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NOTES

CHALLENGING THE TAX SUMMONS: PROCEDURES AND DEFENSES

The investigatory powers of the Internal Revenue Service (IRS) include the authority to summon an individual, his records, or any third party having custody of his records.¹ The taxpayer, in turn, may resist disclosure of his records or other information by challenging the summons either on procedural or substantive grounds.

The Tax Reform Act of 1976 has added significantly to the taxpayer's protection against enforcement of a summons.² Thus, he now is afforded the benefit of notice and the right to intervene under most circumstances, as for example, if a third party in possession of the taxpayer's records is ordered to relinquish them. Moreover, particularly if the taxpayer challenges the propriety of the summons, he may obtain discovery of relevant agency material under

1. I.R.C. § 7601(a) provides that:

The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owing or having care and management of any objects with respect to which any tax is imposed.

I.R.C. § 7602 provides that:

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax . . . or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for the tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

See *United States v. Bisceglia*, 420 U.S. 141, 145 (1975).

2. Specifically, § 1205 of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (1976), requires that certain procedures be followed in issuing summonses to third-party record holders.

the Federal Rules of Civil Procedure and the Freedom of Information Act (FOIA).³ Finally, the taxpayer may assert substantive defenses to enforcement of the summons, including noncompliance by the IRS with the investigative prerequisites, infringement of privileged attorney-client communications, and violation of the taxpayer's constitutional right to privacy.⁴

This Note will canvass the processes of summons issuance and enforcement and discuss the procedures for resistance available to the taxpayer. In particular, it will examine the discovery procedures available to a summoinee under the Federal Rules of Civil Procedure and the FOIA, as well as the substantive defenses assertible against summons enforcement. The protection guaranteed by the fourth and fifth amendments will be evaluated in an attempt to reconcile the interest of the government in devising a fair and expeditious system for enforcing the revenue laws and that of the individual in protecting the privacy of his records.

PROCEDURES FOR TAXPAYER RESISTANCE OF THE TAX SUMMONS

Background: Summons Resistance Prior to the 1976 Tax Reform Act

A taxpayer under IRS investigation must be served with a summons at least ten days prior to the date of examination.⁵ Once served, he must appear before a hearing officer at the time and place designated in the summons, subject to a fine of up to \$1000, a year in jail, or both for noncompliance.⁶ The taxpayer, however, may

3. 5 U.S.C. § 552(a)(3) (1970). For the text of that provision, see note 40 *infra*.

4. The fundamental conflict between the government's interest in enforcing revenue laws and the individual's right to privacy inheres in IRS investigations. Often, the information sought by the IRS was disclosed to third parties with the understanding that it would remain confidential, and, thus, IRS summonses threaten the very foundation of this relationship. For example, the predicament of the bank depositor was articulated by the court in *Burrows v. Superior Court*, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974): "[A bank] depositor reveals many aspects of his personal affairs, opinions, habits and associations. Indeed, the totality of bank records provides a virtual current biography. . . . [These are included in] papers which the customer has supplied to the bank . . . upon the reasonable assumption that the information would remain confidential." *Id.* at 248, 529 P.2d at 596, 118 Cal. Rptr. at 172.

5. I.R.C. § 7605(a). Service of the summons is made through Commissioner-designated IRS personnel who either hand deliver an attested copy of the summons to the summoinee or leave it at the taxpayer's last and usual place of abode. I.R.C. § 7603.

6. I.R.C. § 7210. *See, e.g., United States v. Becker*, 259 F.2d 869 (2d Cir. 1958). These sanctions are applicable only if the summoinee either wholly defaults or contumaciously

appear and still interpose a good faith refusal to comply.⁷

Confronted with a taxpayer's refusal to comply, the IRS may seek judicial enforcement of the summons in the district court for the district in which the taxpayer resides or can be found.⁸ Although the enforcement hearings are governed by the Federal Rules of Civil Procedure,⁹ in practice, the district courts have considerable discretion regarding the Rules' application;¹⁰ therefore, some pretrial procedures used routinely in civil litigation may be unavailable to a summoinee.¹¹ Also, although in the adversary enforcement pro-

refuses to comply and cannot be imposed if a good faith defense is interposed. *Reisman v. Caplin*, 375 U.S. 440 (1974). Even assuming that without good reason the taxpayer disobeys, the hearing officer does not have the power to enforce the summons. *Id.*

7. *Reisman v. Caplin*, 375 U.S. 440, 447 (1974); cf. *FPC v. Metropolitan Edison Co.*, 304 U.S. 375, 386-87 (1938) (equating summoinee's neglect with willful noncompliance).

If the summons is issued directly to the taxpayer rather than to the third-party record holder, the former may force the IRS to institute enforcement proceedings merely by refusing to comply. See, e.g., *Callahan v. First Pa. Bank*, 422 F. Supp. 1098 (E.D. Pa. 1976). Should the summons be issued to the third-party record holder, however, the taxpayer must intervene to prevent compliance by the third party. See generally *Warden, Rules For Administrative Summonses Completely Revamped Under 1976 Act*, 46 J. TAX. 32 (1977).

8. I.R.C. §§ 7604(a), 7402(b) provide that:

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.

9. Fed. R. Civ. P. 81(a)(3) provides, in pertinent part:

[The Federal Rules of Civil Procedure] . . . 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 under any statute 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.

Id. (emphasis supplied). See also *Donaldson v. United States*, 400 U.S. 517, 528 (1971); *United States v. McCarthy*, 514 F.2d 368, 372-73 (3d Cir. 1975).

10. Regarding the procedure to be followed in bringing an enforcement action, the Supreme Court stated that the "proceedings are instituted by filing a complaint, followed by an answer and a hearing." *United States v. Powell*, 397 U.S. 48, 58 n.18 (1964). The courts have construed procedural requirements loosely, however, upholding proceedings instituted by the mere filing of a petition followed by an order to show cause. See, e.g., *United States v. McCarthy*, 514 F.2d 368 (3d Cir. 1975); *United States v. Bell*, 448 F.2d 40 (9th Cir. 1971); *United States v. Newman*, 441 F.2d 165 (5th Cir. 1971); *United States v. Gajewski*, 419 F.2d 1088 (8th Cir. 1969); *McGarry's, Inc. v. Rose*, 344 F.2d 416 (1st Cir. 1965); *United States v. Zimmerman*, 415 F. Supp. 1380 (W.D. Tex. 1976). In *Newman* the court approved this abbreviated procedure, calling it an "effective and appropriate procedural tool. Indeed, it harmonizes procedure with the substantive principle that puts the burden on the summoned party . . ." 441 F.2d at 169.

11. *United States v. Ruggerio*, 300 F. Supp. 968, 972 (C.D. Cal. 1969), *aff'd*, 425 F.2d 1069 (9th Cir. 1970), *cert. denied sub nom. Kyriaco v. United States*, 401 U.S. 922 (1971). Under

ceedings¹² the taxpayer may protest the agency's action before the court,¹³ the IRS, nevertheless, is still in the more advantageous position; it need not show probable cause for the issuance of a summons,¹⁴ and the taxpayer has the burden of proving the noncompliance with formal summons requirements.¹⁵ Moreover, until passage of the Tax Reform Act of 1976, only under limited circumstances could a taxpayer object to the compelled disclosure of records held by third parties such as banks, accountants, and attorneys.

Even under the new Act, the summonee may not initiate an action to challenge the summons but must await the enforcement hearing, if sought by the IRS.¹⁶ Unable to enjoin enforcement,¹⁷ the

Rule 81(a)(3), which specifies that the Federal Rules of Civil Procedure are applicable "except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings", the district court has considerable discretion in applying the Federal Rules of Civil Procedure in enforcement hearings. *United States v. Church of Scientology*, 520 F.2d 818, 821 (9th Cir. 1975). See also note 24 *infra*.

12. *Reisman v. Caplin*, 375 U.S. 440, 446 (1974); *Donaldson v. United States*, 400 U.S. 517, 524, 526 (1971). In *Reisman* Justice Clark wrote that "[a]ny enforcement action under . . . [section 7604(a) of the Internal Revenue Code] would be an adversary proceeding affording a judicial determination of the challenges to the summons and giving complete protection to the witness." 375 U.S. at 446.

13. The taxpayer contesting enforcement, however, has no right to a jury trial. *United States v. Brooks*, 76-1 U.S. Tax Cas. (CCH) ¶ 9327 (D.S.C. 1976); *Kennedy v. Rubin*, 254 F. Supp. 190 (N.D. Ill. 1966).

14. *United States v. Powell*, 379 U.S. 48, 51 (1964).

15. See *United States v. Newman*, 441 F.2d 165 (5th Cir. 1971).

16. See notes 17-18 *infra*.

17. *Kelley v. United States*, 503 F.2d 93 (9th Cir. 1974); *Farnham v. Schwab*, 76-2 U.S. Tax Cas. (CCH) ¶ 9547 (S.D. Tex. 1976). The courts disagree as to the grounds for denying injunctive or declaratory relief in a pre-enforcement hearing. In *Farnham v. Schwab*, *supra*, the court denied injunctive relief because the suit was barred by the doctrine of sovereign immunity. I.R.C. § 7421 expressly prohibits the courts from entertaining a suit "for the purpose of restraining the assessment or collection of any tax," which includes actions to enjoin enforcement of a § 7602 summons. 28 U.S.C. § 2201 (as amended 1976) specifically precludes declaratory relief in cases involving federal taxes. *Accord*, *United States v. Dema*, 544 F.2d 1373 (7th Cir. 1976).

Other courts have disagreed with the decision in *Farnham*, holding that I.R.C. § 7421 does not preclude courts from entertaining suits to enjoin § 7602 summons, in that such suits do not have as their purpose the restraint of assessment or collection. See *Bowser v. First Nat'l Bank*, 390 F. Supp. 834 (D. Md. 1975); *Cook v. United States*, 387 F. Supp. 1103 (D. Nev. 1974); *Kirschenbaum v. Beerman*, 376 F. Supp. 398 (W.D. Pa. 1974); *Hoopes v. IRS*, 33 A.F.T.R.2d (P-H) 74-1233 (D. Utah 1973). Some courts have entertained suits for injunctive relief under 28 U.S.C. § 1340 (1970), granting federal district courts jurisdiction of any civil action arising under any act of Congress that provides for internal revenue, although usually such relief is denied on the merits. See, e.g., *Cook v. United States*, 387 F. Supp. 1103 (D. Nev. 1974). Whether 28 U.S.C. § 2201 (as amended 1976) bars declaratory relief in such a

taxpayer also is precluded from bringing a damages action¹⁸ or a proceeding against the judge or official ordering enforcement.¹⁹ Notwithstanding the clear potential for abuse of the summons procedure, the courts have denied taxpayers injunctive relief against harassment by IRS agents.²⁰ Thus, unscrupulous agents could issue a series of summonses without seeking enforcement but forcing the taxpayer to appear at repeated hearing examinations or risk severe penalties for nonappearance.²¹ This harassment ultimately could coerce the taxpayer either to disclose his records, despite the existence of a bona fide defense, or to settle a collateral dispute prematurely. Awarding injunctive relief in such situations would be not only equitable but also consistent with Congress' expressed intention to curb abuse of the summons power.²²

Discovery under the Federal Rules of Civil Procedure

Although the taxpayer's substantive defense to compliance with an IRS summons may be grounded on misconduct or harassment by the issuing agents,²³ his ability to substantiate these allegations during enforcement hearings may be impaired by the courts' exercise of their discretionary authority. In the interest of expeditious summons enforcement, the district courts may suspend or restrict the discovery procedures sanctioned by the Federal Rules.²⁴ Further-

case currently is unclear. Compare *Calvin v. Alexander*, 36 A.F.T.R.2d (P-H) 75-5946 (N.D. Ind. 1975) with *Hoopes v. IRS*, 33 A.F.T.R.2d (P-H) 74-1233 (D. Utah 1973).

