Tax Frauds and the Government's Right of Access to Taxpayer's Books and Records

Ronald K. Van Wert

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I. INTRODUCTION

A. Tax Frauds: Go Directly to Jail, Do Not Pass Go, Do Not Collect $200

Justice Oliver Wendell Holmes considered payment of taxes to be an important duty of a citizen because "with them I buy civilization." His attempt to purchase civilization was carried through even at his death when he bequeathed his estate to the United States.

However, this great jurist's attitude is shared by very few taxpayers. Further, the self-enforcement program of the tax laws, as well as the complexity of the tax system itself, creates an annual temptation to each taxpayer to evade the payment of tax.

* B.A., University of California, Santa Barbara, 1965; J.D., Hastings College of Law, 1968; LL.M. (Taxation), George Washington University, 1970. Private Practice, 1970-present; Certified Specialist, Taxation, California Board of Legal Specialization; Adjunct Associate Professor of Law, Pepperdine University School of Law.

1. R. PAUL, TAXATION FOR PROSPERITY 277 (1947).

2. CROWLEY & MANNING, CRIMINAL TAX FRAUD—REPRESENTING THE TAXPAYER BEFORE TRIAL 11 n.6 (1976).
Because the Federal tax system requires self-enforcement and the chances for evasion or avoidance are so great, Congress has given the Internal Revenue Service extremely broad collection rights and procedures which appear to conflict with the constitutional and statutory rights of the taxpayer. When the Internal Revenue Service uncovers potential tax evasion, it uses all of its tools to obtain incriminating evidence and to prosecute the taxpayer to the fullest extent of the law. Although the chances of being caught for tax evasion appear to be slight because of the millions of returns that are filed annually, the taxpayer that is caught will probably be tried regardless of his reputation in the community (or because of his reputation in the community) and regardless of whether he has cooperated fully with the taxing authorities (or because he has personally provided through cooperation the missing element of the crime).

The predicament of the uncovered tax evader is compounded by the fact that the recognized constitutional and statutory rules which are part of the arsenal of the defense attorney do not appear to be available to the attorney defending the tax evader. For example, an attorney can be forced to divulge and turn over books and records of his client even though the client has brought them to him for safekeeping. Moreover, the attorney is often surprised that his own statements, written or oral, may be used to convict his client of tax evasion.

The tax evader also believes that the crime of tax evasion is a minor crime and that conviction will result at most in a fine. The division of the Department of Justice which reviews all tax cases prior to indictment promulgates the policy that incarceration shall be either recommended in all tax fraud convictions, or no recommendation of any kind will be made. Plea bargaining will not include an agreement that the defendant will not serve time. Until recently it was also the policy of the Department of Justice, Tax Division, Criminal Section, to publicize fully any indictment of any taxpayer because of the profound effect on other taxpayers which resulted in their “voluntary” compliance. This policy is still in force, but the extent of publicity is dependent on the local U.S. Attorney where the case is tried. The indictment itself and resulting publicity can economically be as disastrous to the client as a conviction, since it can destroy the ability of the client to obtain business or financing.

B. What is a Tax Crime?

Sections 7201 through 7207 of the Internal Revenue Code of 1954 set forth the major tax crimes. Section 7201 is considered the primary criminal tax fraud statute. It provides as follows:

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

If the taxpayer does not want to report all of his income and desires to avoid the fraud penalties under Section 7201, the Code allows an “election” to the tax evader. The “best” course of action for the evader (if he is to be caught) would be merely not to file, since willful failure to file a return and pay a tax is a misdemeanor under Section 7203. Though filing a false return invokes the harsh sanctions of section 7201, failure to file is easier to discover, especially if the taxpayer has filed previous returns.

Prior to United States v. Bishop, taxpayers on trial argued that Section 7203 was a lesser included offense of Section 7201 and must be included in any jury instruction as such when Section 7201 was charged. The taxpayers reasoned that the “willfulness” requirement in both Sections was qualitatively different; i.e., if the “willfulness” was not extreme, the taxpayer could be convicted of the misdemeanor only. The Supreme Court in Bishop ruled that the test for willfulness is the same for both Section 7201 and 7203. If willfulness is absent, the court or jury may not find the taxpayer guilty under either section. However, if willfulness is present, the offense may be chargeable under either section.

Section 7202 is rarely used by the Internal Revenue Service in its enforcement program because of its limited applicability to the general public since it applies to the person who is “required...
... to collect, account for, and pay over any tax imposed by [Title 26] ... who willfully fails to collect or truthfully account for and pay over such tax." An increased use of the Section may be seen because of the growing concern by the Internal Revenue Service and other governmental agencies\(^9\) about cash payments to employees by employers. Since the success of the self-enforcement tax system is based in large part on the knowledge of the taxpayer that his or her income will be reported in some form or another by a third party, control at the employer level is vital to the Internal Revenue Service.

Under Section 7204, an employer who willfully fails to furnish his employee with a W-2 in the correct manner and time, and showing the information as required by Section 6051 (W-2 information), or who willfully furnishes a false or fraudulent W-2, is subject to imprisonment for not more than one year and a fine of $1,000 for each offense.

Surprisingly, there is a specific criminal section for the employee who either willfully fails to provide his employer with information or willfully provides false or fraudulent information for purposes of determining the amount of withholding from the employee's wages, salary or other compensation.\(^10\) For example, where an employee states that he has four dependents when he has only three dependents, he is subject to criminal sanctions even if he reports all of his income and pays all of his taxes.

A taxpayer who willfully makes and subscribes any return, statement or other document, under penalty of perjury and which he does not believe to be true and correct as to every material part shall be subject to three years of imprisonment, a $5,000 fine and the cost of prosecution.\(^11\) This section (7206) can be used against a tax preparer or adviser if such person willfully aids, assists, or otherwise counsels in the preparation or presentation of any return, or document which is fraudulent or is false\(^12\) as to any material matter.\(^13\) It is immaterial that the person who is assisted or counseled by the preparer or assister is unaware of the falsity of the return or document. There have been such widespread unethical practices by preparers and adm-

\(^9\) There was a recent attempt in the California Legislature to prevent the payment of cash for services rendered. All payments would have to be by check.

\(^10\) I.R.C. § 7205.

\(^11\) I.R.C. § 7206.

\(^12\) There is probably no difference between a false document or fraudulent document since the section requires that the false or fraudulent matter be material and that willfulness be present.

\(^13\) I.R.C. § 7206(2).
visers that Congress has recently made numerous changes to the Internal Revenue Code which provide additional civil penalties for the preparer and expand the definition of preparer.\textsuperscript{14}

Section 7206 includes specific language to prevent through criminal sanctions any person from willfully concealing property with respect to a tax from any officer or employee of the United States or withholding, falsifying, or destroying records in connection with compromises, or closing agreements. Further, a person will be subject to its sanctions if such person (directly or indirectly) willfully, and with intent to evade or defeat the assessment or collection of any tax under Title 26, removes, deposits, or conceals property "in respect whereof any tax is or shall be imposed, or upon which levy is authorized by Section 6331."\textsuperscript{15} Section 7207 provides that:

Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both. Any person required pursuant to sections 6047(b) or (c), 6056, or 6104(d) to furnish any information to the Secretary or any other person who willfully furnishes to the Secretary or such other person any information known by him to be fraudulent or to be false as to any material matter shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.

This section is another section which enables the Government (or taxpayer's counsel) to plea bargain, since under Bishop the willfulness in the misdemeanor statute is the same as in the felony statutes.

Section 7210 of the Internal Revenue Code prescribes criminal sanctions for failing to obey a summons issued pursuant to various sections of the Internal Revenue Code. There are numerous other sections of the 1954 Code dealing with, among others, attempts to interfere with the administration of Internal Revenue Laws (Sections 7212 and 7215), unauthorized disclosure of information (Section 7213), offenses by officers and employees of the United States in connection with any revenue law of the United States (Section 7214) and disclosures or use of information by preparers of returns (Section 7216).

