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The Internal Revenue Service Summons to Produce Documents: Powers, Procedures, and Taxpayer Defenses

Nancy I. Kenderdine*

The authorized mission of the Internal Revenue Service\(^1\) is to "encourage and achieve the highest possible degree of voluntary compliance with the tax laws and regulations and to maintain the highest degree of public confidence in the integrity and efficiency of the Service."\(^2\) This Article examines one of the powers granted to the Service to help it achieve that goal: the power to compel the production of documentary evidence by summons.\(^3\)

The Service's summons power is governed by sections 7602 through 7610 of the Internal Revenue Code.\(^4\) Section 7602 authorizes the Secretary to examine any books, papers, records, or other data that may be relevant or material to an inquiry into tax liability.\(^5\) The same section empowers the Secretary to summon any person liable for tax, any officers or employees of that person, or any third party whose books of account contain entries relating to that person's business transactions, to appear and produce documents or give testimony under oath.\(^6\) This power is conferred on the Service to aid it in investigating civil tax liability; section 7602 does not expressly empower the Service to use its summons power pursuant to criminal investigations.\(^7\)

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1. Hereinafter the Service or the IRS.
5. I.R.C. § 7602(1).
6. Id. § 7602(2), (3).
7. The Secretary is authorized to summon materials 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 an internal revenue tax or the liability at law or in equity of any transferee or fiduciary or any person in respect of any internal revenue tax, or collecting any such liability.

*Id.* § 7602. The Supreme Court has said that these purposes do not justify sum-
In recent years, United States Supreme Court decisions have significantly fortified the Service’s summons power. The Court has quietly transformed the IRS administrative summons from a device used primarily for the purpose of investigating civil tax liability to one that now may be used for the sole purpose of furthering criminal investigations. During this period, the Court also has placed the protection of certain constitutional safeguards and common law privileges beyond the reach of taxpayers who are undergoing criminal tax investigation.

This Article examines the maze of procedural and substantive law surrounding the IRS' summons power. It demonstrates the need for a clearer delineation of the limits on this power, and the desirability of judicial or statutory reform in this area of law. Section I briefly details the general scope of the Service’s summons power, and section II elaborates on several of the special problems related to the scope of its third-party summons power. The next three sections examine the various objections that taxpayers commonly raise in resisting IRS summonses. Section III sets forth the procedure the Service must follow in issuing a summons, section IV discusses the dwindling availability of certain constitutional and common law defenses, and section V critically examines the Supreme Court’s recent evisceration of the legal principal that had previously been taxpayers’ most effective objection to enforce-


9. See United States v. LaSalle Nat'l Bank, 437 U.S. 298 (1978). In LaSalle, the special agent who issued the summons did so for the sole purpose of obtaining criminal evidence. The Supreme Court enforced the summons, however, since the taxpayer did not "disprove the actual existence of a valid civil tax determination or collection purpose by the Service." Id. at 316. Thus, courts will now enforce a summons issued by a special agent whose sole personal intent is to gather criminal evidence, so long as the taxpayer challenging the summons does not meet the heavy burden of disproving a valid civil investigation purpose by the service as an institution. See id.

10. The applicability of the fourth amendment, see text accompanying notes 109-125 infra, and the fifth amendment, see text accompanying notes 126-163 infra, to IRS summonses has been almost totally eroded by recent decisions. Similarly, the attorney-client privilege has been narrowly interpreted when IRS third-party summonses are involved, see text accompanying notes 175-187 infra. Furthermore, the Supreme Court has indicated that it will not recognize an accountant-client privilege. See Couch v. United States, 409 U.S. 322 (1973); text accompanying notes 164-174 infra.
ment—that an IRS summons may not be issued for the sole purpose of gathering evidence of criminal conduct. Section VI concludes by proposing that Congress or the courts correct this situation by imposing a probable cause standard upon certain IRS summonses.

I. SCOPE OF THE SERVICE'S SUMMONS POWER

The Internal Revenue Code grants the Service broad power to examine documents and to summon persons for testimony. This grant of power is tempered, however, by two statutory limitations. First, the documents or testimony sought by an IRS summons must be "relevant and material" to a legitimate investigation of tax liability. Second, "[n]o 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 [Service], after investigation, notifies the taxpayer that an additional inspection is necessary." These limitations have been the basis of many taxpayer objections to enforcement of IRS summonses. Courts generally have not, however, been sympathetic to the challenges. Their decisions, which broadly interpret all the statutory provisions, have one common thread: the conviction that "any other holding . . . would thwart and defeat the appropriate investigatory powers that the Congress has placed in the Secretary [which are necessary] to carry out the broad responsibilities [delegated to the Service] for the administration and enforcement of the internal revenue laws."

The section 7602 requirement that summoned information be relevant and material provides no practical check on the
Service’s investigatory power. The test for determining if information is relevant and material is simply whether it “might throw light upon the correctness of the return” or upon taxpayer liability. This easily met test is similar to the one used for determining materiality in grand jury investigations, and relevance in pretrial discovery. With respect to relevance and materiality, the enforcement of IRS summonses is governed by the same general criteria as those that control the investigative subpoenas of federal administrative and regulatory agencies.

Although the limitation of one inspection per taxable year has inspired much litigation, it was the requirement of section 7605(b) that examinations and inspections not be “unnecessary” which led to the significant case of United States v. Powell. In Powell, a taxpayer refused to honor an IRS summons concerning his 1958 and 1959 returns because he had previously been examined for both those years, and because the statute of limitations had run on all possible tax actions except those premised on fraud. The taxpayer argued that the Service must demonstrate grounds for its belief that fraud had been committed before the summons could be enforced. The district court, however, ordered production, finding that the investigating agent’s affidavit, which stated only that he had reason to believe that the taxpayer fraudulently falsified his return by

19. See, e.g., National Plate & Window Glass Co. v. United States, 254 F.2d 92, 93 (2d Cir. 1958) (per curiam) (cursory examination of plaintiff taxpayer’s records incident to the investigation of another related corporation did not constitute an inspection within the meaning of section 7605), cert. denied, 358 U.S. 822 (1958); United States v. Moriarity, 311 F. Supp. 144, 146 (E.D. Wis. 1969) (a reexamination of books and records that is part of a continuing examination is not a violation of section 7605 one inspection requirement), aff’d on other grounds, 435 F.2d 347 (7th Cir. 1970). See also United States v. Interstate Tool & Eng’r Corp., 526 F.2d 59 (7th Cir. 1975); United States v. Giordano, 419 F.2d 564 (8th Cir.), cert. denied, 397 U.S. 1037 (1969); DeMasters v. Arend, 313 F.2d 79 (9th Cir.), cert. denied, 375 U.S. 936 (1963).
21. Id. at 52-53.
overstating expenses, was sufficient to show necessity.\textsuperscript{22} The Court of Appeals reversed, holding that the challenged investigation was unnecessary unless the Service could show, at the adversary enforcement hearing, that it possessed information "which might cause a reasonable man to suspect that there had been fraud in the return."\textsuperscript{23} The agent's affidavit, of course, was unable to satisfy this probable cause standard.

The Supreme Court disagreed, refusing to equate necessity with probable cause or any other similar requirement.\textsuperscript{24} It reasoned that if the Commissioner needed certain information from a taxpayer's records to determine whether fraud had occurred, the investigation was necessary.\textsuperscript{25} The Court expressed the belief that more stringent interpretation of the term "necessity" would hinder the Commissioner in carrying out investigations which he felt were warranted.\textsuperscript{26} The Court concluded that Congress enacted section 7605(b) merely to protect honest taxpayers from repetitive visits bordering on harassment by lower-echelon agents,\textsuperscript{27} and that to read the section as imposing a probable cause standard would "substantially overshoot the goal which the legislators sought to attain."\textsuperscript{28}

The Court in \textit{Powell} explained precisely what the Service would be required to demonstrate at enforcement hearings, and placed the more formidable burden of showing an abuse of the summons process on taxpayers. Under \textit{Powell}, the four elements of the prima facie showing of necessity that the Service must make at enforcement hearings are: (1) that the investigation is conducted pursuant to a legitimate purpose, (2) that the summoned information is relevant to that purpose, (3) that the information sought is not already within the Commissioner's possession, and (4) that the proper procedure has been followed.\textsuperscript{29} In recent years, the legitimate-purpose requirement is the only one of these four that has proved viable as a permanent bar to the enforcement of IRS summonses.\textsuperscript{30}

\begin{itemize}
\item \textsuperscript{22} \textit{Id.} at 50.
\item \textsuperscript{23} United States v. Powell, 325 F.2d 914, 915 (3d Cir. 1963), \textit{rev'd}, 379 U.S. 48 (1964).
\item \textsuperscript{24} United States v. Powell, 379 U.S. 48, 53 (1964).
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} \textit{Id.} at 53-54.
\item \textsuperscript{27} \textit{Id.} at 55-56. The Court fortified this conclusion by quoting Senator Penrose, who had noted that the requirement of necessity "will go a long way toward relieving petty annoyances on the part of honest taxpayers." \textit{Id.} at 55 (quoting 61 CONG. REC. 5855 (1921)).
\item \textsuperscript{28} 379 U.S. at 56.
\item \textsuperscript{29} \textit{Id.} at 57-58.
\item \textsuperscript{30} See text accompanying notes 189-243 \textit{infra}.
\end{itemize}
II. PROCEDURAL DEVELOPMENTS IN THE SCOPE OF THE SERVICE'S THIRD-PARTY SUMMONS POWER

The Service's summons power extends to records, books, and documents that are in the possession of persons other than the one whose tax liability is under investigation. The Service frequently employs its power to issue such third-party summonses since information relevant to tax liability is often maintained in the normal course of business by various business organizations or institutional record keepers. Bank records of checks and deposits, receipts of credit card transactions, records of employers, and contracts are but a few examples of such information.