18. *Farnham v. Schwab*, 76-2 U.S. Tax Cas. (CCH) ¶ 9547 (S.D. Tex. 1976).

19. *United States v. Zimmerman*, 415 F. Supp. 1380 (W.D. Tex. 1977).

20. See *United States v. Dema*, 544 F.2d 1373 (7th Cir. 1976) (Markey, J. dissenting); *Dickerson v. Conrad*, 274 F. Supp. 881 (D. Alas. 1967) (no relief prior to summons). Whether injunctive relief is available to prevent harassment by the issuance of repeated summonses if enforcement has been denied once is unclear. In such a case, the doctrine of res judicata is no bar to a second summons. *United States v. Malnik*, 489 F.2d 682 (5th Cir. 1974).

21. See note 6 *supra* & accompanying text.

22. I.R.C. § 7605(b), in an attempt to limit harassment, requires a revenue agent to obtain authorization from his superior prior to issuing a summons for a second examination of the taxpayer's records. See notes 138, 139 *infra*.

23. *United States v. Powell*, 379 U.S. 48, 57-58 (1964).

24. Rule 81(a)(3) of the Federal Rules of Civil Procedure allows the district court substantial discretion to suspend or limit discovery in the interest of expeditious summons enforcement proceedings. See *United States v. Turner*, 480 F.2d 272, 275 (7th Cir. 1973); accord, *United States v. Wright Motor Co.*, 536 F.2d 1090, 1095 (5th Cir. 1976); *United States v. Church of Scientology*, 520 F.2d 818, 824 (9th Cir. 1975); *United States v. Bell*, 448 F.2d 40, 42 (9th Cir. 1971); *United States v. Bowman*, 435 F.2d 467, 469 (3d Cir. 1970); *United States v. Salter*, 432 F.2d 697, 700-01 (1st Cir. 1970); cf. *Kennedy v. Rubin*, 254 F. Supp. 190 (N.D.

more, to even obtain pretrial discovery, the taxpayer must go beyond merely alleging improper purposes²⁵ and demonstrate specific evidence of IRS misconduct in the summons issuance.²⁶ In explaining the rationale for placing the burden of proof on the taxpayer prior to permitting discovery, the Court of Appeals for the First Circuit stated:

A broad discovery order puts the Internal Revenue Service under a severe handicap in conducting a civil investigation. Broad discovery can be expected to cause extensive delays and to jeopardize the integrity and effectiveness of the entire investigation. Coupled with these considerations is the fact that taxpayers have been almost uniformly unsuccessful in proving an "improper purpose" defense.²⁷

Although the United States Courts of Appeals agree that discovery prior to an enforcement hearing should be denied unless the taxpayer sustains his burden of proof, disagreement exists regarding the necessary degree of proof. In weighing the taxpayer's need to substantiate a claim of IRS misconduct against the government's desire to expedite tax collection,²⁸ the Fifth Circuit concluded in *United States v. Roundtree*²⁹ that discovery should be permitted when "the IRS's purpose . . . has been put in issue and may affect the legality of the summons The district court has authority

Ill. 1966) (ordering discovery without discussing court's prerogative to exercise discretion). For the text of Rule 81(a)(3), see note 9 *supra*.

25. *United States v. Church of Scientology*, 520 F.2d 818, 824 (9th Cir. 1975) (discovery denied when mere allegation of pressure to settle collateral dispute); *United States v. National State Bank*, 454 F.2d 1249, 1252 (7th Cir. 1972) (possibility of obtaining evidence of criminal acts through use of civil summons not evidence of bad faith); *United States v. Salter*, 432 F.2d 697, 700 (1st Cir. 1970) (discovery granted if, after questioning agent, a substantial question exists regarding the legitimacy of the government's purpose).

26. Under the rule in *Brady v. Maryland*, 373 U.S. 83 (1963), the government may be required by due process to provide the defense with any information that may affect the credibility of the government's evidence, *Levin v. Katzenbach*, 363 F.2d 287 (D.C. Cir. 1966), or that may be of "effective use" to the defendant. *Giles v. Maryland*, 386 U.S. 66, 74 (1967). The Freedom of Information Act, 5 U.S.C. § 552 (as amended 1974), also may assist the defendant in securing records. However, the exceptions to the Act, together with the expense and delay inherent in a collateral suit should the IRS resist disclosure, limit the effectiveness of this tool. See *Bray, Production of Documents and Seizure of Evidence*, 32 N.Y.U. INST. ON FED. TAX. 1223, 1244-47, 1249-50 (1974).

27. *United States v. Salter*, 432 F.2d 697, 700-01 (1st Cir. 1970).

28. *United States v. Wright Motor Co.*, 536 F.2d 1090 (5th Cir. 1976).

29. 420 F.2d 845 (5th Cir. 1969).

to curtail the deposition if it is conducted unreasonably."³⁰

The Courts of Appeals for the First and Third Circuits permit limited discovery at the outset of an enforcement hearing.³¹ Adopting a procedure suggested by the IRS, the First Circuit in *United States v. Salter*³² stated that the district court should allow the taxpayer to cross-examine at the hearing the agent who issued the challenged summons. By observing the agent as he testifies, the court is better able to determine whether further discovery is necessary.³³ The Ninth Circuit also has endorsed this procedure, although that court suggested an alternative method whereby the taxpayer could obtain a separate pretrial hearing on the issue of discovery.³⁴

Apparently extending its former position,³⁵ the Fifth Circuit recently proposed the most liberal of the discovery standards, permitting a summoned taxpayer to depose the issuing agent upon only an allegation of a substantial deficiency in the summons procedures.³⁶ In contrast to the First Circuit, which requires the taxpayer to present evidence of IRS impropriety,³⁷ the Fifth Circuit in *United States v. Wright Motor Co.*³⁸ stated that a taxpayer who merely alleges that the IRS has summoned him for an improper purpose should be entitled to investigate that purpose through deposition of the agent.³⁹

30. *Id.* at 852 (footnote and citations omitted). See *United States v. Church of Scientology*, 520 F.2d 818 (9th Cir. 1975).

31. The procedures adopted by the First and Third Circuits are similar. Compare *United States v. McCarthy*, 514 F.2d 368 (3d Cir. 1975) with *United States v. Salter*, 432 F.2d 697 (1st Cir. 1970).

32. 432 F.2d 697 (1st Cir. 1970).

33. *Id.* at 700. Several courts have denied discovery if the summonee had the opportunity to cross-examine the summoning agent at the enforcement hearing. See, e.g., *United States v. Interstate Tool and Eng'r Corp.*, 526 F.2d 59, 62 (7th Cir. 1975); *United States v. National State Bank*, 454 F.2d 1249, 1252 (7th Cir. 1972); *United States v. Bell*, 448 F.2d 40, 42 (9th Cir. 1971); *United States v. Bowman*, 435 F.2d 467, 469 (3d Cir. 1970); *United States v. Rosinsky*, 37 A.F.T.R.2d (P-H) 76-678, 76-679 (M.D.N.C. 1976). In contrast, at least one court has permitted limited discovery after the IRS stymied the summonee's efforts to prepare an adequate defense by calling only a single revenue agent to testify, thus subverting a principal function of the enforcement hearing. *United States v. Lomar Discount Ltd.*, 61 F.R.D. 420, 423 (N.D. Ill. 1973).

34. *United States v. Church of Scientology*, 520 F.2d 818, 824-25 (9th Cir. 1975).

35. As articulated in *United States v. Roundtree*, 536 F.2d 1090 (5th Cir. 1969), the Fifth Circuit permitted discovery if the IRS's purpose in issuing the summons had been contested. See notes 29 & 30 *supra* and accompanying text.

36. *United States v. Newman*, 441 F.2d 165, 169 (5th Cir. 1971).

37. *United States v. Salter*, 432 F.2d 697, 700 (1st Cir. 1970).

38. 536 F.2d 1090 (5th Cir. 1976).

39. *Id.* at 1094.

Because the enforcement of a summons may implicate the taxpayer's fourth amendment right against unreasonable search and seizures, the Fifth Circuit's approach is a proper application of its discretionary authority over the discovery process. Although the IRS need not show probable cause to gain enforcement of its summons,^{39.1} certain minimum procedural and substantive requirements should be met if the search and seizure is to be reasonable within the meaning of the fourth amendment. In recognition of this constitutional dimension to judicial enforcement of an allegedly unlawful summons, the courts should afford the taxpayer a reasonable opportunity not only to demonstrate any impropriety but to discover whether such illegal conduct has occurred. The possible delay and inconvenience to the IRS does not outweigh the taxpayer's right to be secure from unreasonable searches and seizures. Therefore, if the propriety of the summons has been challenged, liberal discovery subject to close judicial scrutiny should be permitted.

Discovery under the Freedom of Information Act

The Freedom of Information Act (FOIA)⁴⁰ was not intended for use as a discovery tool;⁴¹ the summoned taxpayer, however, may invoke its provisions to obtain relevant agency materials to substantiate his claim of impropriety. Requiring governmental agencies to

The Sixth Circuit has held that if the taxpayer has established the need for pretrial discovery and has obtained an order, the discovery process cannot be terminated without a hearing. *United States v. Kessler*, 474 F.2d 995 (6th Cir. 1973). At least one court has required that the defendant either forego discovery or disclose to the government all documents, reports, and objects he intends to produce at the enforcement hearing. *United States v. Whiteside*, 391 F. Supp. 1385 (D. Del. 1975).

39.1. *United States v. Powell*, 379 U.S. 48, 51 (1964).

40. 5 U.S.C. § 552(a)(3) (1970) provides in part that "each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person." See generally *Bray, Production of Documents and Seizure of Evidence*, 32 N.Y.U. INST. ON FED. TAX. 1223 (1974).

41. *United States v. Whiteside*, 391 F. Supp. 1385 (D. Del. 1975). The FOIA is not intended to benefit private litigants beyond the right of access to public records common to the general public. *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 23 (1974). Moreover, if the taxpayer is being investigated for criminal activity, the FOIA may exempt the information being sought. See, e.g., *New England Medical Center Hosp. v. NLRB*, 548 F.2d 377 (1st Cir. 1976); *Roger J. Au & Son, Inc. v. NLRB*, 538 F.2d 80 (3d Cir. 1976); *Title Guarantee Co. v. NLRB*, 534 F.2d 484 (2d Cir. 1976); *Electri-flex Co. v. IRS*, 412 F. Supp. 698, 702 (N.D. Ill. 1976); *Williams v. IRS*, 345 F. Supp. 591 (D. Del. 1972).

disclose certain documents to private citizens upon request or to publish those documents in the Federal Register, the FOIA was designed to subject agency action to public scrutiny⁴² and to provide public access to some governmental records.⁴³ If an agency fails to comply with a request for information, suit may be brought to compel disclosure,⁴⁴ with the burden on the agency to justify its refusal.⁴⁵

A litigant need not exhaust other discovery mechanisms to obtain agency disclosure under the FOIA,⁴⁶ but the FOIA in no way enlarges the class of materials discoverable under the civil and criminal rules of procedure.⁴⁷ Although a suit to compel agency disclosure has priority on the docket,^{47.1} courts have refused to stay pending civil or criminal litigation in which the requested information is to be used.^{47.2} Moreover, certain exceptions⁴⁸ to the disclosure requirement limit the Act's effectiveness as a tool for discovery in tax summons cases.⁴⁹ Exemption five, for example, permits the agency to withhold inter- or intra-agency memoranda that normally would be privileged in a civil discovery context.⁵⁰ Similarly, exemption

42. *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

43. *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973).

44. *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974).

45. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973); *Kanter v. IRS*, 433 F. Supp. 812 (N.D. Ill. 1977).