In addition to the Sections of the Internal Revenue Code set-


\textsuperscript{15} I.R.C. § 7206(4).
ting forth criminal sanctions, various sections of Title 18, of the United States Code, are often involved in criminal tax cases. Included in the government's arsenal of weapons against the tax evader are: Section 371, conspiracy (e.g., preparer and taxpayer agreeing to evade tax); Section 1001, false statements to governmental agencies, whether written or oral, sworn or unsworn (e.g., taxpayer lies to special agent of Internal Revenue Service that he has reported all of his income);\(^{16}\) and, Section 1341, mail frauds.

As can be seen by the brief explanation of the tax crimes, they, along with Title 18 offenses, are sufficiently broad to encompass all tax evasion devices and schemes of the taxpayer.\(^{17}\) In addition, the taxpayer is not the only target. In fact, the taxpayer may not have committed any crime or the government may not be able to prove a crime against the taxpayer, and yet his accountants, attorneys, assistants, preparers, and associates may be indicted and convicted, even though the entire tax benefit of the scheme or device accrues to the taxpayer.\(^{18}\)

It is not difficult for the taxpayer and his representative to understand what constitutes tax evasion. Further, both can discover easily what tools the Government has at its disposal to investigate and uncover tax evasion. What is difficult is determining the extent of the rights of the taxpayer or his representative in preventing the Government from obtaining information and evidence from the taxpayer or third party that may be used against the taxpayer either in a civil proceeding or criminal proceeding. It is the purpose of this article to examine such rights and to suggest arguments that may be asserted by the taxpayer at each step of the investigation.

**II. GOVERNMENT RIGHT OF ACCESS TO TAXPAYERS' BOOKS AND RECORDS**

The Government has at its disposal numerous methods of

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\(^{16}\) See, United States v. Gripentrog, U.S. Tax Cas. § 9629 (W.D. Wis. 1977). The court stated that "[i]n general, the courts have held the statute [Section 1001 of Title 18] inapplicable to negative or exculpatory responses made by a defendant in the course of a conference or interrogation not initiated by a defendant, (citations); and applicable to positive statements which substantially impair the basic functions entrusted by law to a governmental agency."

\(^{17}\) Regardless of whether criminal prosecution is sought, the taxpayer may be liable for civil fraud penalties. Under § 6653(b), the taxpayer is assessed 50% of the underpayment of taxes. The 50% is imposed against the entire understated amount even if only part of the understatement is due to fraud. A conviction or guilty plea under either § 7201 or § 7206 will be conclusive as to civil fraud. Tomlinson v. Lefkowitz, 334 F.2d 262 (5th Cir. 1965).

\(^{18}\) Obviously, the accountant, etc. does receive compensation from the taxpayer for services rendered. See 18 U.S.C. § 2 (1969); I.R.C. § 7206(2).
obtaining the books and records of the taxpayer or third parties whose books and records are relevant to the investigation of the taxpayer. The method selected may require court review if a search warrant is sought or may involve misrepresentation and stealth, usually in cases where the taxpayer is either unaware of his rights or unaware that the focus of an inquiry by the Government has changed from civil to criminal. Obviously, the method generally used by the Internal Revenue Service agent is to merely request from the taxpayer (or third party) the books and records thought to be necessary. If the taxpayer is reticent, the Secretary of the Treasury, (herein “the Secretary”), or his delegate may serve on the taxpayer (or third party) a summons.\textsuperscript{19} If the taxpayer is under indictment or if a criminal investigation has been concluded, a search warrant could be sought to compel the production of records not voluntarily turned over. If the Internal Revenue Service is unsuccessful, it may seek to use the grand jury as its tool in obtaining incriminating evidence otherwise not available.\textsuperscript{20} It has even been suggested by a senior attorney for the Government that if all else fails, the Government might, through its power of levy, enter the taxpayer's house or office for the ostensible purpose of satisfying a tax lien. Once inside incriminating “property” could then be seized even though the Government could not obtain a search warrant; there had been no grand jury investigation; and a criminal investigation had been concluded.

In order to fully protect the taxpayer, the attorney for the taxpayer as well as the taxpayer's recordholders must understand the constitutional and statutory rights of the taxpayer in connection with the right of the Government to obtain and copy the taxpayer's books and records. It must not be concluded that objection is required only in those cases where criminality is present. It is often as important to safeguard records, and to maintain secrecy, as it is to make the Government abide by the statutory and constitutional mandates in its attempt to prosecute the taxpayer. The government agent, especially lower eche-
ion personnel, seeking to obtain the records may not understand the significance of a trade secret or the importance of a particular accounting method. The agent may be involved in an industry audit and may by accident (or otherwise) divulge to a competitor the successful system of a previously audited company. The effect on employees when an agent begins an audit can only be understood by one that has been under audit. The time and expense required to satisfy the inquisitive agent may far outweigh any possible revenue that the agent may finally assess. It may be as important to restrict the agent's access to the taxpayer's books and records in a civil case as in a criminal case since the civil investigation can easily turn into a criminal case. Moreover, the agent's aggressiveness may be extremely destructive to the business of the taxpayer.

The following discussion examines the tools used by the Government in obtaining the books and records of the taxpayer and books and records maintained for the benefit of the taxpayer by third parties; and the defenses that may be asserted by the taxpayer to prevent the acquisition of such books and records by the revenue agent, the special agent or other agent of the Internal Revenue Service.

A. The Summons

The statutory authority for the Secretary or the Secretary's delegate in obtaining books and records of the taxpayer or books and records maintained for the benefit of the taxpayer by third parties is Section 7602. It provides:

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 the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate 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 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 or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers,

21. A revenue agent is involved in civil investigation or joint criminal investigation under the guidance of the special agent. A special agent is assigned to Intelligence, Internal Revenue Service, and is used to investigate criminal tax fraud cases. For further discussion on the role of a revenue and special agent respectively, see REDMAN & QUIGGLE, PROCEDURE BEFORE THE INTERNAL REVENUE SERVICE, 80, 158 (1974 American Law Institute).
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.

Procedurally, the summons must be delivered to the person to whom it is directed or to the person's last and usual place of abode. The time and place of the examination of the books and records of the taxpayer or third party must be reasonable, and the date for the examination shall not be less than ten days from the date of the summons.

If the taxpayer or third party recordholder refuses to obey the summons, United States v. Powell requires the Commissioner of Internal Revenue Service (herein "the Commissioner") to seek enforcement through an adversary hearing. In order to obtain enforcement of the summons, "the Commissioner need not meet any standard of probable cause. . . ." However, the Commissioner must show that:

(1) The Investigation will be conducted pursuant to a legitimate purpose
(2) The inquiry may be relevant to the purpose
(3) The information sought is not already within the Commissioner's possession, and
(4) That the administrative steps required by the Code [Internal Revenue Code of 1954] have been followed.

In Powell, the Court recognized that its inquiry might go further even if the four requirements stated above were shown by the Commissioner to be satisfied. For example, if the Commissioner knew that the cost to the taxpayer of producing the records required by the summons vastly exceeded the value of the records to the Commissioner or if the inconvenience to the taxpayer outweighed any benefit to the Commissioner, the

22. I.R.C. § 7603. Service of the Summons may be accomplished by delivery to the taxpayer personally, to taxpayer's usual place of abode, or to taxpayer's last known address unless it is a "John Doe" summons.
23. I.R.C. § 7605(a).
25. Id. at 58.
26. Id. at 57.
27. Id. at 57, 58. The court does state that the Commissioner must show the requirements [1] through [4]. However, as a practical matter, the "burden" is on the taxpayer or recordkeeper to assert the reason the summons should not be enforced since the Commissioner merely asserts that the material is necessary to determine whether certain taxes are due.
court could determine (and should determine) that the "summons had been issued for an improper purpose." Any purpose "reflecting on the good faith of the particular investigation" could result in the court refusing to enforce the summons if the enforcement would cause the court's "process to be abused." Nevertheless, the comforting words to the taxpayer and counsel may be illusory since "[t]he burden of showing an abuse of the court's process is on the taxpayer." Since an enforcement proceeding is usually at the initial stage of a criminal investigation, as it appeared to be in Powell, it is unusual that counsel will fully understand the true purpose behind the issuance of the summons. Both revenue agents and special agents feel free to ask questions of counsel or of the taxpayer and obtain evidence that may be incriminating. However, neither are generally willing to discuss the underlying reasons why the Commissioner or his delegate is seeking enforcement. It is quite obvious that no agent is going to confess that the reason for the summons is to harrass the taxpayer or that it is issued in bad faith. Thus, because of the difficulty of proving Governmental harrassment or bad faith at the early stages of a tax investigation, the taxpayer is generally forced to disprove that the Commissioner has complied with the four requirements of Powell.