The third-party summons has always been a source of special problems for taxpayers. Although the summoned third party may have objections of its own to compliance, it is normally the unsummoned taxpayer who is most concerned with the information sought. It is the taxpayer who will want to raise objections to the Service's examination of the summoned material, and ensure that the third party does not comply before such objections can be raised at an enforcement hearing.

In order for taxpayers to adequately protect themselves from third-party summonses, two procedural rights are necessary: they must receive notice that a summons relating to their tax liability has been issued, and they must have the ability to stay compliance and to intervene in the enforcement proceedings. Prior to the 1976 Tax Reform Act, taxpayers had no legal right to notice of third-party summonses in which they were implicated. Furthermore, their right to intervene in enforcement proceed-

ment proceedings had been severely limited by Supreme Court decisions.\textsuperscript{34}

In \textit{Reisman v. Caplin},\textsuperscript{35} the United States Supreme Court stated that a taxpayer could restrain third-party compliance until it was ordered by a district court in a proper enforcement proceeding.\textsuperscript{36} The \textit{Reisman} Court also noted that "third parties might intervene to protect their interests, [and] in the event the taxpayer is not a party to the summons . . . , he, too, may intervene."\textsuperscript{37} Following the \textit{Reisman} decision, the circuits were unable to agree whether this language indicated that taxpayers could intervene as a matter of right in all cases in which their records were involved,\textsuperscript{38} or whether taxpayers first had to demonstrate the existence of a substantial protectable interest as required by rule 24(a) of the Federal Rules of Civil Procedure.\textsuperscript{39}

In \textit{Donaldson v. United States},\textsuperscript{40} decided in 1971, the Supreme Court resolved this conflict. While investigating Donaldson's tax liability, the Service had issued summonses both to his former employer, the Acme Circus, and to Acme's accountant. The summonses directed both parties to testify and produce certain records relating to Donaldson's employment.\textsuperscript{41} Donaldson secured a temporary restraining order, and the Service moved for enforcement under Code section 7604(a).\textsuperscript{42}

\begin{itemize}
  \item \textsuperscript{34} See, \textit{e.g.}, United States v. Miller, 425 U.S. 435 (1976); Donaldson v. United States, 400 U.S. 517 (1971).
  \item \textsuperscript{35} 375 U.S. 440 (1963).
  \item \textsuperscript{36} \textit{Id.} at 450.
  \item \textsuperscript{37} \textit{Id.} at 449.
  \item \textsuperscript{38} See, \textit{e.g.}, United States v. Benford, 406 F.2d 1192 (7th Cir. 1969); United States v. Bank of Commerce, 405 F.2d 931 (3d Cir. 1969); Justice v. United States, 365 F.2d 312 (6th Cir. 1966).
  \item \textsuperscript{40} Rule 24(a) provides that, in general, a person shall be permitted to intervene "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair . . . his ability to protect that interest." \textit{Fed. R. Civ. P.} 24(a).
  \item \textsuperscript{41} The summoned records included any employment applications and other records that might contain social security numbers or other background data, any contracts between Donaldson and the Circus, and any W-2 forms, checks, vouchers, or correspondence relating to financial transactions between Acme and Donaldson. \textit{Id.} at 519.
  \item \textsuperscript{42} L.R.C. § 7604 provides in relevant part:
    \begin{itemize}
      \item (a) Jurisdiction of district court.—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
    \end{itemize}
Donaldson petitioned to intervene at the enforcement hearing as a matter of right and raised several objections to the summonses in his proposed answer. The district court refused to allow the intervention, and the Fifth Circuit affirmed. The circuit court based its decision on the fact that the language in Reisman referred to permissive, not mandatory, intervention. The court also noted that the summoned materials were simply Acme's ordinary business records, in which the taxpayer had no interest that was substantial enough to be protected under rule 24(a). The Supreme Court agreed, holding that a taxpayer has no absolute right to intervene in a third-party enforcement proceeding simply because he is the subject of the investigation. The Court concluded that a taxpayer must demonstrate a significantly protectable interest before intervention would be allowed. As examples of such interests, the Court mentioned information covered by the attorney-client privilege and materials in which taxpayers have a proprietary interest.

While the Court was limiting taxpayers' right to intervene in enforcement hearings, it was also substantially narrowing the availability of constitutional objections, and the privilege and improper purpose defenses. As a result, lower courts were seldom able to find the significant protectable interest required by Donaldson. Moreover, Donaldson was read by some courts as vitiating even the right to permissive intervention under rule 24(b) on the ground that giving taxpayers jurisdiction by appropriate process to compel such attendance, testimony, production of books, papers, records, or other data.

43. The petition was based on Fed. R. Civ. P. 24(a). See note 39 supra.
45. See text accompanying note 37 supra.
46. 418 F.2d at 1214.
47. Id. at 1218.
48. 400 U.S. at 530.
49. Id. at 531.
50. Id. at 530.
51. See text accompanying notes 107-163 infra.
52. See text accompanying notes 164-187 infra.
53. See text accompanying notes 188-243 infra.
55. See note 39 supra.
ers the ability to participate in such controversies would "unwarrantedly cast doubt upon and stultify the Service's every investigatory move."\textsuperscript{56}

In 1976, Congress attempted to remedy the third-party summons problem by adding section 7609 to the Code. This section gives taxpayers the right to notice of any summons implicating them that has been served on a third-party record keeper,\textsuperscript{57} as well as the rights to stay its compliance\textsuperscript{58} and to intervene in its enforcement proceeding.\textsuperscript{59} Third-party record keepers are defined as:

(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 . . . , or any credit union . . . ;
(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.\textsuperscript{60}

In order to stay compliance under section 7609, a taxpayer must, within fourteen days of receiving notice of the third-party summons, give written notice\textsuperscript{61} to the record keeper not to comply with the summons. If the taxpayer gives proper notice to stay compliance, the Service may enforce the summons only under section 7604,\textsuperscript{62} and section 7609 gives taxpayers an absolute right to intervene in section 7604 proceedings.\textsuperscript{63}

The provisions of section 7609, however, do not apply if the summons is served on an officer or employee of the taxpayer under investigation,\textsuperscript{64} nor do they apply if the purpose of the summons is merely to determine whether any records of a suspect transaction exist.\textsuperscript{65} Moreover, to make certain that taxpay-


\textsuperscript{57} A list of persons considered third-party record keepers for the purposes of the subsection is contained at I.R.C. § 7609 (a) (3). \textit{See} text accompanying note 60 \textit{infra}.

\textsuperscript{58} I.R.C. § 7609 (b) (2).

\textsuperscript{59} \textit{Id.} § 7609 (b) (1).

\textsuperscript{60} \textit{Id.} § 7609 (a) (3).

\textsuperscript{61} \textit{Id.} § 7609 (b) (2).

\textsuperscript{62} \textit{See} note 42 \textit{supra}.

\textsuperscript{63} "Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons . . . shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604." I.R.C. § 7609 (b) (1).

\textsuperscript{64} \textit{Id.} § 7609 (a) (4) (A).

\textsuperscript{65} \textit{Id.} § 7609 (a) (4) (B).
ers do not stay compliance merely as a delaying tactic, section 7609(e) provides that the running of any statutory period of limitation on the assessment or collection of taxes, or on related criminal prosecutions, is suspended for so long as any enforcement proceeding or appeal is pending.66

There are many third-party summonses, other than the exceptions specified in section 7609(a)(4), to which the provisions of section 7609 do not apply. The concern of Congress was not that taxpayers receive notice whenever their tax liability is under investigation, but rather, that "the use of this important investigative tool should not unreasonably infringe on the civil rights of taxpayers, including the right to privacy."67 Congress accordingly limited the coverage of section 7609 to summonses served on persons "engaged in making or keeping the records involving transactions of other persons."68 It seems clear that Congress felt it was the Service's unbridled power to summon professional accumulators of data that most threatened taxpayers' privacy rights.