46. *Hawkes v. IRS*, 467 F.2d 787, 792 n.6 (6th Cir. 1972).

47. *United States v. Murdock*, 548 F.2d 599, 602 (5th Cir. 1977) (criminal proceeding); *New England Medical Center Hosp. v. NLRB*, 548 F.2d 377 (1st Cir. 1976) (civil proceeding); *Title Guarantee Co. v. NLRB*, 534 F.2d 484, 491-92 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976) (civil proceeding); *Kanter v. IRS*, 433 F. Supp. 812 (N.D. Ill. 1977) (criminal proceeding).

47.1. 5 U.S.C. § 552(4) (1970).

47.2. *Fruehauf Corp. v. Thornton*, 507 F.2d 1253 (6th Cir. 1974); *Kanter v. IRS*, 433 F. Supp. 812 (N.D. Ill. 1977). *See also* *EPA v. Mink*, 410 U.S. 73 (1973); *United States v. Murdock* 548 F.2d 599 (5th Cir. 1977).

48. These exemptions include material made secret under executive order for national defense or foreign policy reasons, material relating only to internal personnel rules and practices, matters specifically exempted by statute, trade secrets, commercial or financial information which is confidential, inter-agency or intra-agency memoranda available only to a party in litigation with the agency, information, the disclosure of which would constitute an invasion of privacy, investigatory files compiled for law enforcement purposes, and reports for the use of an agency responsible for supervision of financial institutions. 5 U.S.C. § 552(b)(1)-(8) (1970). *See generally* *Bray, Production of Documents and Seizure of Evidence*, N.Y.U. INST. ON FED. TAX. 1223, 1244-45 (1974).

49. *See* note 41 *supra*.

50. Under exemption five, pre-decisional communications are treated as the attorney's work-product. The Supreme Court previously had recognized an attorney's work-product exemption. *Hickman v. Taylor*, 329 U.S. 495 (1947). The Act, however, makes no exception

seven excludes from the Act investigatory records compiled for law enforcement purposes.⁵¹ The latter exemption is intended to prevent prejudice to the government by earlier or greater access to investigative files than would have been available to a litigant under discovery rules.⁵²

Although exemptions to the FOIA are to be construed narrowly,⁵³ they nevertheless reduce the effectiveness of the Act as a means of discovery. These exceptions to disclosure as well as the potential delay in bringing a suit to compel disclosure should the IRS refuse to comply at the outset suggest that the summoned taxpayer is able to obtain no greater information from filing an FOIA request than he can from instituting civil discovery procedures.

for final agency dispositions. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975). According to the rationale of the Court in *Sears*, "Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5 . . ." *Id.* See also *Chamberlain v. Alexander*, 37 A.F.T.R.2d 76-1176, 1178 (S.D. Ala. 1976).

51. *Kanter v. IRS*, 433 F. Supp. 812, 819 (N.D. Ill. 1977). 5 U.S.C. § 552(b)(7) (1970) provides that:

(b) This section does not apply to matters that are—(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

Law enforcement purposes include those relating to both civil and criminal enforcement. *Williams v. IRS*, 345 F. Supp. 591, 593 (D. Del. 1972). See also Joint Conference Report No. 93-1200, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6291-92, indicating that the Conferees intended to include both law enforcement and other agencies in the phrase "by an agency".

52. See note 47 *supra* and accompanying text.

53. *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976); *Washington Research Project, Inc. v. HEW*, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). In *Marathon Le Tourneau Co., Marine Div. v. NLRB*, 414 F. Supp. 1074, 1079 (D. Miss. 1976), the court found immaterial the plaintiff's alleged need for the information to prepare a defense. It defined the issue instead as whether the plaintiff, as an "average member of the public," was entitled to the information.

TAX SUMMONSES AND THE TAX REFORM ACT OF 1976

*Third-Party Summonses**Procedural Considerations*

IRS summonses may be issued either to a taxpayer under investigation or to third parties, such as banks, attorneys, and accountants, having possession or control of records bearing on the taxpayer's liability.⁵⁴ Prior to the Tax Reform Act of 1976, the Code did not require either the IRS or the third party to inform the person being investigated that a summons had been issued or obeyed.⁵⁵ Unless the taxpayer somehow was apprised of the agency's action, then, he was unable to challenge the legitimacy of third-party summonses, even though he may have justifiable objections to the summons. Furthermore, as illustrated by the Supreme Court's 1971 decision, *Donaldson v. United States*,⁵⁶ the taxpayer, although aware of the agency's request for documents held by a third party, may be refused access to the proceeding. After a summons had been issued to the taxpayer's former employer and his accountant for the production of employment and compensation records, the taxpayer in *Donaldson*, relying on Rule 24(a)(2) of the Federal Rules,⁵⁷ filed a motion to intervene in the IRS enforcement action. Writing for the majority, Justice Blackmun emphasized that the records sought by the IRS were not the property of the taxpayer but of the employer and that, therefore, the taxpayer had no right to protest disclosure. Despite the relevance of the records to his potential liability, the taxpayer did not possess the "significantly protectable interest" necessary for intervention through Rule 24(a)(2).⁵⁸ Although the Court had stated several years previously that "third parties might intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene,"⁵⁹ it concluded in *Donaldson* that this language was

54. I.R.C. § 7602.

55. *Scarfiotti v. Shea*, 456 F.2d 1052 (10th Cir. 1972).

56. 400 U.S. 517 (1971).

57. FED. R. CIV. P. 24(a)(2). Rule 24(a)(2) provides for intervention by a party claiming an interest in the property or transaction that is the subject of the action.

58. 400 U.S. at 531. The Court also noted that Rule 81(a)(3) permits the district court broad discretion to limit the applicability of the Federal Rules, including the right of intervention, in enforcement proceedings. *Id.* at 528.

59. *Reisman v. Caplin*, 375 U.S. 440, 449 (1964) (taxpayer's attorneys denied injunction to

merely permissive, not mandatory.⁶⁰ The Court did not foreclose the possibility of intervention, however, noting that the district court might, in its discretion, permit the taxpayer to enter the action "when the circumstances are proper," as when the IRS issued the summons for an improper purpose or sought information protected by the attorney-client privilege.⁶¹

Notwithstanding this dictum, the Court in *Donaldson* deprived taxpayers of the opportunity to challenge the legitimacy of a summons issued to a third party. Intervention was possible only if the taxpayer could prove impropriety in the summons' issuance, but unless he could intervene at the outset the taxpayer probably would be unable to discover any impropriety. With the burden of resisting disclosure placed upon a third party having only a formal proprietary interest in the records sought, the taxpayer faced a virtually insurmountable barrier; assuming that timely intervention was barred, his only alternative was to persuade the third party to challenge the order and thereby risk the penalties for noncompliance. Understandably, in practice, most third parties, particularly banks,⁶² voluntarily chose to obey the IRS summonses, rendering the taxpayer powerless to enjoin such compliance.⁶³ Even if the court initially accepted jurisdiction to determine whether compliance should be enjoined,⁶⁴ it ultimately would find that the taxpayer lacked a "significantly protectable interest" and, thus, standing to prevent voluntary compliance.⁶⁵

Recognizing that the interest of a third party in protecting the privacy of summoned records is not as great as that of the taxpayer to whom the records pertain,⁶⁶ Congress amended the Internal Reve-

prevent accountants employed by them from answering summons to produce taxpayer records in their custody).

60. 400 U.S. at 531. The Court suggested that a balancing of equities would be appropriate in determining whether to grant or deny intervention. *Id.* at 530.

61. *Id.*

62. See *Kirschenbaum v. Beerman*, 376 F. Supp. 398, 399 (W.D. Pa. 1974).

63. *E.g.*, *Cook v. United States*, 387 F. Supp. 1103 (D. Nev. 1974); *Kirschenbaum v. Beerman*, 376 F. Supp. 398 (W.D. Pa. 1974); *Hoopes v. IRS*, 33 A.F.T.R.2d (P-H) 74-1233 (D. Utah 1973).

64. *E.g.*, *Kirschenbaum v. Beerman*, 376 F. Supp. 398 (W.D. Pa. 1974); *Hoopes v. IRS*, 33 A.F.T.R.2d (P-H) 74-1233 (D. Utah 1973).

65. For a discussion of the taxpayer's standing to prevent voluntary compliance, see *Kirschenbaum v. Beerman*, 376 F. Supp. 398, 399 (W.D. Pa. 1974).

66. H.R. REP. NO. 658, 94th Cong., 2d Sess. 307, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2897, 3203 [hereinafter cited as H.R. REP. NO. 658].

nue Code to include provisions regulating third-party summonses.⁶⁷ Although it included several exceptions,⁶⁸ section 7609 requires the IRS to give notice of the summons to any person identified in the records' description within three days of service and no later than the fourteenth day prior to the records' examination.⁶⁹ The person entitled to notice also must receive a copy of the summons, and he may intervene in enforcement proceedings brought under section 7604.⁷⁰ In addition, the noticee may stay third-party compliance by serving the third party with a written notice not to comply and by filing a copy of such notice with the IRS.⁷¹ Section 7609, then, apparently overrules those decisions denying the taxpayer injunctive relief to stay voluntary compliance.⁷²

Section 7609, though, sets forth several exceptions to the third-party notice requirements. Notice is not required, for example, if the summoinee and person entitled to notice are the same⁷³ or if the summons is issued to determine either the existence of some record

67. I.R.C. § 7609(a)(3) provides in pertinent part:

For purposes of this subsection, the term "third-party recordkeeper" means—

(A) any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law, any bank (as defined in section 581), or any credit union (within the meaning of section 501(c)(14)(A));

(B) any consumer reporting agency . . . ;

(C) any person extending credit through the use of credit cards or similar devices;

(D) any broker . . . ;

(E) any attorney; and

(F) any accountant.

68. I.R.C. § 7609(a)(4) provides that this notice requirement shall be inapplicable to any summons:

(A) served on the person with respect to whose liability the summons is issued, or any officer or employee of such person,

(B) to determine whether or not records of the business transactions or affairs of an identified person have been made or kept, or

(C) described in subsection (f) [issued in the name of "John Doe"].

69. I.R.C. § 7609(a)(1)(B).

70. *Id.* at (b)(1). Presumably, the IRS could not defeat this right merely by bringing an action to enforce the summons under § 7402(b) rather than under § 7604. Sections 7604 and 7609 are part of chapter 78 relating specifically to discovery of liability while § 7402(b) is included in Chapter 76, which relates to civil actions for the recovery of tax due.

71. I.R.C. § 7609(b)(2).

72. See S. REP. NO. 938, 94th Cong., 2d Sess. 368-70, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 3439, 3797-99 [hereinafter cited as S. REP. NO. 938].

73. I.R.C. § 7609(a)(4)(A).

of an identified person's transactions⁷⁴ or the identity of a person having a numbered bank account or similar device.⁷⁵ In order to prevent the transfer of assets to frustrate collection,⁷⁶ notice also is unnecessary if the summons is designed to aid collection from persons against whom assessments have been made or judgments rendered.⁷⁷

Substantive Considerations

Seeking to protect the taxpayer's right to privacy, Congress intended through the Tax Reform Act to provide taxpayers with an opportunity to raise substantive defenses against third-party summonses. Nevertheless, the amended Code provisions do not increase the substantive rights and defenses of the summoned taxpayer⁷⁸ but only assure that such defenses will be raised by the true party in interest.

Despite Congress' clear intent to protect the taxpayer's right to privacy, apparently the IRS still may gain informal access to records held by financial institutions, such as banks, without providing notice to the taxpayer being investigated. Under the Bank Secrecy

74. *Id.* at (B).

75. *Id.* at (c)(2)(A).