1. The Summons Enforcement Requirements of Powell.

   (A) The Investigation Will Be Conducted Pursuant to a Legitimate Purpose and In Good Faith

      Prior to Powell, the Supreme Court recognized in Reisman v. Caplin that "the witness may challenge the summons on any appropriate ground . . . [including] the defense that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution. . . ." Though Powell gave lip service to Reisman, it did not appear to provide objective standards for courts to determine when evidence was being sought for such improper purpose or if enforcement of a summons would be granted if an improper purpose was coupled with a proper purpose.

      The only discussion in Powell about the obtaining of evidence as to criminal fraud was in connection with its discussion as to whether probable cause of such fraud had to be shown by the

28. Id. at 58.
29. Id.
30. Id.
32. Id. at 449; cf. Boren v. Tucker, 239 F.2d 767, 772-73 (9th Cir. 1957).
Commissioner prior to a second investigation. The taxpayer argued that probable cause for a summons was required because of Section 7605(b) which prevented a second examination of a taxpayer's books and records except under certain circumstances and where necessary. The Court stated that "we do not equate necessity as contemplated by Section 7605(b) with probable cause or any like notion. . . ." It continued:

If, in order to determine the existence or nonexistence of fraud in the taxpayer's returns, information in the taxpayer's records is needed which is not already in the Commissioner's possession, we think the examination is not 'unnecessary' within the meaning of Sec. 7605(b).

Surprisingly, this language, which appears to allow the Commissioner unrestricted access to records in fraud cases by means of a summons, has not been cited by later courts who have attempted to expand the summons powers of the Internal Revenue Service. The reason may be that the statement was made in response to the Court's inquiry as to whether probable cause was required and was not directed to the issue of whether the summons was being used to obtain criminal evidence. It may also be that the courts missed the impact of the language or realized that it could limit the summons power of the Commissioner if a different interpretation was given to the language. This alternative interpretation, more consistent with Reisman, which was subsequently cited with approval by Powell, would be that the Commissioner could obtain only that minimal amount of "information" necessary to determine whether there is the existence or nonexistence of fraud. The Commissioner could not use the summons to obtain evidence in quantity or quality sufficient to perfect its criminal case. The courts in an enforcement proceeding could easily determine what information was in possession of the Internal Revenue Service and whether the information sought was needed to make that initial determination.

Notwithstanding the limitation on the Commissioner set forth in Powell and Reisman, the lower courts began to limit the

34. Id. at 53.
35. Id.
taxpayer's criminal purpose defense. In *Wild v. United States*\(^{37}\) the court stated that unless the "sole objective" of the investigation is to obtain evidence for use in criminal prosecution, the summons will be enforced.\(^{38}\) Since the policy of the Internal Revenue Service is to suspend any civil proceedings until the criminal investigation has been completed, the Internal Revenue Service can always argue that the information will be needed in the subsequent civil proceedings. Enforcement was ordered in *Wild* even though a special agent sought the information as part of a criminal investigation.\(^{39}\)

In 1971, the Supreme Court again considered the Internal Revenue summons and defenses to its enforcement.\(^{40}\) The taxpayer in *Donaldson v. United States*\(^{41}\) had initially obtained a preliminary injunction enjoining third parties from turning over their records to the Commissioner. However, after a full hearing, the third parties were ordered to appear before the special agent who issued the summons and produce the required books and records. On appeal the Supreme Court first concluded that a taxpayer could not intervene as a matter of right in an enforcement proceeding against a third party whose records affect the tax liability of the taxpayer.\(^{42}\) Although unnecessary for its decision, the Supreme Court then considered Donaldson's second argument that the "internal revenue summons may not be utilized at all in aid of an investigation that has the potentiality of resulting in a recommendation that a criminal prosecution be instituted against the taxpayer."\(^{43}\) The Court asserted that it adopted the sole objective rationale of *Wild* on the basis that

[t]he Reisman dictum is to be read in light of its citation of *Boren*, and of *Boren*’s own citation of *O'Connor*; when so read, the dictum comes

\(^{37}\) 362 F.2d 206, 208 (9th Cir. 1966). A special agent of the Internal Revenue Service was conducting an investigation of the tax affairs of Albert J. Wild. Pursuant to the investigation, the special agent issued a summons directed to Wild's bank. The summons directed the bank to produce, for examination, various financial records pertaining to transactions between the bank and Wild. Wild obtained a preliminary injunction, restraining the bank from complying with the summons. Proceedings were commenced by the Government to enforce the summons; Wild intervened; a hearing was held; and an order was entered granting the special agent's petition for enforcement. Wild thereafter appealed the order to the Ninth Circuit.

\(^{38}\) There may be other defenses to the summons enforcement as set forth in *Powell, supra* note 33.

\(^{39}\) *Wild v. United States*, 362 F.2d 206, 208 (9th Cir. 1966).

\(^{40}\) *Donaldson v. United States*, 400 U.S. 517 (1971).

\(^{41}\) *Id.* at 522, 523. An initial Fourth Amendment challenge was conceded on oral argument by the taxpayer not to be valid since the summons was directed to third parties.

\(^{42}\) *Id.* at 530.

\(^{43}\) *Id.* at 532.
Contrary to the statement of Justice Blackmun for the majority in Donaldson, the Boren Court did not hold that a summons would be enforced unless the sole object of the investigation was for criminal purposes or only in those cases where the taxpayer was under indictment. The Boren Court recognized realistically that in many cases some preliminary conclusions would have to be reached by the "Secretary or his delegate" upon which a conclusion might be drawn that "there existed facts sufficient upon which to base a possible criminal prosecution." These preliminary conclusions would not in themselves prevent the enforcement of a summons otherwise properly issued. Further, the "sole object" test enunciated in Wild was not required in United States v. O'Connor to prevent enforcement of the summons. Justice Blackmun apparently did not read the entire analysis by Judge Wyzanski in O'Connor since Judge Wyzanski stated that the subpoena power could not be used "to uncover information which might aid in the enforcement of criminal statutes and the preparation of criminal cases. . . ." His limitation of the Internal Revenue Service's subpoena power was not applicable only to post indictment cases. He stated:

The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people speak clearly. They recognize the primary and nearly exclusive role of the Grand Jury as the agency of compulsory disclosure. That is the inquisitorial body provided by our fundamental law to subpoena documents required in advance of a criminal trial, and in the preparation of an indictment or its particularization. See Hale v. Henkel. (citation)

To encourage the use of administrative subpoenas as a device for compulsory disclosure of testimony to be used in presentments of criminal cases would diminish one of the fundamental guarantees of liberty. Moreover, it would sanction perversion of a statutory power. The power under Sec. 3614 [Sec. 7602] was granted for one purpose, and is now sought to be used in a direction entirely unanticipated by the lawgivers. The limitations implicit in every grant of power are that it will be used not colorably, but conscientiously for the realization of those specific ends contemplated by the donors of the power.  