Thus, section 7609 would not, for example, change the result in Donaldson concerning the summons issued to Donaldson's employer, because the section does not define employers as third-party record keepers. The statute might apply to the summons issued to Acme's accountant, however, because third-party record keepers include "any accountant."69 But the expectation-of-privacy rationale underlying section 7609 makes it doubtful that courts would interpret the section as applying to accountants in situations similar to that in Donaldson.

The justification for supposing such a narrow interpretation of section 7609 lies in its provision that it applies only where "the summons requires the production of any portion of records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in the description of the records contained in the summons."70 In denying intervention in Donaldson, the Court

66. In order for the running of the statute of limitations to be suspended, the intervenor must be the person whose tax liability is under investigation, or his agent, nominee, or "other person acting under the direction or control of such person." Id. § 7609(e).
70. This language is from the notice provision of section 7609. See I.R.C. § 7609(a)(1)(B). The parenthetical qualification that the summoned records
emphasized that the summoned materials were Acme’s routine business records and not records of the taxpayer,\textsuperscript{71} a fact which prevented Donaldson from having any protectable interest in the records. It could be argued, of course, that section 7609 was enacted to override the Donaldson rule. Then, any records containing information that reflects the affairs of a person under investigation would be protected so long as they were in a section 7609 record keeper’s possession. It could also be argued, however, that section 7609 has simply incorporated the Donaldson logic. Then, the records kept by Acme’s accountant would not be protected under the section because they were the employer’s business records, not the taxpayer’s.

The latter argument is supported by the fact that Congress did not include employers in the definition of section 7609 record keepers. It is difficult to believe that an employer’s decision to use an accountant to maintain his business records would be the controlling fact in determining whether a taxpayer-employee is entitled to notice and the right to intervene if his employer’s records are summoned.

One of the few reported lower court cases interpreting section 7609(a), \textit{United States v. Exxon Co.,}\textsuperscript{72} provides further support for the proposition that courts will choose to narrowly interpret section 7609(a). In Exxon, a third-party summons directed a corporation to produce its copies of all agreements, contracts, and correspondence relating to certain property that the corporation had leased from the taxpayer under investigation. Checks reflecting lease payments were also requested. The corporation refused to comply because the taxpayer had not been given notice of the summons. The main issue at the enforcement proceeding was whether the corporation qualified as a third-party record keeper. Exxon argued that section 7609 controlled since Exxon was a person who extends credit to customers through the use of credit cards.\textsuperscript{73} The court refused to classify Exxon as a third-party record keeper, at least for the limited purposes of the summoned materials, because “the records sought . . . are not the credit records of [the taxpayer] and do not appear to involve directly the type of business

\textsuperscript{71} See 460 U.S. at 500.
\textsuperscript{72} 450 F. Supp. 472 (D. Md. 1978).
\textsuperscript{73} See id. at 475.
transactions contemplated in the statute." 74 The court in Exxon relied heavily on legislative history which indicated that section 7609 was designed for the purpose of safeguarding taxpayers' legitimate expectations of privacy. 75 Since the records at issue were simply records of Exxon's business transactions, the court concluded that requiring the Service to give the taxpayer notice would exceed congressional intent. 76

The fact situation in Exxon presents a clear case for the narrow interpretation of section 7609 because the material sought by the IRS bore no relation to Exxon's function as a supplier of credit—the function which would qualify Exxon as a third-party record keeper. The case would be less clear, however, if an attorney or accountant should refuse to comply with a third-party summons because the Service has failed to notify the implicated taxpayer.

The rationale of Exxon indicates that in such a situation courts will look beyond the simple fact that attorneys and accountants are section 7609 record keepers. The question is how far beyond the language of the section courts will look. Exxon suggests that courts may inquire no further than whether the summoned records are being kept by an attorney or accountant as an incident of their professional functions. This interpretation of section 7609 would represent an expansion of taxpayer rights beyond the Donaldson significant protectable interest test. Courts, however, may employ an even more circumscribed test requiring not only that the summoned records be kept by an attorney or accountant as an incident of his professional function, but also that the records be kept on behalf of

74. Id. at 477.

75. "[T]he use of this important investigative tool should not unreasonably infringe on the civil rights of taxpayers, including the right to privacy." Id. at 476 (quoting H.R. Rep., supra note 32, at 307, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2897, 3203).

76. 450 F. Supp. at 477. As evidence of congressional intent, the court noted that the House report states that notice is to be sent to the person "who is identified in the description of the books and records contained in the summons 'as the person relating to whose business or transactions the books or records are kept.'" Id. at 476 (quoting H.R. Rep., supra note 32, at 307, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2897, 3204). From this language, the court inferred that the notice provisions of section 7609 apply only where the personal business records of the taxpayer seeking to block compliance are held by a third-party record keeper. 450 F. Supp. at 476. The court also relied on the following language from the Senate Report: "For the purposes of these rules, a third party record keeper is generally to be a person engaged in making or keeping the records involving transactions of others." Id. at 477 (quoting S. Rep., supra note 32, at 393, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2897, 3798) (emphasis added).
the taxpayer under investigation so that the taxpayer has a protectable interest in them. The latter test, which is supported by several of the Congressional statements accompanying the enactment of section 7609, and by the fact that courts have not been inclined to read Code provisions any more liberally than necessary, would mean that the section has done virtually nothing to extend taxpayer rights beyond those presumed by the Donaldson court.

The effect of section 7609 on the Service’s third-party summons power is still unclear. Presumably summonses issued to record keepers not included in section 7609 will continue to be judged by the Donaldson standard. It could be argued that by specifying the situations in which taxpayers have an absolute right to intervene, Congress delineated the areas where taxpayer privacy expectations have precedence over the Service’s investigatory powers. Furthermore, it appears that certain summonses issued to record keepers included in section 7609 may also be judged by the Donaldson standard if courts, relying on Congressional intent, read the stated exception to section 7609—“other than the records of the person summoned”—to mean that taxpayers must show a proprietary interest in the records. Thus, despite its impressive list of protected record keepers, section 7609 may, in many cases, do no more than require notice to taxpayers in situations where they already had the right to intervene.

III. PROCEDURAL REQUIREMENTS FOR VALID ISSUANCE OF AN IRS SUMMONS

The procedural requirements for proper service of an IRS summons provide taxpayers with several objections to compliance. Proper service may be accomplished either by delivering an attested copy “in hand” to the summoned person or by leaving it at his usual place of abode. If the summons is for the production of written matter, the information requested must


78. The House report states that “it should be made clear that the purpose of this provision is to facilitate the opportunity of the noticee to raise defenses which are already available under the law.” H.R. Rep., supra note 32, at 309, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2897, 3205.

79. I.R.C. § 7603.
be described "with reasonable certainty." In addition, the date set for appearance may not be less than ten days from the date of service.

The Code requires special procedures for third-party summonses. If a summons is served on a third-party record keeper and requires production of the business records of any person other than the record keeper, that person is entitled to notice of the summons. Notice must be given within three days of service, and no later than fourteen days prior to the date set for examination. The notice of summons must inform the taxpayer of his right to stay compliance, and of the procedure for achieving a stay. The IRS' examination of the summoned material cannot take place prior to the expiration of the fourteen-day period in which the taxpayer may stay compliance, and if the taxpayer stays compliance, the examination can take place only upon court order.

These special third-party summons provisions do not apply where the summons is issued "solely to determine the identity of a person having a numbered account," or merely to expedite the collection of a previously assessed liability. If the Service believes that giving notice to a taxpayer would lead to attempts to conceal or alter the summoned records, to flight, or to intimidation or bribery of the summoned third party, it may petition the United States District Court for an ex parte determination that there is probable cause to support these beliefs. If the court makes such a finding, the notice provisions of section 7609 are waived.

Section 7609(f) specifies additional requirements that must

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80. Id.
81. Id. § 7605(a).
82. See id. § 7609. Third-party record keepers are defined in section 7609(a)(3). See text accompanying notes 57-78 supra.
84. I.R.C. § 7609(a)(1).
85. Id. The notice of summons may be served in the same manner as provided for the service of a summons, or it may be sent by certified or registered mail to the taxpayer's last known address. In the absence of a known address, the notice of summons may be left with the record keeper. Id. § 7609(a)(2).
86. Id. § 7609(d).
87. Id. § 7609(c)(2)(A).
88. Id. § 7609(c)(2)(B).
89. Id. § 7609(g). The proper court for this determination is the district court for the district within which the person to be summoned resides or is found. Id. § 7609(h).
be met for issuing a “John Doe” summons to a third-party record keeper. These summonses traditionally have been issued when the Service has knowledge of a transaction indicating a possible tax liability but does not know the identity of the actor. Such summonses typically direct the record keeper to produce all information relating to the transaction, including any information concerning the identity of the taxpayer. Congress, concerned with the privacy issues these summonses raise, added John Doe provisions to the Code in the 1976 Tax Reform Act.