76. S. REP. NO. 938, *supra* note 72, at 371-72. This exception is inapplicable if the IRS is attempting to obtain information for purposes other than collection, such as computation of the taxpayer's taxable income by net worth. *Id.*

77. I.R.C. § 7609(c)(2)(B)(i).

78. H.R. REP. NO. 658, *supra* note 66, at 309. According to the Committee report, "[t]hese provisions [of the Act] are not intended to overturn court interpretations of the Fifth amendment or to imply that the noticee necessarily has the same protectable Fifth amendment interest with respect to records in the possession of a third party which he might have with respect to records in his own possession." *Id.* Nevertheless, the Act provides the taxpayer new defenses, some of which had been available only to the third-party summoinee: "the committee intends that the noticee will be allowed to stand in the shoes of the third-party recordkeeper and assert certain defenses to enforcement which witnesses are traditionally allowed to claim, but which may not be available to intervenors (under many court decisions) on grounds of standing." *Id.* However, "the noticee will not be permitted to assert as defenses to enforcement issues which only affect the interests of the third-party recordkeeper, such as the defense that the third-party recordkeeper was not properly served with the summons . . . or that it will be unduly burdensome . . . for the third-party recordkeeper to comply with the summons." *Id.*

To prevent the use of the new procedures as a dilatory tactic, § 7609(e) of the Code provides that the statute of limitations for the assessment of the taxpayer's liability is to be suspended during the period of any court action to enforce the summons. H. R. REP. NO. 658, *supra*, at 309-10.

Act,⁷⁹ banks are required to maintain records of substantially all customer transactions.⁸⁰ Although not served with legal process, banks frequently cooperate with agents of the IRS by providing access to these records upon request, a procedure the Internal Revenue Manual encourages revenue agents to use in investigating potential liability.⁸¹

The Tax Reform Act of 1976 fails to clarify whether a court should protect the taxpayer's privacy by excluding evidence obtained through informal access absent a summons to the third party and notice to the taxpayer. Although the Supreme Court stated in 1974 that access to records maintained under the Bank Secrecy Act could be obtained "only by normal legal process,"⁸² subsequent decisions have construed this language to permit only the bank, not its customers, to demand legal process in the form of a summons or a subpoena. In *United States v. Prevatt*,⁸³ for example, the Court of Appeals for the Fifth Circuit held that the voluntary relinquishment of records by a bank vitiated any requirement of compulsory legal process to the taxpayer under investigation.⁸⁴ Moreover, the district court's suppression of such records obtained through informal channels would have been inconsistent with the Bank Secrecy Act which, the court concluded, was intended to preserve records having a

79. Pub. L. 91-508, 84 Stat. 1114 (1970). The Act is codified in 12 U.S.C. §§ 1730d, 1829b (1970) (retention of records by insured banks and savings and loan institutions), 12 U.S.C. §§ 1951-1959 (1970) (retention of records by all uninsured financial institutions), and 31 U.S.C. §§ 1051-1122 (1970) (reporting of domestic and foreign currency transactions).

80. 12 U.S.C. § 1829b (1970).

81. The Internal Revenue Manual provides:

The importance of bank records to Intelligence investigators and the rapid changes in banking procedures being brought about by automation, makes 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.

[1977] 5 INT. REV. MANUAL AD. (CCH) § 937(12), at 28,188. See generally Comment, *Government Access to Bank Records in the Aftermath of United States v. Miller and the Tax Reform Act of 1976*, 14 Hous. L. Rev. 636, 656-57 (1977).

82. *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 54 (1974) (dictum). In *California Bankers Ass'n* the association challenged the constitutionality of the reporting and record-keeping provisions of the Bank Secrecy Act. In upholding the statute, the Court held *inter alia* that the recordkeeping 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. *Id.* at 52-54.

83. 526 F.2d 400 (5th Cir. 1976).

84. *Id.* at 402-03.

"high degree of usefulness in criminal, tax or regulatory investigations or proceedings."⁸⁵ This view is consistent with the Supreme Court's decision in *United States v. Miller*,⁸⁶ holding that a taxpayer under IRS investigation has no protectable interest in records maintained pursuant to the Bank Secrecy Act.⁸⁷

The view that only a bank and not its customers may insist on issuance of a summons prior to record disclosure, though, largely defeats the purposes of the Tax Reform Act. The provisions of section 7609 are intended to provide a taxpayer with an adequate opportunity to contest a third party's disclosure of information pertaining to the taxpayer, but if evidence obtained through informal access was deemed admissible at a trial, this opportunity would be foreclosed. Under section 7609, the taxpayer is granted standing to raise issues that previously could be raised only by third-party summonees;⁸⁸ permitting the taxpayer to insist on issuance of legal process would comport with the objective of this provision.⁸⁹ Moreover, a requirement that the decision to comply voluntarily or not be made by the more interested party would relieve banks of unwanted responsibility, although it would not expand the taxpayer's "protectable interest." Extension to the taxpayer of the right to demand summons issuance prior to disclosure, then, may require that the taxpayer, as putative noticee, be apprised of informal requests made to third parties for records concerning his affairs and that he be afforded the right to enjoin compliance until a summons is issued. In the absence of such a procedure, evidence obtained by the IRS through informal access should be inadmissible in subsequent proceedings.

The informal access procedure, also, may constitute a breach of the bank's implied warranty of nondisclosure. Because banking institutions impliedly agree "not to divulge information without the

85. *Id.* at 402 (citing *California Bankers Ass'n v. Schultz*, 416 U.S. 21 (1976)).

86. 425 U.S. 435 (1976).

87. *Id.* at 441-43. In *Miller* the Supreme Court concluded that, absent such a protectable interest, a summons issued to a third-party bank did not violate the fourth amendment rights of the depositor under investigation. *Id.* at 443.

88. H.R. REP. No. 658, *supra* note 66, at 309.

89. *See id.* at 308. The Report's language suggests that informal access by the IRS would be improper: "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." *Id.* (emphasis supplied).

customer's consent unless compelled by court order,"⁹⁰ a bank may be liable if it permits the IRS to inspect customer records prior to the issuance of a summons.⁹¹ Moreover, even assuming that a summons was issued, voluntary compliance by the bank may breach its warranty since a summons alone, absent an enforcement order, may not constitute a "court order" within the meaning of the bank's warranty; voluntary disclosure at any time before the district court orders enforcement of the summons, then, would be unlawful.⁹²

A final ambiguity with regard to third-party summonses under the Tax Reform Act concerns the taxpayer's right to counsel at an investigatory proceeding. The Act makes no provision for protecting the taxpayer's interests by permitting, upon request, the presence of his attorney during either the questioning of a third-party witness or the examination of the records at issue.⁹³ Although the Administrative Procedure Act⁹⁴ allows representation of witnesses compelled to testify, whether the person under investigation⁹⁵ or his counsel have a right to be present at the examination of a witness in a fact-finding, non-adjudicative, investigatory proceeding is unclear.⁹⁶

90. *Valley Bank of Nev. v. Superior Court*, 15 Cal. 3d 652, 657, 542 P.2d 977, 979, 125 Cal. Rptr. 553, 555 (1975); e.g., *Milochnich v. First Nat'l Bank*, 224 So.2d 759 (Fla. Dist. Ct. App. 1969); *Peterson v. Idaho First Nat'l Bank*, 83 Idaho 578, 367 P.2d 284 (1961); *First Nat'l Bank in Lenox v. Brown*, 181 N.W.2d 178, 183 (Iowa 1970); *Brex v. Smith*, 104 N.J.Eq. 386, 146 A. 34 (1929).

91. *Cf. Brex v. Smith*, 104 N.J.Eq. 386, 146 A. 34 (1929). In *Brex* the court enjoined a public prosecutor's request for inspection of bank records, stating that he had an adequate means of inspection through a grand jury subpoena and that the bank had an implied obligation of nondisclosure.

92. Of course, the plaintiff-taxpayer must demonstrate damages. See *Brex v. Smith*, 104 N.J.Eq. 386, 146 A. 34 (1929).

93. See *United States v. Kershaw*, 436 F. Supp. 552 (D. Or. 1977). The IRS sought to question a taxpayer's accountant who had been working under the direction of the taxpayer's attorney. The court held that the taxpayer's attorney could not be present but that the accountant's attorney could protect against disclosure of any privileged information. *Id.* at 553.

94. 5 U.S.C. § 555(b) (1970).

95. Justice Douglas has suggested that due process requires such a right. *United States v. Donaldson*, 400 U.S. 533, 538 (Douglas, J., concurring).

96. Indeed, the right of a witness to be represented by counsel has not been resolved. *FCC v. Schreiber*, 329 F.2d 517 (9th Cir. 1964) (availability of right to counsel in non-adjudicative, fact-finding investigation is undecided by Supreme Court but, even if it exists, does not include calling of witnesses or cross-examination); *Smith v. United States*, 250 F. Supp. 803 (D.N.J. 1966) (existence of right to counsel at IRS investigatory proceeding unresolved but immaterial if voluntary appearance constitutes a waiver); *United States v. Steel*, 238 F. Supp. 575 (S.D.N.Y. 1965) (existence of right to counsel at investigation unresolved but immaterial if agency precludes only representation of two parties by same counsel). An

An early case decided by the District Court for the District of Connecticut equated IRS investigations with grand jury proceedings and held that the need for secrecy would be sufficient reason to deny witnesses counsel.⁹⁷ If this position is maintained, then, arguably, the taxpayer's attorney may be excluded when the IRS is questioning a third party even though this testimony may affect the taxpayer's liability. The equation of the two, however, obscures the most fundamental distinction, namely, that the principal purposes of grand jury secrecy—to protect witnesses, to avoid prematurely alerting a target witness who may flee to escape questioning, and to protect innocent target parties should an indictment not issue—are inapplicable to an IRS examination. Indeed, at least one court has repudiated the analogy between grand jury proceedings and IRS examinations.⁹⁸ Thus, unless significant delay would result, the taxpayer's counsel should be permitted to be present during the IRS examination initiated by a summons whenever a danger of prejudice to the taxpayer exists.

John Doe Summonses

If the Service suspects that an unidentified individual has failed to disclose or to discharge his full tax liability, it may issue a "John Doe" summons to persons possessing information leading to his identification.⁹⁹ Although no statutory authority existed for IRS issuance of John Doe summonses prior to 1976, the Supreme Court upheld the procedure in 1975. In *United States v. Bisceglia*,¹⁰⁰ the IRS discovered large deposits of old and badly deteriorated \$100 bills and suspected that transactions relating to the deposits had not been reported. To aid in its investigation, it issued John Doe summonses.

investigation for civil tax liability is an investigatory, fact-finding proceeding. *Commissioner v. Backer*, 178 F. Supp. 256 (M.D. Ga. 1959), *rev'd on other grounds*, 275 F.2d 141 (5th Cir. 1960).

97. *United States v. Smith*, 87 F. Supp. 293 (D. Conn. 1949). The Supreme Court, in dicta, also has equated agency investigations with grand jury proceedings. See *United States v. Powell*, 379 U.S. 48, 57 (1964); *United States v. Morton Salt Co.*, 338 U.S. 632, 642-44 (1950). Neither opinion, however, discusses the analogy in the context of the right to counsel.

98. See *Backer v. Commissioner*, 275 F.2d 141 (5th Cir. 1960) (witness entitled to counsel of own choice, even if counsel also retained by taxpayer under investigation); *accord*, *SEC v. Csapo*, 533 F.2d 7 (D.C. Cir. 1976) (counsel for witness could not be excluded although he represented other witnesses under investigation).

99. See note 114 *infra*.

100. 420 U.S. 141 (1975).