44. Id. at 533.
45. Boren v. Tucker, 239 F.2d 767, 772 (9th Cir. 1957).
47. Id.
48. Id. (emphasis added). In Hale v. Henkel, 201 U.S. 43, 74 (1905), the
The subpoena (summons) could not be used if it was issued to gather evidence for criminal purposes rather than to discover information and determine if there was sufficient cause to believe tax evasion may have occurred. The Supreme Court in Donaldson does soften the Wild test by its unnecessary finding that it was only a possibility that Donaldson might be indicted and prosecuted "no more and no less in his case than in the case of any other taxpayer whose income tax return is undergoing audit."\textsuperscript{49} By implication, if the taxpayer has a greater chance of prosecution at the time of the issuance of the summons, the defense might be available. This would be consistent with Bo- ren and O'Connor. Further, if it is the taxpayer that is being summoned, Fourth Amendment considerations may preclude the enforcement proceedings. However, the Court is inconsistent by stating: "the fact that a full scale tax fraud investigation is being made does not necessarily mean that prosecution ensues when tax liability becomes apparent."\textsuperscript{50} Even if a special agent is concerned with the "conduct of tax fraud investigation(s)," such agent's issuance of a summons is valid, the Court reasoned, since "the special agent may well conduct his investigation jointly with an agent from the Audit Division."\textsuperscript{51} The Court appears to be unaware that the revenue agent assigned to the case is often necessary to explain the technical nature of various transactions and is possibly the individual that has uncovered potential evidence of fraud resulting in referral to the Intelligence Division. As stated previously, the civil case does not proceed and the purpose of the new investigation is to support a criminal prosecution. The special agent's investigation is always solely for criminal purposes even though a special agent may assist a revenue agent in a civil case. The special agent has control over the revenue agent and the manner in which the case is to be prepared.\textsuperscript{52} Justice Blackman's statement for the majority that prosecution may not ensue even after full investigation is irrelevant since many cases that could be prosecuted are not because of the amounts involved, the health of the taxpayer, the number of cases in the office, or other factors unconnected with whether the evidence is sufficient to prove the elements of a crime.\textsuperscript{53}

\textsuperscript{49} Donaldson v. United States, 400 U.S. at 534.
\textsuperscript{50} Id. at 535.
\textsuperscript{51} Id. at 534, 538.
\textsuperscript{52} I CCH, INTERNAL REVENUE MANUAL-AUDIT § 4231, (10) 95, 2(3) (Aug. 9, 1977).
\textsuperscript{53} Donaldson v. United States, 400 U.S. at 535.
Finally, the "holding" of the Court appears to create a different test:

We hold that under Sec. 7602, an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution.\(^5\)

The "good faith" requirement of Powell is given lip service, but it is negated by the holding itself. Obviously, the special agent will withhold a recommendation for prosecution until after the agent has obtained all of the evidence necessary for criminal prosecution. Since the taxpayer must prove lack of good faith, it is seemingly an impossible burden.

Though a proper analysis of O'Connor and Boren would have supported a literal application of the Reisman-Powell language prohibiting enforcement if the Internal Revenue Service was seeking evidence leading to criminal prosecution, Donaldson attempted to limit Reisman-Powell to bad faith, post referral or post indictment cases.

Since Donaldson, several courts have enforced a summons even where the focus of the Internal Revenue Service inquiry had changed from civil to criminal. Some courts have gone beyond Donaldson and have allowed enforcement of the summons even though the taxpayer had moved into a position where it was very likely that he would be prosecuted. For example, in United States v. Billingsley\(^5\) a special agent had recommended that the taxpayer be criminally prosecuted. A reading of Donaldson clearly supported the lower court's decision in favor of the taxpayer.\(^5\) The appellate court held that "the recommendation referred to in Donaldson occurs at the earliest, when the Internal Revenue Service forwards a case to the Department of Justice for criminal prosecution."\(^5\) The court rationalized that "the potential for civil liability necessarily accompanied the potential for criminal prosecution."\(^5\) However, this statement is true even after criminal prosecution since a

\(^5\) Id. at 536. This is technically not part of the holding since the issue did not have to be decided by the Court.

\(^5\) 469 F.2d 1208 (10th Cir. 1972). See also United States v. Weingarden, 473 F.2d 454 (6th Cir. 1973); United States v. Cleveland Trust Co., 474 F.2d 1234 (6th Cir. 1973); United States v. Cronen, 483 F.2d 99 (9th Cir. 1973).


\(^5\) United States v. Billingsley, 469 F.2d 1208, 1209 (10th Cir. 1972).

\(^5\) Id.
successful prosecution is conclusive of civil fraud. The civil and criminal aspects are always intermingled but become disengaged for investigation purposes earlier than at the time of referral to the Department of Justice. In fact, the Intelligence Division will not even discuss the civil aspects of the case. The recommendation by the special agent did not and does not concern itself with any civil aspect. The court's misunderstanding of the procedure in a tax fraud case is clear when it states: "That [taxpayer] might be indicted and prosecuted remained a mere possibility." Contrary to the court's conclusion, the chances of prosecution after the initial review and referral to the special agent are substantial.

The Ninth Circuit, in United States v. Zack, believed that the case law supported summons enforcement "even if the primary purpose of the investigation is criminal... if there is also the legitimate purpose of establishing civil tax liability." In an apparent realization of the control that the Government has over recommendations and indictments, the court refused to accept the argument of the Government that indictment or a recommendation of criminal prosecution is a prerequisite to a finding that an investigation is solely criminal. It stated that the Donaldson case set up two requirements rather than one as advocated by the Government; i.e., the summons must be issued prior to a recommendation, and it must be used in good faith.

Thus, in this case, if the administrative summons was used solely for criminal purposes, it is not issued in good faith and is impermissible. This is true even though there has been no recommendation for prosecution.

59. Tomlinson v. Lefkowitz, 334 F.2d 262 (5th Cir. 1964).
60. United States v. Billingsley, 469 F.2d at 1210.
61. In 1974, the Intelligence Division of the Internal Revenue Service completed 7215 fraud cases and recommended prosecution in 2454 of the cases. Completions included cases where the initial screening resulted in a return of the case for civil proceedings. Regional counsel, the next step in the process, historically has declined prosecutions in approximately 30% of the cases. Once it reaches the last step, the Department of Justice, the declination rate is minimal (91 cases in 1974). Therefore, even assuming that all 7215 cases in 1974 were investigated by special agents rather than declined prior to referral during the initial screening, the investigated taxpayer has approximately a 20% chance of indictment and prosecution, certainly more than a mere possibility. With respect to the chances of any taxpayer who is undergoing audit to be indicted, the chances are less than 1/2000 that such taxpayer will be indicted and prosecuted. 1975 Annual Report of Internal Service (computations are those of the author.) See CROWLEY & MANNING, supra note 2 at 5259.
62. 521 F.2d 1366 (9th Cir. 1975).
63. Id. at 1368. The Court argues that its apparent inconsistent decision in United States v. Bell, 448 F.2d 40, 42 (9th Cir. 1971) is "not to the contrary" since one object of the investigation was to determine civil liability. Id. at n. 1.
64. Id. at 1368.
Though the lower court found that the investigation was solely for criminal purposes, the case was reversed and remanded because of the court's inability to determine if the trier of fact had used the correct test (whatever it might be). 65

A recent decision extends Zack by suggesting that some courts may find "bad faith" when the special agent holds back the recommendation or has sufficient information to conclude that a recommendation for prosecution will be made. In United States v. Lafko, 66 as in Zack, the court recognized that Donaldson set up two tests in its holding. 67 It cited with approval United States v. Wall Corp. 68 which determined after Donaldson that "a firm purpose to recommend criminal prosecution" was all that was needed and "if the civil liability were already determined, the summons would appear to be solely for a criminal purpose." 69 The court reiterated the dicta in Reisman to the effect that the "Internal Revenue has no authority to conduct a criminal investigation through the use of its summons power." 70

Unlike earlier cases, the court refused to accept the view that Donaldson prevented further inquiry by a court if there were both a civil and criminal proceeding. In United States v. Friedman 71 the court was asked to adopt "a per se rule that the issuance of a Sec. 7602 summons by a special agent having power to recommend prosecution is always improper." 72

Though it refused to adopt such a rule, it did review post Donaldson cases in its (Third Circuit) effort to provide lower courts with meaningful guidelines in summons enforcement cases.