A John Doe summons may now be served only after completion of a court proceeding in which the Secretary establishes that the “summons relates to the investigation of a particular person or ascertainable group,” that there is a reasonable basis to believe that such person or group has failed to comply with a provision of the tax laws, and that the information sought is not readily available from other sources. The Senate Finance Committee stressed in its report that these provisions were added to avoid “fishing expeditions,” and to make certain that the Service’s suspicions were based on specific facts. The report added, however, that section 7609(f) was not intended to impose a probable cause requirement on the Service, and that the burden of section 7609(f) can be met simply by showing both that a transaction suggestive of improper tax reporting has occurred, and that previous good faith efforts to identify the taxpayer have been made without success.

The Code does not give the IRS authority to enforce its summonses administratively. Rather, the power to compel attendance, testimony, or production is vested in the United States District Courts. If a person refuses to obey a summons, the Service must apply to the appropriate district court,

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92. I.R.C. § 7609(f).
94. Id. at 373, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 3439, 3802.
95. Id.
96. Id. at 373, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 3439, 3802-03.
97. I.R.C. §§ 7402(b), 7604.
or to a United States commissioner for that district, for a compliance order. It is only the failure to obey a compliance order that subjects the summoned party to punishment for contempt, because the enforcement action is "an adversary proceeding affording a judicial determination of the challenges to the summons and giving complete protection to the witness." 99

It is important that a person who refuses to comply with an IRS summons understand the consequences of his refusal. Section 7210 provides for a criminal penalty consisting of a fine of not more than $1000, or imprisonment for not more than one year, upon conviction for failure to comply with a duly issued summons. Furthermore, section 7604(b) provides that if a summoned person neglects or refuses to obey, the Service may proceed against him in district court "for an attachment... as for contempt." Upon a showing of satisfactory proof, the attachment is issued; the person is arrested and brought before the judge, who then proceeds "to a hearing of the case." 100 It has been held that, prior to an enforcement hearing, the criminal sanction and attachment procedures apply only where the summoned person "wholly made default or contumaciously refused to comply." 101 The procedures do not apply in situations where the "witness appears and interposes good faith challenges" before the hearing officer. 102

Thus, even though a person is entitled to raise defenses to a summons at an enforcement hearing begun by the attachment process, 103 ignoring a summons is not an advisable method of challenging it. The correct procedure for challenging a summons is to appear initially before the IRS hearing officer and raise all defenses at that time. If the hearing officer denies the challenge and the party continues his refusal to comply, the agent who issued the summons must petition for a judicial enforcement hearing, under section 7402 or section 7604(a), at which the taxpayer may renew his objections. This procedure is deemed a good-faith refusal and will support neither an application for attachment under section 7604(b) nor the imposition of criminal liability under section 7210. 104 A district court order to comply is appealable, since it is a complete and final

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98. Id. § 7604(b).
100. I.R.C. § 7604(b).
102. Id. at 447.
103. See id. at 446.
104. See id.
determination of the obligation to obey the summons.\textsuperscript{105} If the
person summoned fails to appeal a court order, his objections
to compliance will not be reviewed on appeal from a finding of
contempt based on his refusal.\textsuperscript{106}

These procedural requirements suggest a number of objec-
tions that taxpayers may raise in support of their refusal to
comply with IRS summonses. But the problem with procedural
objections is that they often merely delay rather than block en-
forcement. The more effective objections to IRS subpoenas rest
on substantive grounds: the taxpayer must either attack the le-
gitimacy of the purpose for which the summons was issued, or
object to compliance on the grounds of a constitutional right or
a common law privilege.

IV. CONSTITUTIONAL AND COMMON LAW OBJECTIONS
TO COMPLIANCE

A. CONSTITUTIONAL RIGHTS

The recent Supreme Court cases considering constitutional
limitations on the IRS' summons power have all considered fac-
tual situations in which constitutional safeguards were held un-
available to taxpayers.\textsuperscript{107} Taken collectively, these cases
support extremely narrow interpretations of the fourth and
fifth amendments which are based primarily on the concept
that "[r]espect for these [constitutional] principles is eroded
when they leap their proper bounds to interfere with the legiti-
mate interests of society in enforcement of its laws and collec-
tion of the revenues."\textsuperscript{108}

Given such pronouncements, it is not difficult to conclude
that taxpayers have been deprived of all constitutional rights in
their dealings with the IRS. This conclusion is as yet unjusti-
fiied, however, because the recent cases have all involved sum-
monses issued to third parties. It is essential, therefore, to
distinguish between the constitutional protections that may be
invoked by taxpayers when IRS summonses are issued to them

\textsuperscript{105} See United States v. McDonald, 313 F.2d 832 (2d Cir. 1963).
\textsuperscript{106} See United States v. Secor, 476 F.2d 766 (2d Cir. 1973).
\textsuperscript{107} See United States v. Miller, 425 U.S. 435 (1976) (fourth amendment pri-
vate papers doctrine may not be invoked by a taxpayer to stay compliance
where records summoned are ordinary business records of third-party record
keeper); Fisher v. United States, 425 U.S. 391 (1976) (fifth amendment guaran-
tee against self-incrimination does not apply to voluntarily prepared document-
tary evidence).
directly, and those that may be available when summonses are issued to third parties.

1. The Fourth Amendment

Since the Service is not required to show probable cause in support of its summonses, the fourth amendment's primary protection is not available to persons who challenge an IRS summons. When a summons is directed to the taxpayer under investigation, however, the fourth amendment's protection against unreasonable searches and seizures is available for a challenge that the summons is too indefinite because the material requested is not described with reasonable certainty. This objection is of limited utility, though, since the reasonable certainty formula has been liberally construed, and the defect may be cured by modification of the summons.

The issue of the availability of fourth amendment objections is more complicated when summonses are directed to

110. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. Probable cause exists where the facts and circumstances within an officer's personal knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed. See Brinegar v. United States, 338 U.S. 160, 175-76 (1946); Carroll v. United States, 267 U.S. 132 (1925).

111. See U.S. CONST. amend. IV, quoted in note 110 supra.
112. "[W]hen the summons requires the production of books, papers, records, or other data, it shall be sufficient if such ... [data] are described with reasonable certainty." I.R.C. § 7603. See U.S. CONST. amend. IV, quoted in note 110 supra; Fisher v. United States, 425 U.S. 391, 401 (1976).
third parties. In United States v. Miller, the defendant moved to suppress copies of his bank records, which he alleged had been obtained by means of a defective grand jury subpoena issued to his bank. He argued that because the Bank Secrecy Act required that certain records be kept by banks, permitting the government to obtain the records from the bank would enable the government to "circumvent the requirements of the fourth amendment by allowing it to obtain a depositor’s private records without complying with the legal requirements that would be applicable had it proceeded against him directly." The defendant reasoned that he had a fourth amendment interest in the summoned records because they were copies of personal records in which he had a legitimate expectation of privacy.

The Supreme Court held that Miller had no legitimate expectation of privacy in these records and that, therefore, no fourth amendment interest was implicated. A person's personal checks, the Court stated, were "not confidential communications but negotiable instruments to be used in commercial transactions," and both his checks and deposit slips contained information "voluntarily conveyed to the banks . . . in the ordinary course of business." It is clear the Court in Miller felt that a person has no legitimate expectation of privacy in papers voluntarily relinquished in the course of commercial transactions, and, accordingly, that the papers cannot be considered

116. 425 U.S. at 441.
117. Id. at 442.
118. Id. In California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974), the Supreme Court upheld the constitutionality of the record-keeping requirements of the Bank Secrecy Act, 12 U.S.C. § 1829b(d) (1976). The Court reserved the question of whether a bank customer could later challenge the bank's delivery to the government of records kept pursuant to the Act. Justice Marshall, dissenting, pointed out:

[I]t is ironic that although the majority deems the bank customers' Fourth Amendment claims premature, it also intimates that once the bank has made copies of a customer's checks, the customer no longer has standing to invoke his Fourth Amendment rights when a demand is made on the bank by the Government for the records . . . . 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.


private in the fourth amendment sense.120

When Congress added the section 7609 third-party record keeper provisions to the Code,121 it cited Miller as one of the decisions that spurred this codification of taxpayers' protectable zone of privacy.122 There is no question that an IRS summons issued to a bank in a Miller-type situation would now fall under the protective provisions of section 7609. The current uncertainty is over the extent to which Congress intended section 7609 to give taxpayers new substantive rights regarding objections to enforcement.