In upholding the procedure, the Court focused on the broad language of the IRS's statutory summons power, which authorizes the investigation of "*all persons . . . who may be liable.*"¹⁰¹ According to the Court, this language was "inconsistent with an interpretation that would limit the issuance of summonses to investigations . . . [focusing] upon a particular return, a particular named person, or a particular potential tax liability."¹⁰² Moreover, because such summonses require judicial enforcement, the Service was prevented from taking arbitrary or capricious action.¹⁰³

In the wake of *Bisceglia*, the IRS formalized the issuance procedure, requiring that no John Doe summonses be issued without prior approval by the district chief of the IRS operational division requesting the summons and by the IRS Regional Counsel's office.¹⁰⁴ Congress, however, considered even these safeguards insufficient to protect the taxpayer's right to privacy and included in the Tax Reform Act of 1976 further requirements for summons issuance.¹⁰⁵ Under the new provisions, John Doe summonses may issue

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

101. *Id.* at 149 (quoting I.R.C. § 7601) (emphasis in original). Section 7601 authorizes the IRS to "inquire after . . . all persons . . . who may be liable to pay any internal revenue tax."

102. 420 U.S. at 149.

103. *Id.* at 151. In his dissenting opinion, Justice Stewart noted the "breathtaking" transformation of the IRS's general investigatory authority into a broader exploratory power, achieved by tracking the Service's duties under § 7601 with its summons power under § 7602. *Id.* at 153, 157. Justice Blackmun stated in his concurring opinion, however, that particular factual situations raised an

overwhelming probability, if not certitude, that one individual or entity was responsible for the deposits. The uniformly deteriorated condition of the currency and the amount, combined with other unusual aspects, gave the Service good reason, and indeed, the duty to investigate . . . The summons, in short, was issued pursuant to a genuine investigation. The Service was not engaged in researching some general problem; its mission was not exploratory.

Id. at 142-43 (Blackmun, J., concurring).

104. I.R. News Release, IR-1484 (May 8, 1975), reprinted in [1975] 9 STAND. FED. TAX REP. (CCH) ¶ 6584.

105. I.R.C. § 7609(f).

(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.¹⁰⁶

Although Congress sought to prevent the use of John Doe summonses in "fishing expeditions,"¹⁰⁷ it nevertheless intended to preserve their utility as tools for investigation. Accordingly, prior to issuance, the IRS need not show probable cause for its belief that civil fraud or criminal activities are involved. Rather, it must demonstrate only that a transaction has or may have occurred reasonably suggesting the possibility of unreported tax liability, that good faith efforts have been made to explore alternative methods of investigation, and that issuance of a John Doe summons is the only practical means of obtaining the necessary information.¹⁰⁸

Prior to the passage of the Tax Reform Act of 1976, the United States Court of Appeals for the Fifth Circuit had discussed limitations on the issuance of John Doe summonses paralleling those codified in the Act. In *United States v. Humble Oil & Refining Co.*,¹⁰⁹ the IRS issued a John Doe summons to ascertain the identity of various lessors of the Humble Oil Company. Neither Humble Oil nor the lessors were under investigation for failure to comply with tax laws;¹¹⁰ rather, the IRS sought to advance its research on lease restoration requirements. Refusing to enforce the summons, the Fifth Circuit found no nexus "between [the] information sought and a specific investigation of specific individuals"¹¹¹ and declared that the IRS could not use its summons power as an "unrestricted license to enlist the aid of citizens in its data gathering projects."¹¹²

On appeal, the Supreme Court vacated the decision in *Humble Oil* and remanded the case to the Fifth Circuit¹¹³ for further consid-

106. *Id.* The restrictions in § 7609(f) express the distinction between a valid investigatory purpose and an invalid exploratory purpose made by Justice Blackmun in his concurring opinion in *Bisceglia*. See note 103 *supra*.

107. S. REP. NO. 938, *supra* note 72, at 373-74.

108. *Id.*

109. 488 F.2d 953 (5th Cir. 1974), *vacated*, 421 U.S. 943 (1975), *aff'd*, 518 F.2d 747 (5th Cir. 1975).

110. *Id.* at 954.

111. *Id.* at 960 (citing *United States v. Humble Oil & Ref. Co.*, 346 F. Supp. 944, 947 (S.D. Tex. 1972)).

112. 488 F.2d at 963.

113. 421 U.S. 943 (1975). See notes 100-03 *supra*.

eration in light of the Court's decision in *Bisceglia*, upholding the non-statutory John Doe summons procedure after IRS discovery of deteriorated \$100 bills. The Fifth Circuit affirmed its prior decision, however, stating that the information sought in *Bisceglia*, unlike that sought in *Humble Oil*, related to a specific, extraordinary transaction. Moreover, in *Humble Oil* no demonstrable facts suggested the likelihood of unpaid taxes, and no IRS investigation was advanced by the issuance of the summons; instead, the IRS merely wished to expedite its research on lease restoration.¹¹⁴

The Fifth Circuit's test in *Humble Oil*, requiring the existence of both a specific, extraordinary transaction and an ongoing investigation prior to issuance of a John Doe summons, offers a meaningful and objective standard on which to base investigatory procedures. While the relevant provisions of the Tax Reform Act are ambiguous in many respects—for example, they fail to describe how narrow the requisite “ascertainable group or class of persons” under investigation must be before summonses can issue—use of the Fifth Circuit's more definitive standards, in conjunction with the Tax Reform Act, would implement the congressional intention of protecting the taxpayer's right to privacy without unduly hampering IRS investigation of alleged violations.

SUBSTANTIVE DEFENSES

As noted, the Tax Reform Act was not intended to alter a taxpayer's substantive defenses to summons enforcement but only to modify the procedures for summons issuance and resistance.¹¹⁵ Three grounds exist for substantive challenge: IRS noncompliance with formal summons requirements, privileged attorney-client communications, and violations of the fourth and fifth amendments.

114. *United States v. Humble Oil & Ref. Co.*, 518 F.2d 747, 748 (5th Cir. 1975). “John Doe” summonses also have been issued to obtain the identities of the clients of a tax preparer, *Berkowitz v. United States*, 488 F.2d 1235 (3d Cir. 1973), to learn the names of shareholders who may have incurred unreported tax liabilities, *Miles v. United Founders Corp.*, 5 F. Supp. 413 (D.N.J. 1933), and to ascertain the names of owners of an insurance company's stock held by banks as nominees, trustees, or custodians, *United States v. Armour*, 376 F. Supp. 318 (D. Conn. 1974). See also *Tillotson v. Boughner*, 333 F.2d 515 (7th Cir. 1964); *United States v. Duke*, 379 F. Supp. 545 (N.D. Ill. 1974).

115. H.R. REP. NO. 658, *supra* note 66, at 309.

IRS Noncompliance with Formal Requirements

Taxpayers seeking to challenge a summons frequently base their attack on the failure of the IRS to meet the substantive prerequisites to summons enforcement. In *United States v. Powell*,¹¹⁶ the Supreme Court mandated that before a district court can enforce a summons a proposed IRS investigation must meet four requirements: first, a legitimate purpose must exist for the investigation; second, the inquiry must be relevant to that purpose; third, the information sought must not be already in the IRS' possession; and finally, the proper administrative provisions under the Code must have been followed.¹¹⁷ The IRS, however, need not show probable cause in summons issuance,¹¹⁸ and the aggrieved taxpayer has the burden of proving noncompliance.¹¹⁹

Legitimate Purpose

In 1964, the Supreme Court stated in dictum that a taxpayer under IRS investigation could challenge a summons issued for the "improper purpose of obtaining evidence for use in a criminal prosecution."¹²⁰ Seven years later, the Court clarified its legitimate purpose requirement in *Donaldson v. United States*,¹²¹ holding that taxpayer summonses must be issued "in good faith and prior to a recommendation for criminal prosecution."¹²² Although a summons issued solely to aid in a criminal investigation would be improper, it is not subject to challenge merely because it could result in a criminal charge against the taxpayer.^{122.1} Thus, the taxpayer may

116. 379 U.S. 48 (1964).

117. *Id.* at 57-58.

118. *Id.* at 51.

119. *Id.* at 58. Although the taxpayer bears the burden of proof, to achieve enforcement the IRS must substantiate its assertion of compliance. *United States v. Wright Motor Co.*, 536 F.2d 1090, 1095 (5th Cir. 1976); *United States v. McCarthy*, 514 F.2d 368, 372 (3d Cir. 1975).

120. *Reisman v. Caplin*, 375 U.S. 440, 449 (1964); see *Boren v. Tucker*, 239 F.2d 767, 772-73 (9th Cir. 1957).

121. 400 U.S. 517 (1971).

122. *Id.* at 536 (emphasis supplied).

122.1. The Supreme Court, in *United States v. LaSalle Nat'l Bank*, 46 U.S.L.W. 4713 (June 20, 1978), noted that "[t]his result is inevitable because Congress has created a law enforcement system in which criminal and civil elements are inherently intertwined." *Id.* at 4716. "Congress has not categorized tax fraud investigations into civil and criminal components. Any limitation on the good faith use of an Internal Revenue summons must reflect this statutory premise." *Id.* at 4717.

challenge enforcement of a summons issued during the pendency of a criminal action,¹²³ but he may not prevent it from becoming effective simply because criminal, as well as civil, prosecution may result.¹²⁴ Nor is the summons necessarily invalid if the agent issuing the summons is pursuing only a criminal investigation, since the nature of the inquiry is subject to change prior to transfer to the Justice Department.^{124.1}

Whether a criminal prosecution has been "recommended" within the meaning of *Donaldson*, thereby rendering invalid subsequent summons issuance, has been an issue of controversy among the United States Courts of Appeals.¹²⁵ The Tenth Circuit endorsed a narrow view of the legitimate purpose requirement, holding that, at the earliest, recommendation occurs when the IRS forwards its case to the Department of Justice for prosecution.¹²⁶ Although the Third Circuit also held invalid summonses issued following a recommendation for criminal prosecution, it included in its definition of "prior to recommendation" the requirement that the IRS request for a summons be in good faith and not an attempt to bypass restrictions on criminal discovery. Thus, the court stated that "[a] preceding

123. 400 U.S. at 532-33.

124. *Id.* See also *United States v. Couch*, 409 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 (3d Cir. 1971); *United States v. Troupe*, 438 F.2d 117 (8th Cir. 1971). The summons also will not be unenforceable merely because a special agent has been assigned to the case. *Donaldson v. United States*, 400 U.S. 517, 535-36 (1971); *United States v. Fisher*, 500 F.2d 683 (3d Cir. 1974). See also *United States v. Stribling*, 437 F.2d 765 (6th Cir. 1971); *United States v. Richardson*, 337 F. Supp. 1053 (D. Colo. 1971). In *United States v. Cleveland Trust Co.*, 474 F.2d 1234 (6th Cir. 1973), the court held enforceable a summons issued pursuant to an investigation instituted at the request of the Justice Department.

124.1. *United States v. LaSalle Nat'l Bank*, 46 U.S.L.W. 4713 (June 20, 1978).

125. Whether prosecution has been recommended is determined in light of the facts as they existed at the time the summons was issued. *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); *cf. United States v. Held*, 435 F.2d 1361 (6th Cir. 1970) (secondary purpose of civil investigation sufficient). The summons cannot be defeated by showing that a subsequent recommendation for prosecution was made. *United States v. Cromer*, 483 F.2d 99 (9th Cir. 1973). The Seventh Circuit has held, however, that the district court may consider the intervening fact of a criminal indictment after issuance of a summons in determining whether to enforce the summons. *United States v. Monsey*, 429 F.2d 1348 (7th Cir. 1970).

126. *United States v. Billingsley*, 469 F.2d 1208, 1209 (10th Cir. 1972); *accord, United States v. Cecil E. Lucas Gen. Contractors, Inc.*, 406 F. Supp. 1267, 1273 (D.S.C. 1975); *United States v. Kyriaco*, 326 F. Supp. 1184, 1186 (C.D. Cal. 1971).