These cases recognize that the IRS has no authority to conduct a criminal investigation through the use of a Sec. 7602 civil summons. But if (1) the Intelligence Division of the IRS has not yet recommended prosecution, (2) the investigating agent has not already formed a firm purpose to recommend prosecution, (3) the summons is not being used to harass the taxpayer and (4) the material referred to in the summons has not already been inspected by the government, these cases hold that the mere fact that criminal as well as civil liability may result will not prevent judicial enforcement. 73

65. Id. at 1369.
66. 520 F.2d 622 (3d Cir. 1975).
67. Id. at 625.
68. 475 F.2d 893 (D.C. Cir. 1972).
69. Id. at 895.
70. 520 F.2d at 624.
71. 532 F.2d 928 (3d Cir. 1976).
72. Id. at 932, 933.
73. Id. at 932. One of the cases cited, United States v. McCarthy, 514 F.2d
In *United States v. Asphalt Materials, Inc.*, a case in which a petition for certiorari has been filed with the Supreme Court, the lower court ordered that the defendants comply with the Internal Revenue Service summons. In its analysis, the court did suggest a test somewhat different than *Friedman*:

> The likelihood of a criminal prosecution does not bar enforcement of a Section 7602 summons so long as a good faith civil investigation of the taxpayer is being conducted. [Emphasis added]

If the test cannot be determined by an objective standard, i.e., if the court cannot determine by objective proof whether a good faith civil investigation of the taxpayer is being conducted, it is as useless in obtaining uniformity in enforcement proceedings as the tests in both *Donaldson* and other post *Donaldson* cases have proven to be. However, the court can determine if a civil investigation is being conducted by understanding the procedures of the Intelligence Division of the Internal Revenue Service and determining what phase the investigation has progressed. If a revenue agent has discovered information which suggests the possibility of fraud, the agent prepares a referral report for the Intelligence Division which sets forth the reasons why fraud is suspected. It is initially screened by the Chief of the Intelligence Division. According to the *Audit Technique Handbook for Internal Revenue Agents* the case is retained by Intelligence "if it appears that sufficient evidence can be gathered to prove willful violation beyond a reasonable doubt as required in a criminal case." Obviously, the inquiry has gone past that indicated in *Donaldson*, even prior to the assignment of the case by the Chief to a special agent, since the taxpayer has a greater chance of prosecution than any other taxpayer. The special agent, once assigned, is required to gather the evidence to prove willful violation beyond a reasonable doubt. As stated previously, the civil investigation is suspended either formally or informally so that Intelligence may control the method of investigation, impose safeguards to protect the information gathered, and ensure that the revenue agent does not cause the suppression of evidence by violating the constitu-

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368 3d Cir. 1975), provides a suggested procedural guide for both the Government and the taxpayer to use in enforcement proceedings.

74. 77-1 U.S. Tax Cas. § 9143 (W.D.N.Y. 1976); aff'd 1977-2 U.S. Tax Cas. § 9449 (2d Cir. 1977).

75. Id.

76. Id.

77. I CCH, INTERNAL REVENUE SERVICE MANUAL-AUDIT § 4231, (10) 93 (May 27, 1977).

78. Id. at (10) 93. However, the manual does not explain the method or methods of gathering the evidence.
tional rights of the taxpayer.\textsuperscript{79}

Therefore, the court's inquiry could be limited to decide whether or not the "initial screening" resulted in a retention of the case or a return of the case for civil proceedings. If it were retained, the summons should not be enforced since evidence gathering is for criminal prosecution and is unrelated at that time to the civil investigation which is either suspended or left open until completion of the criminal investigation. This procedure would appear to balance the interests of society since the taxpayer would be protected from turning over books and records to a lower echelon official in contravention of the taxpayer's constitutional and statutory rights, and the Government could still seek a court supervised search warrant if its investigation disclosed criminal activity and probable cause.\textsuperscript{80}

This test in modified form was applied in an earlier case, \textit{United States v. LaSalle National Bank}.\textsuperscript{81} Though the court stated that "the presence of a special agent assigned to the investigation does not automatically make it a criminal investigation,"\textsuperscript{82} its enforcement powers would be used only if the focus of the investigation is not upon criminal prosecution; i.e., the criminal prosecution is the end and goal of the Internal Revenue Service's investigation.

(B) The Taxpayer Shall Not Be Subjected To Unnecessary Examinations.

Section 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 or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

\textsuperscript{79} In \textit{United States v. Gilpin}, 542 F.2d 38, 40 (7th Cir. 1976) the court stated: "In this regard, it is established procedure that when, during his investigation, a Revenue Agent discovers an indication of fraud, he is required to cease his examination and refer the case to the Intelligence Division, Internal Revenue Service Manual, Part IV, Section 4565.2."

\textsuperscript{80} Contra, \textit{United States v. Doney}, 559 F.2d 545 (9th Cir. 1977).

\textsuperscript{81} 76-1 U.S. Tax Cas. § 9407 (N. Ill. 1976).

\textsuperscript{82} Id. Even under the test advocated, if a special agent is contacted merely for information by a revenue agent (i.e., what to look for to ascertain whether fraud is present), such involvement by a special agent would not preclude enforcement.
This statutory rule has been likened to the Fourth Amendment's prohibition against illegal searches and seizures and may be asserted by the taxpayer in summons enforcement proceedings even if the focus of the inquiry is civil. Further, the taxpayer can move to suppress evidence obtained by the Internal Revenue Service in contravention of the statute.

In Application of Leonardo, the taxpayers had been previously audited by the Internal Revenue Service and deficiencies had been assessed and paid. Without a request in writing as required by Section 7605(b), an agent returned for an inspection of the books and records of the taxpayers for the same years. However, the agent misled the bookkeeper of the taxpayers by informing the bookkeeper that he was examining subsequent tax years. The court first determined that there was no consent to the inspection since the bookkeeper was misled. It then considered the question of whether the court can grant relief to the taxpayers for abuse of the statutory process. It concluded:

Courts have inherent disciplinary power over any officer thereof, including the United States Attorney, to protect persons whose property is unlawfully in the possession of such court officer, and the granting of such protection does not depend upon the presence or absence of any especial kind of illegality.

By analogy to a pre-indictment motion under Rule 41(e) to suppress the evidentiary use in a federal criminal trial of material allegedly procured through an unreasonable search and seizure, the propriety of which is no longer open to question [citations], this Court may afford similar relief to prevent the use of evidence in violation of a federal statute, which like Section 7605(b), relates to the taxpayer's privacy.

Evidence may be suppressed even if notice has been given by the Secretary or his delegate if the court determines that the examination is unnecessary. The necessity of a second examination, whether as part of a criminal investigation or civil investigation, must be shown by the Government who "has the burden of showing the materiality and relevance of the proposed examination to the tax liability [citations]." Further, even if the Government has met its burden of proof, the taxpayer may show that the examination is unnecessary because the information sought is already in the possession of the Government.

83. 208 F. Supp. 124 (N.D. Cal. 1962). A special agent was involved at one time in the investigation.
84. Id. at 126.
85. Id. at 127.
87. Id. at 14, 15; United States v. Powell, 379 U.S. at 56.
88. United States v. Pritchard, 428 F.2d 969, 971 (5th Cir. 1971).
However, this defense is not available to the taxpayer if the books and records sought are third party’s books and records.\footnote{United States v. Bank of Commerce, 405 F.2d 931, 933 (3d Cir. 1969).}

Notwithstanding \textit{Leonardo}, the effectiveness of the defense is diminished by the willingness of courts to find that the Internal Revenue Service has been involved in a continual examination and that a second examination has not been initiated, so that no notification is necessary. This result has been reached even after books and records have been reviewed by the Internal Revenue Service and a proposed settlement discussed and agreed to by the taxpayer and revenue agent.\footnote{United States v. Williams, 381 F. Supp. 492 (S.D. Ala. 1974). It is unknown why the taxpayer did not assert that the information was already in the possession of the Internal Revenue Service. See United States v. Gilpin, 542 F.2d 38, 40 (7th Cir. 1976).}

\textbf{(C) Relevancy, Possession of Information by Commissioner, and Compliance With Administrative Steps.}

Though it is the purpose of this Article to focus on the bad faith criminal prosecution defense to summons enforcement, the other Powell requirements are oftentimes intertwined. Obviously, the good faith of the Commissioner and the relevancy of the inquiry may be questioned if the papers sought are in the Commissioner’s possession.\footnote{United States v. London Ins. Agency, Inc., 76-2 U.S. Tax Cas. § 9735 (D. R.I. 1976).}

The failure to comply with administrative procedures that must be followed to issue a summons as set forth in Sections 7602, 7603, 7605 and 7609 may also affect the court’s decision on the good faith of the Commissioner.