If courts read section 7609 as merely giving taxpayers the procedural right to notice of a third-party summons so that they can intervene and raise the traditionally recognized objections to enforcement, then, despite its concern for the harsh Miller ruling, Congress will have failed in its attempt to address the privacy problem. Section 7609 should be read to give taxpayers an expanded substantive right to object to the relevancy and scope of third-party summonses. Congress surely intended not only to recognize taxpayers' privacy interest in those documents that fall within the Court's narrow definition of private papers, but also to expand taxpayers' protectable zone of privacy to include certain other documents that might not meet the Court's definition. Any other interpretation of section 7609 would render its protections completely illusory.123

Even if courts were to interpret section 7609 as expanding taxpayers' protectable zone of privacy, certain taxpayers will face yet another problem. If the third party in possession of the taxpayer's records is not a section 7609 record keeper, 124 a

120. According to the Court in Miller, "[t]he depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." Id. at 442.
121. I.R.C. § 7609. See text accompanying notes 57-68 supra.
123. The potential justification for not allowing taxpayers to successfully raise the too indefinite objection, even though they have been given notice and the right to intervene, lies in the language of the House report on section 7609. The report stressed that it was "not intended to expand the substantive rights of these parties," but rather to "facilitate the opportunity of the noticee to raise defenses which are already available." H.R. Rep., supra note 32, at 309, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2897, 3205. The objection based on indefiniteness is a defense previously available, but not to taxpayers in the third-party summons situation because of the holding in Miller. The question now is how the courts will view this particular objection: Is it merely an objection that the proper procedure has not been followed, or is it an attempt to raise a new substantive right, i.e., an expanded expectation of privacy?
124. See text accompanying note 60 supra.
taxpayer's fourth amendment objection will still have to pass the *Miller* privacy test in order to succeed. The *Miller* decision hints that confidential communications would be within the expected zone of privacy. If this vague reference to confidential communications refers to nothing more than material covered by the attorney-client privilege, it adds nothing beyond section 7609 since the statute already defines attorneys as third-party record keepers.

Thus, the practical value of a fourth amendment objection is simply to delay enforcement until the material requested is more reasonably described. As a permanent bar to compliance, the objection is of little value.

2. The Fifth Amendment

The fifth amendment's protection against self-incrimination is not normally available as an intervenor's defense to a third-party summons, even if the record keeper is the taxpayer's attorney. The fifth amendment's applicability has been limited to those situations in which a taxpayer is compelled to be a witness against himself, since it "is a personal privilege [which] adheres basically to the person, not to the information that may incriminate him." The only exception to this general rule is "where constructive possession is so clear or [where] relinquishment of possession [is] so temporary and insignificant as to leave the personal compulsion . . . substantially intact." It is normally the element of personal possession, not ownership, that gives rise to the possibility of fifth amendment immunity.

Even where a summons for documentary evidence is issued to a taxpayer directly, the availability of the fifth amendment objection to bar compliance has been placed very much

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125. In analyzing the defendant's claim that he had a reasonable expectation of privacy in the summoned documents, the court remarked that "[t]he checks are not confidential communications but negotiable instruments to be used in commercial transactions." 425 U.S. at 442.
127. See *Fisher v. United States*, 425 U.S. 391, 397 (1975). It should be noted, however, that if the taxpayer could have successfully argued the private-papers defense when the documents were in his hands, then, if he turned the documents over to his attorney for the purpose of obtaining legal advice, he could successfully assert the attorney-client privilege.
in doubt by *Fisher v. United States*. The Supreme Court in *Fisher* confronted the rule enunciated in *Boyd v. United States* that to compel production of private papers violates the fifth as well as the fourth amendment. The Supreme Court has long struggled to define the private papers that are protected from summons, and the record of this struggle reflects a constant narrowing of the private-paper concept. In *Fisher*, the Court noted that to the extent *Boyd* rests upon the proposition that subpoenas for mere evidence violate the fifth amendment, its "foundations . . . have been washed away." The Court also observed that "the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the fifth amendment against compelling a person to give 'testimony' that incriminates him." Throughout the *Fisher* decision, the Court emphasized that most documentary evidence is not compelled testimony, and that the privilege protects persons only from "being incriminated by [their] own compelled testimonial communications."

The summonses challenged in *Fisher* sought work papers of the taxpayer's accountant and copies of communications from the accountant to the taxpayer, both of which were in the taxpayer's possession. The Court held that the fifth amendment privilege was inapplicable to these items because the summons did "not compel oral testimony," nor did it compel the taxpayer to "restate, repeat, or affirm the truth of the contents of the documents sought." The mere fact that the papers were based on information provided by the taxpayer which might incriminate him was not sufficient to invoke the privilege, since the papers were not prepared by the taxpayer, "and they [contained] no testimonial declarations by him."

In *Fisher*, the Court also examined the communicative aspects inherent in the compelled act of producing evidence. It

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132. 116 U.S. 616 (1886).
133. *Id.* at 634-35.
134. *See, e.g.*, Bellis v. United States, 417 U.S. 85 (1974) (records of any business entity other than sole proprietorship not considered private papers); Shapiro v. United States, 335 U.S. 1 (1948) (records required to be kept by law are outside private-papers concept). *See also* Wilson v. United States, 221 U.S. 361 (1911).
135. 425 U.S. at 409.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
found implicit in compelled production the concession that the papers existed and were in the taxpayer's possession and control. The Court believed, however, that these tacit admissions did not "[rise] to the level of testimony within the protection of the fifth amendment" because the summoned materials were the accountant's papers, and their existence or possession was not at issue. The Court also felt that these tacit admissions, even if testimonial, would not be incriminating, since it is not illegal to seek accounting help or to possess accounting workpapers. Finally, the Court decided that responding to these subpoenas would not authenticate the records because the taxpayer did not prepare them and could not vouch for their accuracy. Since authenticating testimony would be necessary before these materials could be used against the taxpayer, the mere act of production could not be self-incriminating.

The Court in Fisher limited the protections of the fifth amendment to papers prepared by the taxpayer himself. Thus, writings of another person cannot be deemed direct testimonial statements of the summoned taxpayer. The disturbing aspect of Fisher, though, is that the Court did not decide "[w]hether the Fifth Amendment would shield the taxpayer from producing his own tax records."

Fisher indicates that the Court will no longer recognize a fifth amendment argument based solely on the fact that the taxpayer prepared the records sought. First, the Court stressed a line of cases holding that private incriminating statements may be overheard and used in evidence if they are not compelled at the time they are uttered. Second, the Court noted that "the precise claim sustained in Boyd would now be rejected," although it conceded that Boyd's pronouncement "that a person may not be forced to produce his private papers" has appeared as dictum in several post-Boyd opinions. Finally, the Court observed:

[A]s far as this record demonstrates, the preparation of all of the pa-

140. Id. at 410.
141. Id. at 411.
142. Id. at 412.
143. Id. at 413.
144. Id.
145. Id. at 414.
147. 425 U.S. at 408.
pers sought in these cases was wholly voluntary, and they cannot be
said to contain compelled testimonial evidence, either of the taxpayer
or of anyone else. The taxpayer cannot avoid compliance with the sub-
poena merely by asserting that the item of evidence which he is re-
quired to produce contains incriminating writing, whether his own or
that of someone else.\footnote{148}

Taken literally, this statement means that the privilege is un-
available unless the element of compulsion was present while
the taxpayer prepared the records. Thus, any private paper
voluntarily prepared will be mere evidence subject to the
fourth amendment prohibition against unreasonable search
and seizure, but not compelled testimony protected by the fifth
amendment.

Since the Court apparently is unwilling to recognize the in-
herent testimonial aspects of private records, fifth amendment
objections to the production of taxpayer records will have to
rely on the communicative aspects of the act of production be-
cause this is where the compulsion occurs. Thus, when ob-
jecting on fifth amendment grounds, it now is essential to
stress the testimonial elements, such as admission of the exist-
ence of the material, that are implicit in the production of pri-
ivate papers, unless, of course, there was actual compulsion in
the preparation of the papers.\footnote{149}

Unfortunately, in its discussion of the implicit communi-
cative aspects inherent in production, the Court in \textit{Fisher}
departed from the careful analysis that marked the remainder of
its decision. If the Court really meant to imply that the admis-
sion of the papers' existence might rise to the level of testi-
mony only if existence were at issue,\footnote{150} its logic is difficult to
follow. The summoned material's testimonial aspect might

\footnote{148. \textit{Id.} at 409-10 (emphasis added) (footnote omitted).}

\footnote{149. In \textit{Grosso} \textit{v. United States}, 390 U.S. 62 (1968), and \textit{Marchetti} \textit{v. United States}, 390 U.S. 39 (1968), the privilege against self-incrimination was successful-

\footnote{150. \textit{Id.} at 429 (Brennan, J., concurring).}
present an evidentiary question of relevance depending on whether its existence is in issue, but it is not apparent how the importance of the summoned material's existence to the government's case can alter its nature from testimonial to nontestimonial.