Justice Department recommendation to prosecute is not the *sine qua non* for proving that an Internal Revenue summons was issued for an improper purpose."¹²⁷ Finally, the District of Columbia Circuit espoused a broad view of the legitimate purpose requirement, deeming summonses issued in bad faith unenforceable even if issued before criminal prosecution was recommended. Under this test, a summons would be invalid if "the investigating agent had already formed a firm purpose to recommend criminal prosecution even though he had not as yet made a formal recommendation"¹²⁸

This conflict was resolved by the Supreme Court in *United States v. LaSalle National Bank*.^{128.1} In *LaSalle* the Court rejected the view adopted by the Third Circuit and impliedly that of the District of Columbia Circuit in favor of an interpretation of the *Donaldson* standard similar to that adopted in the Tenth Circuit. In dictum, the Court stated that,

[g]iven the interrelated criminal/civil nature of tax fraud investigation whenever it remains within the jurisdiction of the Service, and given the utility of the summons to investigate civil tax liability, we decline to impose the prophylactic restraint on the summons authority any earlier than at the recommendation to the Department of Justice. We cannot deny that the potential for expanding the criminal discovery rights of the Justice Department or for usurping the role of the grand jury exists at the point of the recommendation by the special agent. But we think the possibilities for abuse of these policies are remote before the recommendation to Justice takes place and do not justify imposing an absolute ban on the use of the summons before that point. Earlier imposition of the ban, given the balance of policies and civil law enforcement interests, would unnecessarily hamstring the performance of the tax determination and collection functions by the Service.^{128.2}

Relevance

As enunciated by the Supreme Court in *Powell*, the second requirement for summons enforcement involves a showing by the IRS

127. *United States v. Lafko*, 520 F.2d 622, 625 (3d Cir. 1975).

128. *United States v. Wall Corp.*, 475 F.2d 893, 895 (D.C. Cir. 1972).

128.1. 46 U.S.L.W. 4713 (June 20, 1978).

128.2. *Id.* at 4717 n.15.

that the inquiry is relevant to a proper purpose.¹²⁹ Should a taxpayer allege noncompliance with this prerequisite, the IRS must meet a test similar to that used in grand jury investigations: whether the desired inspection of records "would throw light upon the correctness of the taxpayer's returns."¹³⁰ The judiciary has applied this test most strictly in the context of third-party summonses.¹³¹ Notwithstanding the general rule, some courts also have permitted investigations that "'might' throw light upon subjects under legitimate inquiry."¹³²

Although the standard for relevance and materiality required for summons enforcement may be more lenient than that required to admit evidence at trial,¹³³ the IRS nevertheless must exhibit a "realistic expectation" that the records summoned will be related to the investigation.¹³⁴ Thus, although the Seventh Circuit enforced

129. 379 U.S. at 57; see note 117 *supra* & accompanying text.

130. *United States v. Ryan*, 455 F.2d 728, 733 (9th Cir. 1972).

131. *Venn v. United States*, 400 F.2d 207, 209 (5th Cir. 1968); *accord*, *United States v. Luther*, 481 F.2d 429 (9th Cir. 1973).

132. *United States v. Acker*, 325 F. Supp. 857, 862 (S.D.N.Y. 1971) (enforcing summons for corporate minutes of corporation and affiliates); see *United States v. Matras*, 487 F.2d 1271, 1274 (8th Cir. 1973); *United States v. Egenberg*, 443 F.2d 512, 515 (3d Cir. 1971); *Foster v. United States*, 265 F.2d 183, 187 (2d Cir.), *cert. denied*, 360 U.S. 912 (1959); *United States v. Campbell*, 390 F. Supp. 711 (D.S.D. 1975).

The test for relevancy has been stated succinctly by Chief Judge Lumbard in *United States v. Harrington*:

The question . . . is . . . whether the articulated standard, 'might throw light upon the correctness of the return', is in the particular circumstances an indication of a realistic expectation rather than an idle hope that something may be discovered.

388 F.2d 520, 524 (2d Cir. 1968).

133. *United States v. Rugeiro*, 425 F.2d 1069, 1071 (9th Cir. 1970), *cert. denied sub nom. Kyriaco v. United States*, 401 U.S. 922 (1971); *United States v. Dauphin Deposit Trust Co.*, 385 F.2d 129, 130-31 (3d Cir. 1967), *cert. denied*, 390 U.S. 921 (1968); *United States v. McKay*, 372 F.2d 174, 176 (5th Cir. 1967).

134. *United States v. Harrington*, 388 F.2d 520, 524 (2d Cir. 1968). With regard to the relevancy issue, the question arises as to what may be summoned and, perhaps more importantly, whether the IRS, pursuant to its summons power, may require the summoinee to disclose incriminating evidence. Illustrative of this question are the cases deciding whether the taxpayer may be required to furnish copies of his handwriting. In *United States v. Campbell*, 524 F.2d 604 (8th Cir. 1975), the court held that the taxpayer could be required to manufacture copies of her handwriting as "other data" under § 7602. *Accord*, *United States v. Rosinsky*, 76-1 U.S. Tax Cas. ¶ 9206 (D.N.C. 1976). The Sixth Circuit, however, denied the enforceability of a summons requiring the taxpayer to appear personally to give an agent exemplars of her handwriting, concluding that "other data" did not authorize the production of handwriting exemplars not yet in existence. *United States v. Brown*, 536 F.2d 117, 119 (6th Cir. 1976). The court reasoned that if general language such as "and other data" follows a

a summons seeking disclosure of a taxpayer's journal and work papers because the papers contained records of actual transactions,¹³⁵ the Eighth Circuit denied enforcement when the IRS sought to obtain proposed budgets of a corporation and its affiliates.¹³⁶ In the latter case, the court based its decision on the ground that the proposed budgets did not identify "actual transactions" but instead were materials sought solely for the convenience of the IRS.¹³⁷

Prior Examination and Proper Procedure

Under the third Supreme Court requirement for summons enforcement, information sought from a taxpayer must not be in the possession of the IRS at that time. A frequently litigated issue in this regard involves section 1705(b) of the Internal Revenue Code, which provides that, for any given tax year, only a single inspection may be made of a taxpayer's records unless the taxpayer requests otherwise or the Secretary gives written notice of the necessity for additional inspection.¹³⁸ Designed to prevent revenue agents from abusing their broad investigatory powers by needless and repeated examinations, this "one-inspection" rule requires that an agent pro-

specific enumeration of items, it is to be construed narrowly to mean "other of like kind." *Id.* at 122.

Summons enforcement also will be denied if the demands are unreasonable, *Local 174 v. United States*, 240 F.2d 387 (9th Cir. 1956), because an overly broad summons may violate the summonees' fourth amendment rights. *United States v. Morton Salt Co.*, 338 U.S. 632, 650-53 (1950); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946); *United States v. Malnik*, 489 F.2d 682, 686-87 (5th Cir. 1974). "[The government] must identify with some precision the documents it wishes to inspect." *United States v. Dauphin Deposit Trust Co.*, 385 F.2d 129, 131 (3d Cir. 1967). If the district court in its discretion determines that the summons is too broad, *United States v. Ruggiero*, 425 F.2d 1069, 1071 (9th Cir. 1970); *Dunn v. Ross*, 356 F.2d 664, 667 (5th Cir. 1966), it may modify the summons to conform to a reasonable standard. *Venn v. United States*, 400 F.2d 207, 212 (5th Cir. 1968); *Dunn v. Ross*, 356 F.2d 664, 667 (5th Cir. 1966). See also *United States v. Malnik*, 489 F.2d 682, 686 n.4 (5th Cir. 1974); *United States v. Bowman*, 435 F.2d 467, 470 (3d Cir. 1970).

135. *United States v. Interstate Tool & Eng'r Corp.*, 526 F.2d 59, 63 (7th Cir. 1975).

136. *United States v. Matras*, 487 F.2d 1271 (8th Cir. 1973).

137. *Id.* at 1273-75. A summons issued to a bank to provide certain trust records of thirty-two trusts sought in connection with an investigation of the bank itself was enforced in *United States v. Sun First Nat'l Bank*, 510 F.2d 1101 (5th Cir. 1975).

138. I.R.C. § 7605(b) provides:

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.

cure his supervisor's authorization before repeated examinations will be permitted.¹³⁹

The majority of jurisdictions apply the one-inspection rule only to taxpayers and not to third-party summonees.¹⁴⁰ Although the Tax Reform Act permits the taxpayer to "stand in the shoes of the third party record keeper,"¹⁴¹ application of the one-inspection rule probably will remain limited. The clear purpose of this statutory restriction is to prevent harassment of the taxpayer by repeated demands for records and not to hamstring IRS investigations. The Act does not grant the taxpayer standing to contest summonses when the records are in the possession of a third party; then, the burden of disclosure is on that party, not on the taxpayer.¹⁴²

In challenging summonses, taxpayers frequently have charged noncompliance by the IRS with the notice requirements of the one-inspection rule. As a result, courts have distinguished second inspections from "continuing" inspections, which do not require that notice be given.¹⁴³ Notice, then, is unnecessary prior to separate examinations in the course of an ongoing investigation.¹⁴⁴ In addition, the one-inspection rule is inapplicable if re-examination is an attempt to determine if the taxpayer is liable for a different tax or for a different year.¹⁴⁵

139. *United States v. Powell*, 379 U.S. 48, 55-56 (1964).

140. *Moloney v. United States*, 521 F.2d 491 (6th Cir.), *cert. denied*, 423 U.S. 1017 (1975); *United States v. Krilich*, 470 F.2d 341 (7th Cir.), *cert. denied*, 411 U.S. 938 (1972); *United States v. Bank of Commerce*, 405 F.2d 931 (3d Cir. 1969); *Hinchcliff v. Clarke*, 371 F.2d 697 (6th Cir.), *cert. denied*, 387 U.S. 941 (1967); *Bouschor v. United States*, 316 F.2d 451 (8th Cir. 1963); *cf. DeMasters v. Arend*, 313 F.2d 79 (9th Cir.), *cert. denied*, 375 U.S. 936 (1963) (holding reexamination valid). *But see United States v. McCarthy*, 514 F.2d 368, 376 (3d Cir. 1975), in which the court held that a summons issued to examine records previously examined while in the possession of a third party may constitute a second inspection within the meaning of § 7605(b).

141. H.R. REP. NO. 658, *supra* note 66, at 309.

142. The Tax Reform Act of 1976 was not intended to allow the taxpayer to raise issues peculiar to the interest of the third-party summonee. *Id.*

143. *National Plate & Window Glass Co. v. United States*, 254 F.2d 92 (2d Cir.), *cert. denied*, 358 U.S. 822 (1958); *United States v. Fitzgerald*, 390 F. Supp. 1261 (N.D. Ind. 1975); *see United States v. Schwartz*, 469 F.2d 977 (5th Cir. 1972); *United States v. Bell*, 448 F.2d 40 (9th Cir. 1971); *United States v. Gioradano*, 419 F.2d 564 (8th Cir. 1969), *cert. denied*, 397 U.S. 1037 (1970); *United States v. Shlom*, 301 F. Supp. 440 (S.D.N.Y.), *aff'd*, 420 F.2d 263 (2d Cir. 1969), *cert. denied*, 397 U.S. 1074 (1970).

144. *United States v. House*, 524 F.2d 1035, 1043 (3d Cir. 1975) (as amended on denial of rehearing 1976).

145. *United States v. Kendrick*, 518 F.2d 842 (7th Cir. 1975).