If a third party has received the summons, the taxpayer or third party may have to rely on these procedural requirements since the Fourth and Fifth Amendment, which are personal to the taxpayer, cannot generally be asserted. For the same reason, Section 7605(b) cannot be asserted. Because of the obvious financial and time consuming burden placed on a third party and the inability of the taxpayer to raise certain defenses, the courts will tolerate less of a “fishing expedition” if the summons is directed to a third party. More stringent rules of relevancy and materiality will be applied.\footnote{United States v. Luther, 481 F.2d 429 (9th Cir. 1973).} The court will consider “policy
and burdensomeness” and whether the Internal Revenue Service has in its possession the records being sought even if the records are in a different form in the hands of the third party.93

Though the Government is not required to “state with precision what light [the records subpoenaed] may shed upon the taxpayer’s correct income tax liability,” it has the “burden of demonstrating some justifiable expectation that the information sought [from the third party] is relevant to the purpose of the inquiry.”94 The information sought must be more than marginally relevant, and the Government must prove more than “a general need for a ‘road map’” to guide it, through the assistance of a third party, to information that may assist the Government in discovering errors or omissions as to income tax liability.95

Recently, in United States v. Bisceglia,96 the Supreme Court expanded the right of the Internal Revenue Service to obtain information from third parties even where it failed to identify the taxpayer in the summons. However, it recognized the obligation of the courts to scrutinize carefully the summons “to determine whether [the Internal Revenue Service] seeks information relevant to a legitimate investigative purpose.”97


Prior to the Tax Reform Act of 1976, the taxpayer had to rely upon luck and extraordinary court relief to prevent a third party from disclosing records to the Internal Revenue Service. Since the Service did not have to disclose the fact that it was seeking records, the taxpayer had to generally rely upon a disclosure by the third party that it had received a summons. If the taxpayer could not persuade the third party recordkeeper to refuse to comply with the summons, the taxpayer was forced to seek an injunction to enjoin the third party from voluntarily

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93. United States v. Coopers & Lybrand, 413 F. Supp. 942, 948, 950 (D. Colo. 1974). The court did state that it could not conclude on that basis alone that the Government was “limited to summoning information which the Service has not already reviewed in another form. . . .” However, it is a factor in balancing the interests of the parties. Id. at 950. The court reviewed in its decision many cases dealing with the question of relevancy.
94. Id. at 962.
95. Id. at 953 citing United States v. Harrington, 388 F.2d 520 (2d Cir. 1968) and United States v. Williams, 337 F. Supp. 1114 (S.D.N.Y. 1971), appeal vacated and dismissed, 489 F.2d 1397 (2d Cir. 1971).
97. Id. at 146.
complying. If an enforcement proceeding was instituted because the third party refused voluntary compliance, the taxpayer was forced to attempt to intervene, sometimes successfully but oftentimes unsuccessfully. Sections 7609 and 7610 of the Internal Revenue Code were added by the Tax Reform Act of 1976 to provide a statutory procedure for the taxpayer to stay compliance and to intervene.

Section 7609 requires notice of the summons directed to a "third party recordkeeper" to be given to any person who is "identified in the description of the records contained in the summons." In order to prevent the record keeper from complying with the summons, such noticed person must give the recordkeeper notice in writing not to comply, which notice must be copied and sent by registered or certified mail to the Internal Revenue Service office as the Secretary may direct in the original notice. A "third party recordkeeper includes an attorney, accountant, Savings and Loan, bank, consumer reporting agency, person extending credit and through credit cards or similar devices, or any broker. . . ."98 Failure to strictly comply with the notice requirements will prevent the taxpayer from staying compliance or intervening.99 Notice to the taxpayer is not required if the court, upon petition by the Secretary, determines that

there is reasonable cause to believe the giving of notice may lead to attempts to conceal, destroy, alter records relevant to the examination, to prevent the communication of information from other persons through intimidation, bribery, or collusion, or to flee to avoid prosecution, testifying, or production of records.100

Section 7609 also deals with the "John Doe Summons" in an attempt to reduce the potential for abuse by the Internal Revenue Service and to provide safeguards not required by the statutory scheme as interpreted by the Supreme Court in Bisceglia.

98. Broker is defined in Section 3(a)(4) of the Securities Exchange Act of 1954, 15 U.S.C. § 78c(a)(4) (1971). If a taxpayer is providing information for any type of business transaction, or a third party is preparing information in the taxpayer's behalf and certain information is provided by the taxpayer, the taxpayer would be well advised to turn over the records to one of the delineated "third party recordkeepers" who should retain the information and services of the non-qualifying third party.


100. I.R.C. § 7609(g).
John Doe Summons have received widespread attention in newspapers, Congress and in other articles and notes.\(^{101}\)

**B. The Fifth Amendment Protection of the Taxpayer—Illusory or Real?**

According to one of the leading commentators in the tax fraud field, the Fifth Amendment no longer protects the written testimony of the taxpayer.\(^{102}\) His startling statement was based in large part on the holding in *Andresen v. Maryland*,\(^{103}\) decided by the Supreme Court in 1976. *Andresen* was a culmination of several years of major retreat by the Supreme Court from *Boyd v. United States*\(^{104}\) which set forth the availability of the Fifth Amendment to prevent the Government from extorting a man’s private papers.\(^{105}\)

The first major limitation specifically affecting the right of a taxpayer to assert the protection appeared in 1973 in *Couch v. United States*.\(^{106}\) In *Couch*, the question before the Supreme Court was whether a taxpayer could assert her privilege against compulsory self-incrimination to prevent the Internal Revenue Service from compelling her accountant from turning over the taxpayer’s business and tax records which were in the accountant’s possession.\(^{107}\)

In denying the taxpayer the right to assert the defense, the Court limited the defense to those situations where both ownership and possession are present. The Court stated “[i]t is extortion of information from the accused himself that offends our sense of justice.”\(^{108}\) Where “the ingredient of personal compulsion against the accused is lacking,” the Fifth Amendment is unavailable.\(^{109}\)

The Court did recognize that “constructive possession” may be asserted if “the relinquishment of possession is so temporary and insignificant as to leave the personal compulsion upon the accused substantially intact.” Since there was a continuous in-

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101. See, e.g., Note, *Taxation: I.R.S. Use of John Doe Administrative Summons*, 30 Okla. L. Rev. 465 (1977). John Doe Summons are used by the I.R.S. to obtain books and records of an individual where the name of such individual may be unknown to the service.
104. 116 U.S. 616 (1886).
105. *Id.* at 633.
107. *Id.* at 323.
108. *Id.* at 328.
109. *Id.* at 329.
terchange of records between the taxpayer and her accountant, there was more than "fleeting divestment of possession."\textsuperscript{110} In dismissing the taxpayer's assertion that the Fifth Amendment protected her from such invasion of privacy, the Court opined that there could be no expectation of privacy by the taxpayer since the accountant must make mandatory disclosures to the taxing authorities of "much of the information."\textsuperscript{111} The Court avoids the obvious. Accountants are an integral part of every major business transaction since unfavorable tax consequences may be the transaction's deathblow. There are numerous accountants who never see a tax return and are retained for tax planning. Their working papers may in fact include examples of tax evasion (how to or how not to) in an effort to properly (or improperly) guide the taxpayer. If the free exchange of ideas is hampered by the lack of privacy, the taxpayer will be forced to forego the guidance of the professional. The destruction of work papers and other documents will be the norm rather than the exception.

