Thus, in *United States* v. *Armour* [376 F.Supp. 318 (D. Conn. 1974)], a summons requiring several banks to reveal the names and addresses of certain trust beneficiaries was enforced when there was a showing that the beneficiaries had participated in a transaction that had tax consequences.

Similarly, the courts have enforced summonses against stockbrokers [e.g., *In re Keegan,* 18 F.Supp. 746 (S.D. N.Y. 1937)] and even stenographers. Thus, in *Stone* v. *Frandle* [89 F.Supp. 222 (D. Minn. 1950)], a summons was enforced against a stenographer, whose own tax liability was not in question, to produce notes taken at an arbitration hearing. The court there held that the notes must be produced whether or not they were related to any books of account of the taxpayer under investigation.

[143]*In re Albert Lindley Lee Memorial Hospital,* 209 F.2d 122 (2d Cir. 1953). The court held that "the public interest in the collection of taxes owing by a taxpayer outweighs the private interest of the patient to avoid embarrassment resulting from being required to give the revenue agent information as to fees paid the attending physician." Ibid., at 124.

[144]160 F.2d 532 (5th Cir. 1947).

[145]Ibid., at 534.

[146]232 F.2d 855 (8th Cir. 1956), *cert. denied,* 352 U.S. 833 (1956).

[147]Ibid., at 863. The court noted that "some exploration or fishing necessarily is inherent and entitled to exist in all documentary productions." Ibid., at 862–63. The same reasoning, that the IRS, in order to fulfill its purpose, must be permitted to engage in "some fishing," was offered by the court in *United States ex rel. Sathre* v. *Third Northwestern National Bank,* 102 F.Supp. 879, at 881 (D. Minn. 1952).

[148]379 U.S. 48 (1964).

[149]See Richard S. Miller, "Administrative Agency Intelligence-Gathering," pp. 689–93 (note 59 above).

[150]338 U.S. 632 (1950).

[151]379 U.S. at 57 (1964).

[152]P.L. 94–455, § 1205(a); I.R.C. § 7609(f). The section provides that "any summons . . . which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that–

"(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

"(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

"(3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources."

[153]420 U.S. 141 (1975), *rev'g* 486 F.2d 706 (6th Cir. 1973). The facts in the *Bisceglia* case are these: A commercial bank made two separate deposits within a ten-day period to a branch of the Federal Reserve Bank, each of which contained 200 hundred-dollar bills. The hundred-dollar bills were old and showed signs of severe deterioration. These cash deposits were reported by the Federal Reserve Bank to the Intelligence Division of the IRS, and the special agent in charge of the investigation issued a "John Doe" summons to the commercial bank demanding that the bank produce any books and records that would provide information as to the identity of the depositor of the disintegrating hundred-dollar bills.

[154]420 U.S. at 149.

[155]Robert S. Fink, "Supreme Court's *Bisceglia* Decision: How Sweeping a Mandate for 'John Doe' Summons," *Journal of Taxation* 42 (1975): 300. The implications of the *Bisceglia* case are also discussed in R. Donald Mastry, "*Bisceglia* and *Humble Oil:* A

New Era in Internal Revenue Service Summonses," *Florida Bar Journal* 50 (1976): 311–14.

[156]420 U.S. at 151.

[157]*Senate Report No. 938,* 94th Cong., 2d sess. (Washington, D.C.: Government Printing Office, 1976): 373–74.

[158]116 U.S. 616 (1886).

[159]Ibid., at 633.

[160]232 U.S. 383 (1914).

[161]*Federal Rules of Criminal Procedure,* rule 41(e) states: "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated as a motion to suppress under Rule 12."

The opinion in *Weeks* provided that the Fourth Amendment exclusionary rule did not bind state officers in pursuit of their police activities. The evolution of the *Weeks* rule and its eventual application to state courts is discussed in Louis J. DeReuil, "Applicability of the Fourth Amendment in Civil Cases," *Duke University Law Journal* (1963): 472–87:

"Federal officers, in order to obviate the requirement of procuring a search warrant, would enlist the assistance of a state officer who would then procure evidence in a wrongful or illegal fashion. Such evidence, under the *Weeks* case interpretation, would be admissible in federal court prosecutions. The employment of such unfair tactics led to the evolution of the 'participation doctrine.' Where overt participation between state and federal authorities was established, such evidence, procured as a result of an illegal search and seizure, was excluded in federal court prosecutions. The trend toward constitutional protection was extended in *Rea* v. *United States* [350 U.S. 214 (1956)] which held that evidence illegally seized and suppressed in federal court could not be turned over to state authorities for state prosecution on the theory that federal courts had the right of exercise of authority over their own officers.