Whether the admission, implicit in production, of a document's existence could ever be both testimonial and incriminating under the rationale of *Fisher* is highly debatable. Although the admission might prove testimonial, the self-incrimination hurdle, as defined in *Fisher*, would be nearly impossible to clear.\(^{151}\) Apparently, the mere existence of the papers, or their possession, must be in itself illegal before the admission of their existence and possession will be incriminating. And since, according to *Fisher*, the only compelled testimony is the admission that the papers exist, the contents of the requested materials will always be beyond fifth amendment protection.\(^{152}\)

The Court in *Fisher* did, however, seem willing to accept the proposition that production would force authentication of incriminating evidence.\(^{153}\) Thus, while authentication is actually an evidentiary rather than a fifth amendment issue, the Court's discussion of its inapplicability to accountants' papers leaves the door open for its continued use when taxpayer-prepared papers are involved.\(^{154}\) In *United States v. Beattie*,\(^{155}\) the Second Circuit relied on the authentication aspect of production\(^{156}\) in applying the fifth amendment privilege to summoned copies of memoranda and other correspondence that were initially sent by a taxpayer to his accountant, but which were cur-

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\(^{151}\) *See* 425 U.S. at 412.

\(^{152}\) This inescapable ramification of the majority's logic provoked strong criticism from two Justices. Justice Brennan charged that the majority's approach "is but another step in the denigration of privacy principles settled nearly 100 years ago." *Id.* at 414 (Brennan, J., concurring). Justice Marshall remarked:

The Fifth Amendment basis for resisting production of a document pursuant to subpoena, the Court tells us today, lies not in the document's contents, . . . but in the tacit verification inherent in the act of production itself. . . .

This technical and somewhat esoteric focus on the testimonial elements of production rather than on the content of the evidence the investigator seeks is . . . contrary to the history and traditions of the privilege against self-incrimination. . . .

*Id.* at 431 (Marshall, J., concurring).

\(^{153}\) *See* id. at 412 n.12 (Brennan, J., concurring). *See also* Couch v. United States, 409 U.S. 322, 330 (1973); United States v. White, 322 U.S. 694, 698-99 (1944); Boyd v. United States, 116 U.S. 616, 630 (1886).

\(^{154}\) *See* 425 U.S. at 413.

\(^{155}\) 541 F.2d 329 (2d Cir. 1976).

\(^{156}\) *Id.* at 331.
rently in the taxpayer's possession. On remand from the Supreme Court, the Second Circuit Court refused to read *Fisher* "as detracting from the principle that the fifth amendment protects against compulsory production of a paper written by an accused with respect to his own affairs . . . and now in his possession, even though he may have . . . sent it to another with the expectation that the latter would retain it."  

It is unfortunate that courts may now have to rely on the evidentiary concept of authentication to protect taxpayers from the potential self-incriminating testimonial aspect of producing their own private papers. Functionally, what one has written is just as testimonial as what one has spoken, the only difference being that written testimony does not disappear once uttered. Thus, if the production of a person's incriminating writings is compelled by summons, that person has been forced to testify against himself just as if he were compelled to verbalize the information. In this respect, there is a significant distinction between the protections of the fourth and fifth amendments. If the incriminating papers are seized as a result of a search warrant, the individual has not been personally compelled to turn them over; rather, the government has been permitted to take them. But a summons, unlike a search warrant, compels the individual to act, and the evil that the fifth amendment was designed to guard against is as present in a compelled production of one's own written testimony as it is in compelled speech.

Since lower courts are not reading *Fisher* as totally voiding the fifth amendment's applicability to taxpayers' own private papers, it would be helpful to note the other major limitation on the availability of its protection: it is available only when the danger of criminal prosecution exists. If, when the summons is issued, the statute of limitations has run on all possible criminal prosecutions, the privilege is not available. The burden is on the government, however, to show both that the stat-
ute has run and "that no prosecution has been begun within
that period, or, if begun, that it has been discontinued in such
[a] manner as to protect the witness from further prosecu-
tion."

B. COMMON LAW PRIVILEGES

It is a settled issue that federal courts do not recognize an
accountant-client privilege. The Supreme Court, in Couch v.
United States, cited with approval a Fifth Circuit decision
which held that there is no common law privilege between cli-
ent and accountant. In Couch, the petitioner raised an objec-
tion based on "the confidential nature of the accountant-client
relationship," when her accountant was summoned to pro-
duce certain records that she had conveyed to him for tax re-
turn preparation. The Court decided the case on other
grounds, but stated that "[a]lthough not in itself controlling, we
note that no confidential accountant-client privilege exists
under federal law and no state-created privilege has been rec-
ognized in federal cases." The Court reasoned that since dis-
closure of such information is required on tax returns, "there
can be little expectation of privacy when the records are
handed to an accountant." The Court also pointed to ac-
countants' potential criminal liability if they knowingly assist
in the preparation of false returns as mandating that account-
ants have the right to disclose information given to them by cli-
ents. Finally, the Court concluded that it would be improper
to extend the requested protection "in the very situation where
obligations of disclosure exist and under a system largely de-
pendent upon honest self-reporting even to survive." The Court's reasoning in Couch makes it clear that an ac-
countant-client privilege should not be available when an ac-
countant has been engaged solely for the purpose of preparing
a tax return. A strong argument can be made, however, in sup-
port of an accountant-client privilege when an accountant
maintains a taxpayer's regular business records. By adding
section 7609 to the Code, Congress attempted to limit the Serv-

163. Id. at 262.
165. Falsone v. United States, 205 F.2d 734 (5th Cir.), cert. denied, 346 U.S.
864 (1953).
166. 409 U.S. at 335.
167. Id.
168. Id.
169. Id.
170. Id.
ice’s intrusion into taxpayers’ expected zone of privacy. More specifically, Congress included accountants as section 7609 third-party record keepers. Yet, according to the Court in Couch, there can be little expectation of privacy when records are handed over to an accountant. It is difficult to understand the benefit of section 7609 if it does not give a taxpayer a valid objection to the production of documents in his accountant’s possession. Given the government’s interest in voluntary compliance with the tax laws, it should encourage taxpayers to seek the same competent advice concerning their fiscal affairs that it encourages them to seek, by recognizing the attorney-client privilege, in connection with their legal affairs.

Courts are hopelessly split regarding the extent of the privilege when an attorney engaged in tax work is not an accountant, or when he serves both as an attorney and an accountant. One approach to this problem, illustrated by Canaday v. United States, is that no attorney-client privilege is created when an attorney prepares a client’s tax return since the attorney has not acted as a lawyer, but only as a scrivener. Another approach is found in Colton v. United States, in which the court stated that information that is reported on a tax return is not privileged, but that information provided to an attorney and not included in a return is covered. One problem with the Colton approach is that the taxpayer must contest

173. See text accompanying notes 1-2 supra.
174. The acknowledged social policy behind the attorney-client privilege is that it promotes justice by encouraging clients to make full factual disclosures to their attorneys. See generally McCormick’s HANDBOOK OF THE LAW OF EVIDENCE § 87 (2d ed. 1972).
176. 354 F.2d 849 (8th Cir. 1966).
177. 306 F.2d 633 (2d Cir. 1962).
each item of information summoned so that the court can decide whether the material is directly related to information on the return. Some district courts have followed a third approach, enforcing the full privilege for all aspects of an attorney's tax practice to encourage complete freedom of consultation.178

The privilege question is further complicated when an attorney is also certified as an accountant. With this combination present, some courts have held that tax work is accounting, not legal work, and have viewed the attorney-accountant as an accountant for the purpose of the attorney-client privilege.179 Other courts have analyzed the nature of the work done, and have followed a Colton item-by-item approach in determining what information should be revealed.180

The case of Fisher v. United States181 has placed a judicial gloss on the privilege question regarding both attorneys who are engaged in connection with the filing of tax returns, and those who are sought exclusively for legal advice concerning tax-related matters. Fisher held that pre-existing documents, transferred by a client to his attorney in order to obtain informed legal advice, are protected by the attorney-client privilege only to the extent that they would have been protected from disclosure while in the taxpayer's possession.182

In reaching this conclusion, the Court stressed that the purpose of the attorney-client privilege is to encourage clients to make full disclosure to their attorneys.183 The Court felt that this goal is achieved so long as the client knows that it will be no easier for the Service to obtain the documents from his attorney than from him.184 Thus, if an IRS summons directs an attorney to produce pre-existing documents, the privilege may be successfully invoked only if the taxpayer can show that he personally would not have had to produce them because of a valid fourth or fifth Amendment objection, or because they are sought for an illegal purpose.185

The Court in Fisher emphasized that the privilege should

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179. See, e.g., Olender v. United States, 210 F.2d 795 (9th Cir. 1954), cert. denied, 352 U.S. 982 (1957).
182. Id. at 404-05.
183. Id. at 403.
184. See id. at 403-04.
185. The Fisher Court noted that "the papers, if unobtainable by summons
be extended no further than is necessary to accomplish its purpose. It also stressed that the privilege was designed to protect confidential disclosures made in order to obtain legal assistance.\(^{186}\) This reasoning supports the approach taken in *Colton v. United States*.\(^{187}\) Thus, documents provided to attorneys for the purpose of tax return preparation would not be confidential disclosures of the type contemplated by *Fisher*, because they are not within the legal advice requirement. On the other hand, if the documents sought were provided to an attorney in order to obtain legal advice, and not simply for tax return preparation, then the stated test of *Fisher* would apply.