In the following year, the Supreme Court in \textit{Bellis v. United States}\textsuperscript{112} compelled a partner in a dissolved three man partnership to turn over partnership financial statements to a grand jury. Prior to \textit{Bellis}, corporations, associations, and large partnerships had not been able to assert the Fifth Amendment,\textsuperscript{113} but it had been thought that records of a small partnership would be within the scope of the privilege. The Court distinguished \textit{Boyd} by stating that it applied only to "business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life."\textsuperscript{114} Records of the partnership could not be immune since there could be no expectation of privacy.\textsuperscript{115}

The unanswered question as to whether the Fifth Amendment

\textsuperscript{110} \textit{Id.} at 333, 334 (emphasis added).
\textsuperscript{111} \textit{Id.} at 335.
\textsuperscript{112} 417 U.S. 85 (1974).
\textsuperscript{113} The Fifth Amendment is not available to corporations, \textit{Wilson v. United States}, 221 U.S. 361 (1911); associations, \textit{United States v. White}, 226 U.S. 478 (1913); or large partnerships, \textit{In re Mal Brothers Contracting Co.}, 444 F.2d 615 (3rd Cir.), \textit{cert. denied}, 404 U.S. 857 (1971).
\textsuperscript{114} 417 U.S. at 87, 88.
\textsuperscript{115} \textit{Id.} at 91, 92.
could be asserted by a taxpayer if his attorney was in possession of the books and records was answered in 1976 in *Fisher v. United States.* The taxpayers were interviewed apparently by a special agent in connection with an investigation of possible civil or criminal liability. Shortly thereafter, the taxpayers obtained certain records from their accountant and turned them over to their attorneys, Fisher and Kasmir. Both attorneys were retained by the taxpayers to assist them in the investigation. Upon discovering that the accountant's records, work papers, reports and copies of tax returns were delivered to the attorneys, the Internal Revenue Service issued a summons to Messrs. Fisher and Kasmir.  

The confusion created by *Couch* was illustrated by the unique history of the case. Mr. Fisher's enforcement order was affirmed in the Third Circuit and Mr. Kasmir's enforcement order was reversed by the Fifth Circuit. The Supreme Court agreed with the conclusion of the Fifth Circuit that "if the Fifth Amendment would have excused a taxpayer from turning over the accountant's papers had he possessed them, the attorney to whom they are delivered for the purpose of obtaining legal advice should also be immune from subpoena." The Court's agreement was based on the attorney-client privilege of the Fifth Amendment. In order to prevent the production of the requested documents, the taxpayer or his attorney would have to assert the attorney-client privilege. The Fifth Amendment was not available, the Court reasoned, because the taxpayers are compelled to do no more than was the taxpayer in *Couch.* "Agent or no, the lawyer is not the taxpayer. The taxpayer is the 'accused' and nothing is being extorted from him."  

Although the taxpayers did not assert the attorney-client privilege specifically, the Court felt "obliged to inquire whether the attorney-client privilege applies to documents in the hands of an attorney which would have been privileged in the hands of the client by reason of the Fifth Amendment." Before the attorney-client privilege would ripen, the subpoenaed documents would have to contain disclosures which are confidential.
in nature, constitute testimonial compulsion,\textsuperscript{124} and be necessary for the legal advice sought.\textsuperscript{125} Further, if the records are transferred to the attorney for safe keeping \textit{and not for advice}, the Court suggests by implication that it would order production of the records even though a taxpayer could not be compelled to produce the records had the records been in his possession.\textsuperscript{128}

Since the records were submitted to the attorneys by the taxpayers for advice, the Court had to decide whether the records could have been obtained directly from the taxpayers. Since the papers did not contain "compelled testimonial evidence" the Fifth Amendment would not have been available to the taxpayers. There were no tacit averments by the taxpayers as to either the existence of the papers demanded or as to their ownership of the papers.\textsuperscript{127} "[T]he act of producing them—the only thing which the taxpayer is compelled to do—would not itself involve testimonial self-incrimination."\textsuperscript{128} The Court specifically refused to decide whether a taxpayer could be compelled to produce personal tax records in his possession.

The unanswered question appeared to some\textsuperscript{129} to be resolved unfavorably to the taxpayer in \textit{Andresen v. Maryland}. However, the specific issue before the Court was succinctly stated in the first sentence of the Court's opinion: "[t]his case presents the issue whether the introduction into evidence of a person's business records, seized during a search of his offices, violated the Fifth Amendment's command that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.'"\textsuperscript{130}

\textbf{Andresen, an attorney,}\textsuperscript{131} was involved in certain fraudulent

\textsuperscript{124} Testimonial compulsion requires the defendant to give oral testimony or produce documents or real evidence. 8 Wigmore, Evidence § 2263 et seq. (1970).
\textsuperscript{125} 425 U.S. at 402-404.
\textsuperscript{126} Id. at 405.
\textsuperscript{127} Id. at 409, 410.
\textsuperscript{128} Id. at 411. The court doubted whether an implied admission as to the existence and possession of papers will rise "to the level of testimony within the protection of the Fifth Amendment." Id.
\textsuperscript{129} See note 102, supra.
\textsuperscript{130} 427 U.S. at 465.
\textsuperscript{131} The petitioner argued his own case which once again illustrates the old adage.
real estate transactions. During the investigation, the investigators obtained search warrants which were used to obtain personal records of the petitioner including his own incriminating statements which he had voluntarily committed to writing. Andresen sought unsuccessfully in the lower court to suppress the evidence.

The Supreme Court refused to overturn the lower court by answering its own question in the negative since as in Couch and Fisher, "the petitioner was not asked to say or do anything."[132] Any other conclusion, the Court opined, would undermine earlier decisions of the Court. However, the Court does appear to answer in part the unresolved Fisher issue favorably to the taxpayer if Fisher is understood to vastly limit the Fifth Amendment privilege even as to documents in the possession of the taxpayer. The Court in Andresen recognizes that the "Fifth Amendment may protect an individual from complying with a subpoena [summons] for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information ... "[133] Although the use of the word "may" in the quoted sentence precludes an absolute rule that a summons to the taxpayer for the production of personal records may be quashed, the Court will deny enforcement if the taxpayer is required to aid in the discovery, production, or authentication of personal documents or effects that might incriminate the taxpayer.[134] Otherwise, the careful distinctions the Court makes between Bellis, Fisher and other Fifth Amendment cases would be meaningless. Nevertheless, the personal documents or effects must meet the definitional requirements of Fisher, and the taxpayer's privacy must be invaded to the extent that he is personally compelled to aid the Government.

Justice Brennan, in his dissent in Andresen, illustrates the fallacy of Justice Blackmun's assertion that the majority opinion is based on historical precedent. To exclude the personal records of the taxpayer or accused from the zone of privacy "ignores the essential spirit of the Fifth Amendment."[135] The distinction by the Court between a search warrant and summons is too simplistic since a search and seizure "is as rife with elements of compulsion as subpoena. The intrusion occurs under the lawful process of the State. The individual is not free

132. 427 U.S. at 473.
133. Id. at 473, 474.
134. Id. at 474.
135. Id. at 486, 487-492.

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to resist that authority." The forcible extortion of a man's papers recognized as prohibited by the Fifth Amendment in *Boyd* occurs whether the taxpayer produces the document or the Government forces its way into the private sanctity of the taxpayer's house or business.

Regardless of whether the majority decision in *Andresen* is historically unsound, it is obviously binding. In order for the taxpayer to successfully assert the Fifth Amendment, he must illustrate all of the following:

1. The taxpayer must be an individual;
2. The taxpayer must be required by summons or similar legal process to *personally* discover, produce, or authenticate his personal papers; and
3. The personal papers must be confidential in nature and constitute testimonial communication that is incriminating.

If such privileged papers are in the hands of the taxpayer's attorney, the attorney-client privilege will be available if:

1. The papers have been transferred to the attorney by the taxpayer;
2. The papers are necessary to the attorney in rendering advice to the taxpayer which advice is sought; and
3. The disclosures contained within the papers might not have been made absent the privilege.