Privileged Communications

Under certain circumstances, the attorney-client privilege may shield information from disclosure to the IRS. Required to demonstrate that the privilege is applicable,¹⁴⁶ the summoned taxpayer must do more than merely assert a broad, general claim to confidentiality; he must carry this burden of proof for each communication he desires to withhold.¹⁴⁷ Although state law may protect the professional relationships between accountant and client,¹⁴⁸ bank and depositor,¹⁴⁹ and stenographer and client,¹⁵⁰ federal law acknowledges only the attorney-client privilege¹⁵¹ and, in addition, delineates the breadth of the privilege.¹⁵²

In *Fisher v. United States*,¹⁵³ in which two circuit court decisions were combined for review, the Supreme Court defined the scope of the attorney-client privilege in tax summons cases. The IRS had summoned documents prepared by the taxpayers' accountants that later were delivered by the taxpayers to their attorneys.¹⁵⁴ The Court

146. *United States v. Kratner*, 511 F.2d 248, 252 (7th Cir. 1975).

147. *United States v. Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974); *United States v. Cromer*, 483 F.2d 99, 102 (9th Cir. 1973); *United States v. Roundtree*, 420 F.2d 845, 852 n.18 (5th Cir. 1969); *Colton v. United States*, 306 F.2d 633, 637-40 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963).

148. *Couch v. United States*, 409 U.S. 322, 335 (1973); *United States v. Wainwright*, 413 F.2d 796 (10th Cir. 1969), *cert. denied*, 369 U.S. 1009 (1970); *United States v. Sharpe*, 38 A.F.T.R.2d (P-H) 76-5570 (E.D. Ky. 1976); *United States v. Tsukuno*, 341 F. Supp. 839 (N.D. Ill. 1972), *rev'd without opinion*, 478 F.2d 1406 (7th Cir. 1973).

149. *United States v. Prevatt*, 526 F.2d 400 (5th Cir. 1976).

150. *United States v. Schoenheinz*, 548 F.2d 1389 (9th Cir. 1977).

151. *Reisman v. Caplin*, 375 U.S. 440, 449 (1964).

152. *United States v. Hodgson*, 492 F.2d 1125 (10th Cir. 1974); *United States v. Finley*, 434 F.2d 596 (5th Cir. 1970); *Tillotson v. Boughner*, 350 F.2d 663 (7th Cir. 1965); *Colton v. United States*, 306 F.2d 663 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); *United States v. Sharpe*, 38 A.F.T.R.2d (P-H) 76-5570 (E.D. Ky. 1976). *But see* *United States v. Cromer*, 483 F.2d 99 (9th Cir. 1973); *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960).

United States v. Cromer recognized that FED. RULE EVID. 501, which had not been enacted at the time of the court's decision, may dictate a different result. 483 F.2d at 101 n.18. Although Rule 501 of the Federal Rules of Evidence provides that "in civil actions and proceedings . . . the rule [governing] the privilege . . . shall be determined in accordance with State law," the legislative history indicates that "in non-diversity civil cases, federal privilege law will generally apply." H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. ____, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7098, 7100.

153. 425 U.S. 391 (1976).

154. *United States v. Fisher*, 500 F.2d 683 (3d Cir. 1974) (summons enforced in absence of sufficient possessory interest); *United States v. Kasmir*, 499 F.2d 444 (5th Cir. 1974) (enforcement denied over reasonable expectation of privacy).

rejected the plaintiffs' argument that the records at issue were protected from disclosure by the constitutional right against self-incrimination,¹⁵⁵ stating that the fifth amendment protects the taxpayer only from testifying against himself under compulsion, not from the coerced production of evidence even though it can be used against him. If records held by the taxpayer are not protected by the fifth amendment, then, the Court reasoned, this same information could not be shielded from disclosure by transferring it to an attorney and subsequently claiming an attorney-client privilege.¹⁵⁶ Thus, because the plaintiffs in *Fisher* could not claim a fifth amendment right against self-incrimination for documents prepared by their accountants, they were precluded from asserting an attorney-client privilege when the same documents were delivered to counsel.¹⁵⁷

The Court based its decision largely on the rationale of the attorney-client privilege. Protecting confidential communications by a client to his attorney, the privilege encourages full disclosure of all relevant information, thus enabling the client to obtain informed legal advice.¹⁵⁸ However, in the interest of ascertaining the truth at trial, the Court reasoned, the privilege should apply only if necessary to promote full disclosure. In *Fisher*, delivery of the documents to counsel did not jeopardize the full disclosure interest because the IRS could obtain the documents if retained by the taxpayer himself.¹⁵⁹ Any exercise of the privilege, therefore, was superfluous in that the fifth amendment offered no protection to the taxpayer if the documents were in his possession.¹⁶⁰

In some instances the attorney-client privilege may extend to the

155. 425 U.S. at 397-99. The Court held that, although the fifth amendment protected the taxpayer from testifying against himself involuntarily, no element of unlawful compulsion existed if his attorney were ordered to produce the evidence. The Court held further that agency theory did not extend this personal privilege to the taxpayer's attorney. *Id.*

156. *Id.* at 403-04. Conversely, the Court concluded that "*when the client himself would be privileged from production of the document either as a party at common law . . . or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce.*" *Id.* at 404 (quoting 8 WIGMORE, EVIDENCE § 2307, at 592 (McNaughton rev. ed. 1961)) (emphasis in original).

157. *Id.* at 414. See generally Note, *Fifth Amendment Protection Against Self-Incrimination in Tax Records: Fisher v. United States*, 30 Sw. L.J. 788 (1976); see also Peterson, *Attorney-Client Privilege in Internal Revenue Service Investigations*, 54 MINN. L. REV. 67 (1969).

158. 425 U.S. at 403.

159. *Id.* at 403-05.

160. *Id.* at 414.

testimony of an accountant employed by the taxpayer's attorney.¹⁶¹ If the accountant's services have been necessary to providing effective legal advice, then testimony by the accountant will be privileged at trial.¹⁶² Although information disclosed for the purpose of preparing a tax return is not privileged,¹⁶³ prior employment of the accountant by the taxpayer for that purpose will not defeat the privilege.¹⁶⁴ Thus, if the taxpayer can show that the accountant's aid comprised an "integral part" of the legal advice rendered him,¹⁶⁵ then confidential communications to his attorney may not be revealed through the accountant's testimony.

Shielding only confidential communications by the taxpayer, the attorney-client privilege provides the relationship itself no protection.¹⁶⁶ Thus, the privilege is unavailable to withhold the client's identity,¹⁶⁷ to preclude disclosure of the attorney's fee schedule,¹⁶⁸ or to shield the nature of services rendered by the attorney.¹⁶⁹ These

161. *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963); *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961); *United States v. Schmidt*, 360 F. Supp. 339 (M.D. Pa. 1973); *Bauer v. Orsen*, 258 F. Supp. 338 (D.N.D. 1966); *accord*, *United States v. Gurtner*, 474 F.2d 297 (9th Cir. 1973); *United States v. Cote*, 456 F.2d 142 (8th Cir. 1972).

162. *United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972).

163. *United States v. Gurthier*, 474 F.2d 297, 299 (9th Cir. 1973). *But see* *United States v. Schmidt*, 360 F. Supp. 339, 347 (M.D. Pa. 1973), in which the court indicated that disclosures made by the client to the attorney for the purpose of preparing a return pursuant to a bona fide attorney-client relationship would be privileged.

164. *United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972).

165. *Id.*

166. *United States v. Kasmir*, 499 F.2d 444 (5th Cir. 1974), *rev'd on other grounds sub nom. Fisher v. United States*, 425 U.S. 391 (1976); *United States v. Schmidt*, 360 F. Supp. 339, 347 (M.D. Pa. 1973).

167. *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); *Gannet v. First Nat'l State Bank*, 410 F. Supp. 585 (D.N.J. 1976); *cf.* *Mauch v. Commissioner*, 113 F.2d 555 (3d Cir. 1940) (identity of clients whose money was in attorney-taxpayer's bank account not protected by attorney-client privilege). *But see* *Tillotson v. Boughner*, 350 F.2d 663 (7th Cir. 1965). *See generally* 27 *MERCER L. REV.* 1213 (1976).

Because the attorney-client privilege fails to protect a client's identity, a "John Doe" summons issued to a bank for information regarding an attorney's trust account to determine the identity of a client will not violate the attorney-client privilege. *Gannet v. First Nat'l State Bank of N.J.*, 410 F. Supp. 585 (D.N.J.), *rev'd on other grounds*, 540 F.2d 619 (3d Cir. 1976). *See also* *Frank v. Tomlinson*, 351 F.2d 384 (5th Cir. 1965), *cert. denied*, 382 U.S. 1028 (1966). *But see* *Tillotson v. Boughner*, 350 F.2d 663 (7th Cir. 1965); *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960).

168. *United States v. Hodgson*, 492 F.2d 1175 (10th Cir. 1974).

169. *United States v. Cromer*, 483 F.2d 99 (9th Cir. 1973); *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); *United States v. Long*, 328 F. Supp. 223 (E.D. Mo. 1971).

exceptions appear to comport with the Supreme Court's limited application of the attorney-client privilege in *Fisher*, permitting the withholding only of confidential communications necessary to the encouragement of full disclosure.¹⁷⁰

CONSTITUTIONAL DEFENSES

Fourth Amendment

An IRS summons compelling the disclosure of records constitutes a "search" within the meaning of the fourth amendment.¹⁷¹ Consequently, courts will refuse to order disclosure if enforcement of the summons will interfere unreasonably with the taxpayer's exercise of his constitutional rights. Recently, however, challenges to civil subpoenas have proved unsuccessful,¹⁷² and the Supreme Court has questioned whether the fourth amendment's presumption of privacy is even applicable to taxpayers.¹⁷³

In 1969, the Court of Appeals for the Fifth Circuit rejected the taxpayer's claim that IRS summons enforcement procedures violated his fourth amendment rights. Balancing the need of the IRS to conduct a search¹⁷⁴ against the resultant invasion of taxpayer privacy, the court in *United States v. Roundtree*¹⁷⁵ noted that voluntary compliance by taxpayers constituted the primary means of revenue law enforcement,¹⁷⁶ the IRS necessarily relying on the taxpayer's own books and records. Moreover, both the courts and the general public have condoned the use of summonses as a valid means of assuring compliance.¹⁷⁷ Addressing the potential invasion

170. 425 U.S. at 403.

171. In *United States v. Roundtree*, 420 F.2d 845, 849 (5th Cir. 1969), the court compared the tax summons to a search warrant, subject to the fourth amendment prohibition of arbitrary invasions of an individual's privacy by government agents. The court cited *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967), for the proposition that such a search requires a "balancing [of] the need to search against the invasion which the search entails." 420 F.2d at 850.

172. See, e.g., *United States v. Miller*, 425 U.S. 435 (1976); *Fisher v. United States*, 425 U.S. 391 (1976); *Couch v. United States*, 409 U.S. 322 (1973); See *v. City of Seattle*, 387 U.S. 541 (1967); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

173. *Couch v. United States*, 409 U.S. at 335-36.

174. *United States v. Roundtree*, 420 F.2d 845, 849 (5th Cir. 1969). In considering the protection afforded the individual, the court indicated that a tax summons is at least equivalent to a search warrant.

175. 420 F.2d 845 (5th Cir. 1969).

176. *Id.* at 850-51.

177. *Id.*

of taxpayer privacy engendered by the search, the Fifth Circuit emphasized that, although the Service need not show probable cause,¹⁷⁸ it must demonstrate that the objective requirements of investigative legitimacy and relevance have been met.¹⁷⁹ In light of these considerations, the court concluded that no fourth amendment rights were violated by the IRS enforcement procedures.

Recent decisions by the Supreme Court appear to support the Fifth Circuit's conclusions regarding fourth amendment challenges.¹⁸⁰ In *Couch v. United States*,¹⁸¹ for example, the Court noted in dictum that the tax system is dependent primarily upon honest and voluntary self-reporting by taxpayers.¹⁸² One court has noted that under such a system the need for access to individual records, tempered by the judicial scrutiny required for summons enforcement, outweighs the burden of invasion.¹⁸³

The fourth amendment also might be invoked to challenge an IRS summons that is unreasonable or overly vague. With regard to civil subpoenas seeking production of business records and papers, the Supreme Court has stated 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."¹⁸⁴ Nevertheless, such challenges usually are viewed with suspicion, and the courts will simply limit the scope of the summons and then order enforcement.¹⁸⁵

178. *Id.* (citing *United States v. Powell*, 379 U.S. 48, 57-58 (1964)).