The same rationale should apply to work papers of an attorney which reflect verbal communications of a taxpayer-client. To the extent that the information sought was conveyed for tax-preparation purposes, the attorney-client privilege would not be available because the information does not consist of confidential communications made to obtain legal advice. If the communications were made to obtain legal advice, however, the attorney's work papers would be completely outside the reach of the Service.

It seems, therefore, that the constitutional and common law objections to compliance, while waning in importance, are still of some value to taxpayers. Particularly, the fifth amendment and attorney-client arguments appear capable of accommodating some taxpayer rights. It is the statutory requirement that a summons be issued for a legitimate purpose, however, which has always held the most promise for taxpayers.

VI. THE LEGITIMATE PURPOSE OBJECTION

For the past fifteen years, the primary taxpayer challenge to IRS summonses has focused on the requirement that the summons be issued pursuant to an investigation conducted for a legitimate purpose.\(^{188}\) Specifically, the issue has been the extent to which taxpayers may successfully defend against enforcement of an IRS summons by arguing that enforcement may result in the discovery of criminal as well as civil liability.

The actual problem courts have struggled with, though, is

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186. *Id.* at 403 (citing 8 J. WIGMORE, EVIDENCE § 2291 (McNaughton rev. 1961)).
187. 306 F.2d 633 (2d Cir. 1962); see text accompanying note 177 supra.
188. See text accompanying note 29 supra.
not whether section 7602 can be invoked to gather evidence for the sole purpose of determining criminal liability, but rather, how to determine whether a particular summons was issued for a legitimate purpose—the investigation of civil tax liability.\textsuperscript{189} This inquiry has been complicated by the fact that the IRS is charged with the dual responsibility of obtaining civil enforcement of the tax laws and of recommending the criminal prosecution of certain taxpayers to the Justice Department.

Prior to the Supreme Court case of \textit{Reisman v. Caplin},\textsuperscript{190} which dealt with the appropriate procedure for enforcing and challenging IRS summonses, few lower courts had considered the criminal evidence issue. The impetus for litigating the criminal evidence issue came from some ill-considered language in \textit{Reisman}, which stated that "in any of these procedures [for challenging enforcement] the witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defense that the material is sought for the improper purpose of obtaining evidence for [its] use in a criminal prosecution."\textsuperscript{191}

Courts faced with the task of interpreting \textit{Reisman} began to distinguish between those situations in which the sole objective of the investigation was to obtain evidence for criminal prosecution and those in which the investigation was intended to explore both civil and criminal liability.\textsuperscript{192} Some courts went so far as to condone the Service's use of summonses for the primary purpose of uncovering criminal evidence so long as the criminal prosecution had not been formally commenced.\textsuperscript{193}

\textsuperscript{189} The purposes for which the Service may legitimately issue a summons—ascertaining the correctness of a return, making a return, determining liability for internal revenue tax, and collecting such liability, \textit{see} I.R.C. § 7602—all arise out of the Service's collection power. It is implicit in this enumeration of purposes that the Service is not empowered to use section 7602 summonses for the sole purpose of obtaining criminal evidence. \textit{See} Reisman v. Caplin, 375 U.S. 440, 449 (1964).

\textsuperscript{190} 375 U.S. 440 (1964).

\textsuperscript{191} \textit{Id.} at 449 (emphasis added) (citing Boren v. Tucker, 239 F.2d 767, 772-73 (9th Cir. 1956)). In \textit{Boren}, the court enforced an IRS summons even though there existed a possibility that criminal prosecution might occur once the information was handed over to the government. 239 F.2d at 772. The \textit{Boren} court distinguished a contrary holding in United States v. O'Connor, 118 F. Supp. 248 (D. Mass. 1953), one ground being that \textit{O'Connor} involved a taxpayer already under indictment. 239 F.2d at 772-73.

\textsuperscript{192} \textit{See}, e.g., United States v. Giordano, 419 F.2d 564 (8th Cir.), cert. denied, 397 U.S. 1037 (1969); United States v. Hayes, 408 F.2d 932 (7th Cir.), cert. denied, 396 U.S. 835 (1969); Wild v. United States, 362 F.2d 206 (9th Cir. 1966).

\textsuperscript{193} \textit{See}, e.g., Howfield, Inc. v. United States, 409 F.2d 694, 697 (9th Cir. 1969); United States v. Hayes, 408 F.2d 932, 936 (7th Cir.), cert. denied, 396 U.S. 835 (1969).
In 1971, the Supreme Court finally confronted the problems created by Reisman. In Donaldson v. United States, the taxpayer argued that summonses issued to his employer and his employer's accountant were outside the scope of section 7602 because their issuance, by agents of the Service's Intelligence Division, indicated that the investigation was concerned not only with civil liability, but also with the possible recommendation of criminal prosecution.

The Court rejected this argument because it clashed with the Service's dual responsibility to conduct investigations relating to the collection of civil penalties, and to refer certain cases to the Justice Department for criminal prosecution. Moreover, the Court was unable to discern any specific congressional prohibition against the use of summonses in investigations that may expose criminal liability. In fact, it found implicit authority for such use of summonses in the relationship between the Code's definition of tax—which includes any addition or penalty—and the Intelligence Division's authority to aid in the collection of penalties. Thus, the Court concluded that there was "no statutory suggestion for any meaningful line of distinction, for civil as compared with criminal purposes, at the point of a special agent's appearance." The Court believed that to infer such a line of demarcation would require the Service either to forego the use of its summons power to discover civil fraud or to forego its duty to recommend that certain taxpayers be prosecuted. Since such a result would thwart and defeat the broad responsibilities of the Service, the Court held "that under [section] 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."

The controversy that followed Donaldson centered on two issues the Court failed to clarify. First, while Donaldson indi-
icated that a summons issued prior to a recommendation for criminal prosecution was presumptively issued in good faith, it neglected to reveal which recommendation was the critical one: the initial recommendation of the special agent, the ultimate recommendation of the Service to the Justice Department, or some intermediate recommendation. Second, Donaldson did not discuss whether a summons issued prior to criminal recommendation was conclusively presumed to have been issued in good faith, or whether taxpayers could rebut the presumption of good faith by demonstrating that the summons had been issued for the sole purpose of gathering criminal evidence.

The Supreme Court recently addressed both of these unresolved issues in United States v. LaSalle National Bank: In a five-to-four opinion, the Court held that the critical recommendation which a summons must precede is the one ultimately made by the Service to the Justice Department. The Court also identified a second good faith requirement: the sole purpose of the investigation, in an institutional sense, must not be to further a criminal prosecution.

At the enforcement hearing in LaSalle, the taxpayer argued that the summons had been issued by an IRS special agent whose sole purpose was to gather evidence for criminal prosecution. The trial court concluded that there was nothing in the special agent’s testimony “to suggest that the thought of a civil investigation ever crossed his mind,” and that it was “an improper use of the summons ‘to serve it solely for the purpose of obtaining evidence for use in a criminal prosecution.’” The Seventh Circuit, relying on Donaldson,

205. Compare United States v. Hodge and Zwieg, 548 F.2d 1347 (9th Cir. 1977) and United States v. Billingsley, 469 F.2d 1208 (10th Cir. 1972) (recommendation to Justice Department) with United States v. Lafko, 520 F.2d 622 (3d Cir. 1975) (recommendation made within the IRS).