If the ruling in *Andresen* is strictly followed, the attorney may be forced to obey a search warrant even as to papers of his client which meet the *Fisher* criteria for invoking the attorney-client privilege since there would be no compulsion as to the client. For example, if the taxpayer took his records out of hiding, gave information to his attorney in documentary form, or the attorney prepared notes of his conversations with the taxpayer, the Government could obtain a search warrant and assert that the taxpayer as in *Couch* was not compelled to do anything. Since the Fifth Amendment would be unavailable to the taxpayer, the attorney could not assert the attorney-client privilege if the court's language in *Fisher* is literally applied. However, this would destroy the attorney-client privilege as we know it today and the court may (hopefully) be forced to retreat from this conclusion. It might be difficult in other areas for the

136. *Id.* at 486, 487.
137. If a taxpayer partner is not maintaining papers in a representative capacity, the taxpayer may be entitled to assert the Fifth Amendment.
Government to show probable cause in order to obtain the warrant, but oftentimes the Internal Revenue Service is aware of what is in the hands of the attorney because of the statements of the attorney in his effort to convince the Internal Revenue Service that the case should not be referred for prosecution. The special agents might seek out a friendly employee or secretary of either the taxpayer or attorney to support the application for the warrant. The evidence in the hands of the attorney would obviously be relevant and would relate to the crime charged. However, such literal application of the rule would destroy the very purpose of the attorney-client privilege; i.e., the client must be able to confide in his lawyer so that the lawyer can fully advise the client.\textsuperscript{138} Hopefully, the pendulum will not swing so far.

C. The Fourth Amendment—Safeguard of the Taxpayer.

Unlike the Fifth Amendment, the Fourth Amendment is available to a corporate taxpayer, a partner, or an individual.\textsuperscript{139} It can be asserted to quash a summons that is unreasonable or overly burdensome.\textsuperscript{140} It is also an important tool in preventing the Internal Revenue Service from obtaining evidence unlawfully, which will be the focus of this section.

Until the Watergate investigations, the extent of the Internal Revenue Service’s activity in investigations unrelated to revenue gathering was generally unknown. Because of the disclosures during the investigations that the Executive Branch was using the Internal Revenue Service agents for non-revenue matters, the courts began to scrutinize more closely the activities of the agents. This increased concern is due in part to the tremendous power given to lower echelon personnel in the Internal Revenue Service, power which is not supervised by either superiors within the Service or the court. An understanding by taxpayers, their counsel and third party recordkeepers of the scope of the illegal activities will assist them in preventing agents from enjoying the fruits of their efforts.

An example of the misuse of power by agents and their attempt to obtain evidence by any means is illustrated in \textit{United States v. Tweel},\textsuperscript{141} decided in 1977. After the completion of an

\textsuperscript{138} 425 U.S. at 403.
\textsuperscript{139} \textit{See}, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Mancusi v. DeForte, 392 U.S. 364 (1968).
\textsuperscript{141} 550 F.2d 297 (5th Cir. 1977).
audit to which a special agent had been assigned, but had withdrawn, a second audit was initiated at the specific request of the Organized Crime and Racketeering Section of the Department of Justice. A revenue agent sought and obtained an appointment with the taxpayer's accountant. In response to a question of the accountant, the revenue agent stated that there was no special agent involved. The agent failed to disclose that the audit was not a routine audit, causing the accountant to believe that it was simply a civil audit. In reliance on the representations of the agent, the accountant "voluntarily" provided the agent with the taxpayer's records.142 The court stated that "a consent search is unreasonable under the Fourth Amendment if the consent was induced by the deceit, trickery or misrepresentation of the Internal Revenue agent."143 It found from the facts that "the agent's failure to apprise the [taxpayer] of the obvious criminal nature of this investigation was a sneaky deliberate deception by the agent...and a flagrant disregard for [taxpayer's] rights. The silent misrepresentation was both intentionally misleading and material."144 The Court gave a stern warning because of the assertion by the Government that the procedures followed by the agent were "routine". "If that is the case we hope our message is clear. This sort of deception will not be tolerated and if this is the 'routine' it should be corrected immediately."145

Although the Government may use decoys and may conceal the identity of its agents in certain limited instances, "the various protections of the Bill of Rights, of course, provide checks upon such official deception for the protection of the individuals."146 A search and seizure obtained by stealth is as unreasonable as one obtained by force or coercion.147 Special agents cannot avoid disclosing their identity by staying behind the scene and directing the activity of the revenue agent.148 If the illegal activity is conducted by one other than a Government

142. Id. at 298.
143. Id. at 299.
144. Id.
145. Id. at 300 n. 9.
agent without the knowledge of the Government, the evidence obtained will not be suppressed even if it is used by the Government.\textsuperscript{149}

\textbf{D. Other Methods of Governmental Access to Records.}

If the Government is unsuccessful in obtaining a search warrant or believes it cannot enforce a summons, it may seek information through a grand jury investigation. Because of the substantial investigatory powers of the grand jury, it is extremely difficult for the taxpayer or his counsel to prevent the gathering of evidence. Until recently, the Government, as a matter of course, obtained \textit{ex parte} orders pursuant to Rule 6(e)\textsuperscript{150} of the Federal Rules of Criminal Procedure which enabled Internal Revenue Service agents to obtain secret information from the grand jury that might be unavailable by other means.

Because of the grand jury's massive power to intrude upon the taxpayer, the Ninth Circuit recently limited the agent's access to the grand jury information. In \textit{Simplot Co. v. United States},\textsuperscript{151} the court believed that Rule 6(e) could not be indiscriminately used to "include agency personnel whenever it suits the convenience of the United States Attorney. . . ."\textsuperscript{152} Though the court was concerned with limiting the use of the grand jury information in a potential civil proceeding, its analysis of Rule 6(e) suggests a procedure for defense counsel to prevent indiscriminate agent involvement even in the criminal aspect of the case. It recognized that "[t]o allow government agencies access would create a serious inequity in grand jury procedures and would undercut the function of secrecy as a bulwark against

\begin{footnotesize}
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    \item \textsuperscript{149} Meister v. Vomm'r, 504 F.2d 505 (3d Cir. 1974); See also United States v. Janis, 428 U.S. 433 (1976).
    \item \textsuperscript{150} \textit{Fed. R. Crim. P. 6(e), Secrecy of Proceedings and Disclosure: Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.}
    \item \textsuperscript{151} 77-1 U.S. Tax Cas. § 9144 (9th Cir. 1976) as amended by 77-2 Tax Cas. § 9511 (9th Cir. 1977).
    \item \textsuperscript{152} Id.
\end{itemize}
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unwarranted investigations." 153 To safeguard the independence of the grand jury, the court interprets Rule 6(e) as requiring an adversary hearing to determine if agency access should be allowed. Further, the Government "must show the necessity for each particular person's aid rather than showing merely a general necessity for assistance, expert or otherwise. Moreover absent an explanation for the failure to use qualified personnel within the Justice Department the Government cannot carry its burden of showing that outside personnel are necessary." 154

III. CONCLUSION

Because of the ever increasing expansion of the Government's right of access to taxpayer's books and records, the taxpayer, and third party recordholders, and counsel, must assess what business information should be recorded, what records should be retained, and where the records should be kept. Such decisions must be made in light of the substantial bookkeeping requirements of the Internal Revenue Code.

In connection with summons enforcement proceedings, counsel must educate the courts as to the procedure of the Internal Revenue Service so that courts will recognize that upon referral of a case to the Intelligence Division of the Internal Revenue Service, the civil aspects of the case are suspended and the focus of the investigation becomes criminal. As advocated in this article, this should be the starting point of the court's inquiry as to whether the investigation has ceased to be civil in nature. If the court finds that the case has been retained by Intelligence and not returned for civil proceedings, a summons issued by the Internal Revenue Service contemporaneously or subsequent to such retention should not be enforced. This result would not prevent the Internal Revenue Service from obtaining books and records of the taxpayer. It would merely require court supervision of any search and reduce the chance for abuse by lower echelon officials of the Internal Revenue Service. If this test is adopted, any detriment to the Government is far outweighed by the substantial risk of abuse with respect to the taxpayer which would otherwise occur.

153. Id.
154. Id.
Taxpayers and third party recordholders must also be educated by their counsel as to the practices of agents so that illegal activity can be curtailed. Once a special agent is assigned to a case, the acts of a revenue agent are suspect; or if a civil investigation appears to be unduly prolonged, the taxpayer must be instructed that cooperation with the Service is the exception and not the rule. Before any statements are made, even if the statements are exculpatory, the taxpayer and his counsel must fully analyze what the Service is seeking. Every statutory and constitutional right must be asserted at each administrative step.