179. 420 F.2d at 850-51.

180. See *United States v. Miller*, 425 U.S. 435 (1976); *Couch v. United States*, 409 U.S. 322 (1973).

181. *Id.* In *Couch* the Court rejected the taxpayer's fourth amendment challenge to the validity of a summons for records in the custody of her accountant. The Court held that "the necessary expectation of privacy to launch a valid Fourth Amendment claim does not exist." *Id.* at 336 n.19.

182. *Id.* at 335-36.

183. See *United States v. Roundtree*, 420 F.2d 845, 850-51 (5th Cir. 1969). The taxpayer's "reasonable expectation of privacy" concerning his records apparently is dissolved merely because the tax law requires that the information be reported. This result fails to distinguish between the law and its enforcement. Analogously, the mere illegality of possession of certain material, such as controlled substances, in itself does not sanction indiscriminate searches and seizures of such materials.

184. *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946).

185. See, e.g., *United States v. Theodore*, 479 F.2d 749 (4th Cir. 1973). Pursuant to a general investigation of professional tax preparation services, the IRS issued a summons for all returns and supporting documents retained by appellant's service for a three-year period.

Fourth amendment protection has been restricted most severely in taxpayer challenges to the investigation of third-party records. In *United States v. Miller*,¹⁸⁶ agents of the Treasury Department presented grand jury subpoenas issued in blank to several banks maintaining Miller's accounts. Miller subsequently moved to suppress, contending that the subpoenas were defective and that the materials had been obtained in violation of his fourth amendment rights.¹⁸⁷ The Supreme Court held that, because Miller neither owned nor possessed the bank records under investigation, he lacked a protectable interest sufficient to invoke the fourth amendment right to privacy.¹⁸⁸ Checks and deposits evidencing transactions with the bank are not confidential communications but, rather, are instruments used for commercial purposes. That Miller had made his records available to the bank for a limited purpose only did not expand his interest: "[t]he depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government."¹⁸⁹ The Court concluded that information knowingly revealed to the public is unprotected by the fourth amendment.¹⁹⁰

A comparison of the Court's decision in *Miller* with its reasoning in *Couch*, that taxpayers can have little expectation of privacy if disclosure of personal information is required by law,¹⁹¹ suggests that

The Fourth Circuit held that a summons will not be enforced if it is too broad and vague and if "it appears that the purpose of the summons is a rambling exploration of a third party's files." *Id.* at 754-55. Ultimately, the court limited the summons to a list of appellant's clients, provided the IRS could not otherwise obtain one. *Id.* at 755.

186. 425 U.S. 435 (1976).

187. *Id.* at 438-40.

188. *Id.* at 440-43.

189. *Id.* at 443.

190. *Id.* at 442. Justices Brennan and Marshall dissented. Quoting extensively from the California Supreme Court's decision in *Borrows v. Superior Court*, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974), which reached the opposite conclusion on a similar issue, Justice Brennan argued that a bank customer has a protected expectation of privacy, the information being revealed to the bank only for limited internal purposes. 425 U.S. at 448 (Brennan, J., dissenting).

Justice Marshall's dissent noted that the result in *Miller* confirmed his prediction in *California Bankers Ass'n v. Schultz*, 416 U.S. 21 (1974), upholding the constitutionality of the Bank Secrecy Act. Quoting from his prior dissent, Marshall wrote: "By accepting the Government's bifurcated approach to the recordkeeping requirement and the acquisition of records, the majority engages in a hollow charade whereby Fourth Amendment claims are to be labeled premature until such time as they can be deemed too late." 435 U.S. at 455 (quoting 416 U.S. at 97) (Marshall, J., dissenting).

191. 409 U.S. at 335-36.

fourth amendment challenges to third-party summonses probably would be unsuccessful. In particular, if the third-party record holder acts as more than a mere custodian, the taxpayer will be precluded from asserting the reasonable expectation of privacy necessary to invoke fourth amendment protection.

The Fifth Amendment

Several recent Supreme Court decisions indicate that challenges to third-party summonses based on the fifth amendment right against self-incrimination probably would prove as unsuccessful as those based on the fourth amendment. In *Couch v. United States*,¹⁹² for example, a taxpayer routinely delivered records to an independent accountant for the preparation of her tax return.¹⁹³ When the accountant was summoned by the IRS, the taxpayer asserted that disclosure would violate her rights under the fifth amendment. Noting that compliance with a summons issued to a third party requires no action by the taxpayer, the Court determined that the direct compulsion necessary to invoke fifth amendment protection was absent; thus, the Court enforced the summons.¹⁹⁴ According to the Court's rationale, the privilege against compelled testimony is personal, attaching only to the individual and not the information. As a result, it does not follow the material into the hands of a third party.¹⁹⁵

A year later the Supreme Court placed additional limitations on fifth amendment challenges to summonses issued directly to taxpayers. In *Bellis v. United States*,¹⁹⁶ the former partner of a three-person law firm had received a grand jury subpoena seeking disclosure of the partnership's records. Rejecting the partner's contention that the fifth amendment protected the records at issue, the Court concluded that disclosure was mandated because the records were

192. 409 U.S. 322 (1973).

193. *Id.* at 324.

194. *Id.* at 328-29. The Court in *Couch* indicated that "situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact." *Id.* at 333 (footnote omitted). However, the Court's decision in *Miller*, see notes 186-90 *supra* & accompanying text, in which the bank acted merely as an intermediary for the taxpayer's personal transactions, intimates that such instances probably will be infrequent.

195. 409 U.S. at 328-29.

196. 417 U.S. 85 (1974).

held in a "representative" rather than a "personal" capacity,¹⁹⁷ even though disclosure might incriminate the partner personally. Thus, the fifth amendment right against self-incrimination apparently is inapplicable if disclosure is sought from an independent, well-organized entity, as opposed to its individual members, and if the summoned individual holds the records in a custodial capacity with no right to independent control over their contents.¹⁹⁸

The Court's most recent discussion of fifth amendment challenges to tax summonses appears in *Fisher v. United States*,¹⁹⁹ which suggests that the fifth amendment protects an individual only against incrimination "by his own compelled *testimonial* communications."²⁰⁰ In *Fisher* the taxpayer's attorney was summoned to produce records received from the taxpayer but prepared by the taxpayer's accountant. Upholding the legality of the summons, the Court stated that the production of records prepared by a third party involves no compulsory testimony, either tacit or express, by the taxpayer, and therefore the fifth amendment does not bar the production of such documents even if the taxpayer is incriminated as a result.

Although the Court in *Fisher* stated explicitly that it need not decide whether fifth amendment claims would be equally unsuccessful if asserted to protect from disclosure records prepared by the summoned taxpayer's himself, the Court noted in dictum that "[t]he taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, *whether his own* or that of someone else."²⁰¹ By thus limiting the fifth amendment privilege, the Court appears to have extended its statement in *Couch* that survival of the tax system, predicated upon honest and voluntary

197. *Id.* at 87-91. Consistent with established precedent, the Court concluded that an individual may not rely on a fifth amendment privilege to avoid producing the records of a separate entity such as a corporation. *See, e.g.,* *Wilson v. United States*, 221 U.S. 361 (1911) (no fifth amendment protection for officer-recordholder of corporation). *See also* *United States v. White*, 322 U.S. 694 (1944) (officer of unincorporated labor union could not assert fifth amendment privilege against disclosure of union records).

198. 417 U.S. at 97-99. A different result may have been reached had the factual situation involved a small family partnership not clearly distinct from its individual partners. *Id.* at 101.

199. 425 U.S. 391 (1976). *See* notes 153-57 *supra* & accompanying text.

200. 425 U.S. at 409 (emphasis supplied).

201. *Id.* at 410 (emphasis supplied).

disclosure by the taxpayer, may require a suspension of the right against self-incrimination.²⁰² Nevertheless, a distinction exists between disclosures required for a tax return and those necessary to aid in investigations of tax liability. The tax reporting requirement, although necessitating the publication of certain private information, is not in itself incriminating. In contrast, a compelled disclosure for the purpose of verifying the original report may be incriminating if it reveals perjury in the information supplied on the return and if the summoned taxpayer himself has maintained the records. The issue, therefore, is whether the disclosures are of such a *testimonial* character as to warrant fifth amendment protection.²⁰³ If the records in question have been kept voluntarily by the summonnee, then in light of the Supreme Court's abandonment of the "mere evidence" rule,²⁰⁴ the mere act of producing the requested information may be insufficiently testimonial to evoke constitutional protection.²⁰⁵ If the taxpayer is required by law to maintain the records, however, a danger may exist of compelled self-incriminatory testimony sufficient to implicate fifth amendment protection, even though the compelled communication results from a two-part process of mandatory record-keeping and disclosure.

CONCLUSION

A taxpayer ordered by the IRS to produce his records may challenge the summons on various grounds. If the summons is directed to the taxpayer himself, he may insist that the IRS seek court enforcement of the summons, and thereby obtain an opportunity to challenge in court the procedural or substantive validity of the summons. If the summons is issued to a third-party recordholder, the

202. In *Couch* the Court stated that "[p]etitioner seeks extensions of constitutional protections against self-incrimination in the very situation where obligations of disclosure exist and under a system largely dependent upon honest self-reporting even to survive." 409 U.S. at 335.

203. *Schmerber v. California*, 384 U.S. 757 (1966).

204. *Warden v. Hayden*, 387 U.S. 294 (1967). The mere evidence rule operated to prevent searches for evidence that would aid in a particular apprehension or conviction but was neither contraband nor an instrumentality or fruit of the crime.

205. *But see Curcio v. United States*, 354 U.S. 118, 125 (1957), in which the Court stated that the "act of producing books or records in response to a Subpoena *duces tecum* is itself a representation that the documents produced are those demanded by the subpoena." However, because the content of the records, together with the original return, may be incriminating, the content, and not the production, must be testimonial in nature.

taxpayer also may have the opportunity to contest its legality. With few exceptions, the Tax Reform Act of 1976 mandates that the taxpayer receive notice of the issuance of a summons to a third party, permitting the former to stay compliance by the third party and to intervene at the enforcement hearing. He may insist that enforcement be denied unless certain procedures have been satisfied: the summons must have been issued for a proper investigatory purpose, in good faith, and prior to a recommendation to the Justice Department that the taxpayer be prosecuted criminally for the deficiency under investigation.

Although the taxpayer may challenge the summons for various procedural deficiencies, he bears the burden of proving noncompliance with the requirements. Moreover, the courts have broad discretion to limit his discovery privileges, a situation unlikely to be remedied by the disclosure requirements of the Freedom of Information Act, which exempts from disclosure certain inter- or intra-office memoranda and investigatory files.

The taxpayer's constitutional challenges also are restricted. To gain enforcement, the Service need not show probable cause. Nor does the taxpayer have a protected fourth amendment interest in his records if they are in the possession of a third party for other than custodial purposes. Assuming that the IRS has met the formal prerequisites for a valid summons, the judiciary will find no unreasonable search within the meaning of the fourth amendment.

The taxpayer probably will be no more successful should he attempt to interpose a fifth amendment privilege against self-incrimination. Because of the self-reporting requirement of the tax system, the courts have construed that constitutional mandate narrowly in tax matters. Indeed, whether it applies to tax records at all is unclear. At a minimum, however, the right against self-incrimination should protect against compelled disclosure of records kept by the taxpayer if the summons is directed to the taxpayer for records that he is required to maintain.