"In *Wolf* v. *Colorado* [338 U.S. 25 (1949)], the Supreme Court held that in a prosecution in a state court for a state crime, the fourth amendment prohibits unreasonable searches and seizures by state officers but that the due process clause of the fourteenth amendment did not forbid the admission of relevant evidence even though obtained by an unreasonable search and seizure. Thus, in *Wolf* the Supreme Court decided that the *Weeks* exclusionary rule would not be imposed upon the states which were free to admit or exclude such evidence.

"Where state officers made a search and seizure not for the purpose of aiding in prosecution of the federal offense, the results of said seizure, however prosecuted, could then be turned over to federal authorities for prosecution in the federal courts. Where evidence was improperly obtained by state officers and presented on a silver platter to federal officials for use in a federal prosecution, some courts held such evidence admissible and other courts held it inadmissible. The difference in federal interpretations concerning the silver platter doctrine was ultimately decided by the Supreme Court of the United States in *Elkins* v. *United States* [364 U.S. 206 (1960)] in which the Court, in overruling *Weeks,* repudiated the silver platter doctrine where evidence legally obtained by state officers without federal participation or cooperation was held inadmissible in a federal court prosecution.

"In the recent revolutionary decision of *Mapp* v. *Ohio* [367 U.S. 643 (1961)], which

amplified the *Wolf* rule that the fourteenth amendment incorporated the fourth amendment, the Supreme Court held that all evidence obtained by search and seizure by state officials in violation of the fourth amendment is inadmissible in a criminal trial in the state court. Thus, *Mapp* put 'teeth' in the fourteenth amendment by requiring extension of the federal exclusionary rule to the states. The law is now well established that any and all evidence procured by either state or federal officials as a result of an illegal or unreasonable search and seizure in violation of the constitutional rights of an accused is inadmissible in a criminal trial in a federal or state court inasmuch as the federal exclusionary rule is now an essential part of both the fourth and fourteenth amendments." Ibid., at 474–75.

Despite the extension of the exclusionary rule to state officers in *Mapp*, it has been held that evidence obtained by state officers in violation of state law is admissible for federal income tax purposes! See *United States* v. *Scolnick*, 392 F.2d 320 (3rd Cir. 1968), *cert. denied*, 392 U.S. 931 (1968); *United States* v. *Silverman*, 449 F.2d 1341 (2d Cir. 1971), *cert. denied*, 405 U.S. 918 (1972); *United States* v. *Balistrieri*, 436 F.2d 1212 (7th Cir. 1971), *cert. denied*, 402 U.S. 953 (1971); *United States* v. *Schipani*, 414 F.2d 1262 (2d Cir. 1969), *cert. denied*, 397 U.S. 922 (1969).

[162]See "Constitutional Aspects of Federal Tax Investigations," *Columbia Law Review* 57 (1957): 676–99. In *United States* v. *Grosso* [358 F.2d 154 (3rd Cir. 1966), *aff'g* 225 F.Supp. 161 (W.D. Pa. 1964)], the Third Circuit held that evidence that had been illegally seized from a third party could be introduced to impeach a taxpayer's testimony.

[163]See, for example, *Turner* v. *United States*, 222 F.2d 926 (4th Cir. 1955), *cert. denied*, 350 U.S. 831 (1955); *Grant* v. *United States*, 291 F.2d 227 (2d Cir. 1961); *Greene* v. *United States*, 296 F.2d 841 (2d Cir. 1961); *Kohatsu* v. *United States*, 351 F.2d 898 (9th Cir. 1965), *cert. denied*, 384 U.S. 1101 (1966); *United States* v. *Squeri*, 398 F.2d 785 (2d Cir. 1968); *United States* v. *Stamp*, 458 F.2d 759 (D.C. Cir. 1971); *United States* v. *Robson*, 477 F.2d 13 (9th Cir. 1973), *cert. denied*, 420 U.S. 927 (1975). In *United States* v. *Spomar* [339 F.2d 941 (7th Cir. 1965), *cert. denied*, 380 U.S. 975 (1965)], the court noted that "even though defendant may not have been aware of his constitutional rights . . . we hold his subjective lack of knowledge of such rights did not serve to vitiate the voluntary surrender of his records. . . ." (339 F.2d at 943.)

[164]265 F.2d 408 (2d Cir. 1959), *cert. denied*, 360 U.S. 918 (1959).

[165]Ibid., at 414–15.

[166]430 F.2d 1042 (5th Cir. 1970), *cert. denied*, 400 U.S. 943 (1970).

[167]Ibid., at 1044.

[168]See also *United States* v. *Bland*, 458 F.2d 1 (5th Cir. 1972), *cert. denied*, 409 U.S. 843 (1973).

[169]209 F.2d 657 (1st Cir. 1954).

[170]*Brownson* v. *United States*, 32 F.2d 844 (8th Cir. 1929); *First National Bank* v. *United States*, 295 Fed. 142 (D. Ala. 1924), *aff'd*, 267 U.S. 576 (1925).

In *Perkal* v. *Rayunac* [237 F.Supp. 102 (N.D. Ill. 1964)] a taxpayer sought to intervene on grounds of protecting his rights against unreasonable search and seizure and self-incrimination in an IRS action to compel a bank to produce its records pertaining to the taxpayer. The court concluded that the taxpayer had no right of intervention in an action directed at a third party to produce records not belonging to the taxpayer.

[171]327 U.S. 186 (1946).

[172]Ibid., at 208.

[173]362 U.S. 257 (1960). See also *Alderman* v. *United States,* 394 U.S. 165 (1969); *Wong Sun* v. *United States,* 371 U.S. 471 (1962).

[174]P.L. 91-508, 84 Stat. 1114 (1970).

[175]425 U.S. 435 (1976).

[176]Ibid., at 438.

[177]500 F.2d 751 (5th Cir. 1974).

[178]425 U.S. at 443. The *Miller* case is discussed at length in Terry Philip Segal, "Supreme Court: Fourth Amendment Does Not Bar Subpoena of Taxpayer's Bank Records," *Journal of Taxation* 45 (1976): 80-81.

[179]541 F.2d 1370 (9th Cir. 1976).

[180]*Scarafiotti* v. *Shea,* 456 F.2d 1052 (10th Cir. 1972).

[181]400 U.S. 517 (1971).

[182]See page 232, above.

[183]*House of Representatives Report No. 658,* 94th Cong., 2d sess. (Washington, D.C.: Government Printing Office, 1976): 309. "The noticee will not be permitted to assert as defenses to enforcement issues which only affect the interests of the third-party recordkeeper. . . ."

[184]"Challenging the Tax Summons: Procedures and Defenses," *William and Mary Law Review* 19 (1978): 784.

[185]The IRS manual states: "The importance of bank records to Intelligence investigators and the rapid changes in banking procedures being brought about by automation, make it highly desirable for management officials in the field to meet with and get to know banking officials personally. The objective of such actions is to improve relationships with these officials and to open channels of communication beneficial to both parties." *Internal Revenue Handbook* 5 (1977): 28,188, § 937(12).

[186]526 F.2d 400 (5th Cir. 1976).

[187]Ibid., at 402. This finding appears inconsistent both with the Supreme Court decision in *California Bankers Association* v. *Schultz* [416 U.S. 21 (1974)] and with the intent of Congress in passing the Tax Reform Act. In *California Bankers Association,* the Supreme Court, in upholding the constitutionality of the reporting and record-keeping provisions of the Bank Secrecy Act, held that the record-keeping requirement did not violate the Fourth Amendment because mere compulsory maintenance of records without any attendant requirement of disclosure did not constitute a search and seizure [416 U.S. at 52-54].

The House report on the Tax Reform Act appears to prohibit informal access to third-party records without notification to the taxpayer: "In cases where noticees do exercise their right to request noncompliance, the Service is not to seek to inspect the books or records subject to the summons unless the Service first goes into Court and obtains an order, against the third-party recordkeeper, for enforcement of its summons." *House Report* (note 183, above), at p. 308.

[188]*United States* v. *Tsukuno,* 341 F.Supp. 839 (N.D. Ill. 1972); *United States* v. *Finley,* 434 F.2d 596 (5th Cir. 1970); *United States* v. *Kansas City Lutheran Home & Hospital Association,* 297 F.Supp. 239 (W.D. Mo. 1969); *United States* v. *Jaskiewicz,* 278 F.Supp. 525 (E.D. Pa. 1968), *aff'd,* 433 F.2d 415 (3rd Cir. 1970); *Baldridge* v. *United States,* 281 F.Supp. 470 (S.D. Tex. 1968), *vac'd, and rem'd,* 406 F.2d 526 (5th Cir. 1969); *United States* v. *Threlkeld,* 241 F.Supp. (W.D. Tenn. 1965).

The leading case respecting whether an accountant-client privilege exists in tax cases is *Falsone* v. *United States* [205 F.2d 734 (5th Cir. 1953), *cert. denied,* 346 U.S. 864 (1953)]. Falsone, a Florida accountant, was issued a summons to produce docu-

ments and to testify on matters relevant to two of his clients. He appeared but refused both to testify or to surrender any documents, arguing that a Florida statute creating an accountant-client privilege was controlling. The district court directed the accountant to obey the summons and the accountant's motion to vacate the order and quash the summons was denied. The Fifth Circuit affirmed, holding that state rules of evidence were not applicable to proceedings before the IRS and could not be applied by the court in a proceeding to enforce its summons. The court agreed that the *Federal Rules of Civil Procedure* [Rule 43(a)] provides that state law governs questions of privilege, but held that they applied solely to judicial proceedings and not to the administrative proceeding under § 7602 of the Internal Revenue Code.

The question of an accountant-client privilege was touched on by the Supreme Court in *United States* v. *Couch* [409 U.S. 322 (1973), *affg* 449 F.2d 141 (4th Cir. 1971)], where the Court, in an aside, noted: "Although not in itself controlling, we note that no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases" [Ibid., at 335].

[189]313 F.Supp. 442 (S.D. N.Y. 1970).

[190]409 U.S. 322 (1973).

[191]Ibid., at 335–36. The Fourth Amendment aspects of *Couch* are discussed in "Constitutional Law—Taxation: A Taxpayer Who Has Demonstrably Relinquished Possession of Her Financial Books and Records to an Accountant Cannot Prevent Enforcement of a Summons Directed to the Accountant for Production of Such Records by Invoking Her Right to Privacy and Privilege Against Self-Incrimination," *Brooklyn Law Review* 40 (1973): 211–26; R. David Lester, "*Couch* v. *United States:* The Supreme Court Takes a Fresh Look at the Attorney-Client Privilege—Or Does It?" *Kentucky Law Journal* 62 (1973): 263–77.

[192]See, for example, *United States* v. *Cleveland Trust Co.* [474 F.2d 1234 (6th Cir. 1973)] where the court held that there was no reasonable expectation of privacy respecting a financial report submitted by a taxpayer to a trust company in order to obtain a loan. In *Andersen* v. *Internal Revenue Service* [371 F.Supp. 1278 (D. Wyo. 1974)] it was held that there was no recognizable bank-customer privilege that might allow for a Fourth Amendment claim. In *United States* v. *Bremicker* [365 F.Supp. 701 (D. Minn. 1973)] the court, analogizing to the Supreme Court's rejection of an accountant-client privilege in *Couch,* rejected a bank's claim that there existed a confidential relationship between a depositor and the bank.

[193]In *Jarecki* v. *Whetstone* [82 F.Supp. 367 (N.D. Ill. 1948)] the IRS brought suit to enforce a subpoena duces tecum issued to a taxpayer to appear with her records disclosing her financial condition and to testify respecting collection of her 1944 tax liability. The taxpayer raised her Fourth Amendment right against unreasonable search and seizure but the court rejected her argument. The Fourth Amendment, it held, was applicable only in protecting a citizen against an oppressive, unreasonable, and inquisitorial investigation, but nothing contained in the terms of the summons was held to violate the taxpayer's constitutional guarantees.

"The taxpayer's constitutional protection against unreasonable search and seizure," one commentator has noted, "is probably co-extensive with his rights under section 7605(b) . . . which bars 'unnecessary examination or investigations.'" Norman Redlich (note 137, above).

[194]251 U.S. 385 (1920).

[195]Ibid., at 392. See also *Wong Sun* v. *United States,* 371 U.S. 471 (1962); *Nardone* v. *United States,* 308 U.S. 338 (1939); *United States* v. *Sheba Bracelets, Inc.,* 248 F.2d 134 (2d Cir. 1957).

[196]222 F.2d 926 (4th Cir. 1955), *cert. denied,* 350 U.S. 831 (1955).

[197]132 F.Supp. 519 (E.D. N.Y. 1955).

[198]223 F.Supp. 684 (D. Mass. 1964).

[199]344 F.2d 416 (1st Cir. 1965).

[200]*McGarry* v. *United States,* 388 F.2d 862 (1st Cir. 1968).

[201]Henry, Lord Brougham, *Historical Sketches of Statesmen Who Flourished in the Time of George III,* 3 vols. (London and Glasgow: Richard Griffin & Co., 1958), 1:42.