206. Compare United States v. Hodge and Zwieg, 548 F.2d 1347 (9th Cir. 1977); United States v. Zack, 521 F.2d 1366 (9th Cir. 1975); United States v. McCarthy, 514 F.2d 368 (3d Cir. 1975); United States v. Wiengarden, 473 F.2d 454 (6th Cir. 1973) and United States v. Billingsley, 469 F.2d 1208 (10th Cir. 1972) ( summons issued prior to formal recommendation is issued in bad faith if its sole purpose is to aid in a criminal investigation) with United States v. Morgan Guar. Trust Co., 572 F.2d 36 (2d Cir. 1978), cert. denied, 99 S. Ct. 89 (1979) and United States v. Troupe, 438 F.2d 117 (9th Cir. 1971) ( summons issued prior to formal recommendation is conclusively presumed to have been issued in good faith).


208. Id. at 311.

209. Id. at 316-17.

210. Id. at 303.

211. Id. at 304.

212. See text accompanying notes 194-204 supra.
affirmed, concluding that the lower court properly included the issue of criminal purpose within the good faith inquiry, and that the lower court's determination that the summonses were issued for the sole purpose of furthering a criminal prosecution was not clearly erroneous. 213

The Supreme Court reversed, reasoning that "the language of Donaldson . . . must be read in the light of the recognition of the interrelated criminal/civil nature of a tax fraud inquiry." 214 As it had in Donaldson, the Court examined the multi-layer review structure of the Service, 215 and emphasized the fact that only after officials in at least two of the layers had concurred in the special agent's recommendation was an official referral to the Justice Department made. The Court noted: "At any of the various stages, the Service can abandon the criminal prosecution, can decide instead to assert a civil penalty, or can pursue both goals. While the special agent is an important actor in the process, his motivation is hardly dispositive." 216 Accordingly, the Court declined the opportunity to base the line of demarcation between criminal and civil purpose on the special agent's personal intent. Instead, it created the institutional good faith test, which taxpayers can meet only by disproving "the actual existence of a valid civil tax determination or collection purpose by the Service." 217 The Court observed, in gross understatement, that "this burden is a heavy one," but suggested that it might be met by a showing that an institutional commitment to make the referral had already been made, and that the Service was delaying its official referral in order to gather additional evidence for prosecution. 218 The Court also stated that

214. 437 U.S. at 315.
216. 437 U.S. at 315.
217. Id. at 316.
218. The majority criticized the dissent's view that the good-faith inquiry should be abandoned altogether, see id. at 316-17, arguing that the dissenting opinion reveals a "fundamental misunderstanding about the authority of the IRS." See id. at 316 n.18. Citing the purposes enumerated in section 7602, see note 7 supra, the Court stated that "Congress . . . intended the summons authority to be used to aid the determination and collection of taxes. These purposes do not include the goal of filing criminal charges against citizens. Consequently, summons authority does not exist to aid criminal investigations solely." 437 U.S. at 317 n.18. The Court declared, "We shall not countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution." Id. at 316-17. As a result of this chastisement of the dissent, taxpayers have begun to make the delay argument with vigor. See United States v. Serubo, No. 78-2805 (3d Cir. Aug.
"the good-faith standard will not permit the IRS to become an information gathering agency for other departments, including the Department of Justice, regardless of the status of criminal cases."

The dissent attacked this new test as wholly unworkable and predicted that it would produce "little but endless discovery... and ultimate frustration of the fair administration of the... Code." The dissenters favored adoption of Donaldson's objective timing test: if a summons has been issued prior to a recommendation for criminal prosecution, it is conclusively presumed to have been issued in good faith. The dissenters' objections to the institutional good faith test are sound. It is difficult to imagine a situation in which a taxpayer could prove that an institutional commitment to refer for criminal prosecution had been purposely delayed so that the Service could gather more information for prosecution.

The recent case of United States v. Chase Manhattan Bank, however, shows that at least one court has attempted to give the institutional good faith test some viability. In Chase Manhattan, the Second Circuit reversed and remanded a trial court order enforcing a third-party summons served on a bank by an IRS agent. Prior to commencement of the investigation, the taxpayer was the subject of an FBI and federal grand jury investigation concerning alleged violations of the Interstate Travel Act. It was undisputed that criminal indictment of the taxpayer was imminent in October 1977, yet that indictment was inexplicably delayed. Meanwhile, an IRS investigation had been commenced, based on information received by the Service from the FBI and on May 1, 1978, more than six months after the "imminent" indictment, an IRS summons was issued to the taxpayer's bank.

The enforcement hearing became an affidavit swearing match between the taxpayer's attorneys and the IRS agents. The taxpayer contended that the summons was issued by the IRS as a substitute for grand jury subpoenas and search warrants, and that it was issued to aid an investigation initiated

20, 1979); United States v. Chase Manhattan Bank, 598 F.2d 321 (2d Cir. 1979); United States v. Genser, 595 F.2d 146 (3d Cir. 1979).
219. 437 U.S. at 317.
220. Id. at 320 (Stewart, J., dissenting).
221. Id.
222. 598 F.2d 321 (2d Cir. 1979).
223. Id. at 324.
224. Id. at 324, 325.
225. Id. at 326, 327.
and requested by the FBI and Department of Justice, not to aid a civil tax investigation. The agents swore that they had never stated that the Service was solely interested in criminal tax fraud, and that they had not disclosed any information to the FBI or Justice Department to aid these agencies in their criminal case. The district court ordered enforcement since it found the taxpayer had shown "'no facts from which bad faith can be concluded.'" The circuit court, on remand, instructed the lower court to allow the taxpayer an opportunity for limited discovery to determine whether the delay of the non-tax criminal indictment was connected in an improper way to compliance with the IRS summons. The court relied on the second requirement of the institutional good faith test suggested by the Supreme Court in LaSalle: that the summons not be issued to gather information for other departments for non-tax prosecutions.

If IRS agents, or agents of other governmental departments, are sufficiently accommodating to reveal to outsiders the Service's true improper purposes, as they allegedly did in Chase Manhattan, the institutional good faith test may work in a few rare cases. If an intelligent response by the Service to Chase Manhattan can be assumed, however, the institutional good faith test will soon become totally unworkable. In Chase Manhattan, if the agents, during the discovery process ordered on remand, continue to assert that they were interested only in tax violations, it is not clear how the limited discovery allowed by the court will ultimately prevent the enforcement of the summons. The case, therefore, may be no more than a clear

226. Id. at 322.
227. Id. at 325.
228. Id. at 323.
229. Id. at 327, 328.
230. Id. at 327.
231. Id. at 324.
232. The Third Circuit has recently decided a number of cases that deal with the issue of the extent to which courts should allow taxpayers discovery as a pre-enforcement tactic. The test is two-part; the taxpayer has a right to limited discovery, and if it proves fruitful, he is entitled to broaden the scope of his discovery. In United States v. Genser, 595 F.2d 146 (3d Cir. 1979), the court said:

At a minimum, the taxpayer should be entitled to discover the identities of the investigating agents, the date the investigation began, the dates the agent or agents filed reports recommending prosecution, . . . and the dates of all summonses issued under 26 U.S.C. § 7602. Furthermore, the taxpayer should be entitled to discover the nature of any contacts, relating to and during the investigation, between the investigating agents and officials of the Department of Justice.

Where this information or other evidence introduced by the tax-
example of the endless discovery and ultimate frustration al\-
luded to by the dissenting justices in LaSalle.\textsuperscript{233}

For all practical purposes, the LaSalle dissenters’ timing
test—that any IRS summons issued prior to an official recom-
mandation for criminal prosecution by the Service is conclu-
sively presumed to have been issued in good faith\textsuperscript{234}—will
become the legal standard by which IRS summonses are judg-
ed. But the timing test is unsatisfactory because it grants the
IRS virtually unlimited power to compel taxpayers to produce
the very evidence that may lead to their criminal convictions
even though the usual safeguards given an individual in a crim-
inal investigation are absent.\textsuperscript{235}

The major problem with the line of cases which culminates
in LaSalle is that the Court has approached challenges to en-
forcement as if they call into question the ultimate necessity of
the Service’s summoning power. These cases did not challenge
the broad power of the Service to summon documents in order
to properly administer the tax laws. It must be remembered
that the protection taxpayers enjoyed under the erstwhile Reis-
man doctrine—the right to withhold information upon proof
that a special agent’s sole purpose in issuing a summons was to
develop evidence for criminal prosecution\textsuperscript{236}—was a very nar-
row protection.

\textsuperscript{233} See text accompanying notes 190-193 supra.
The real issue before the Court in all these cases was whether the Service may use its administrative summoning power for the sole purpose of gathering evidence for criminal prosecution even though its power is unencumbered by the traditional safeguards that attach to other criminal inquiries. The *LaSalle* Court took note of the fact that Congress "intended the summons authority to be used to aid the determination and collection of taxes,"\(^{237}\) and that this purpose did not "include the goal of filing criminal charges against citizens."\(^{238}\) Given this recognition, it is difficult to imagine how the Court concluded that it should enforce a summons admittedly issued for the sole purpose of gathering evidence for criminal prosecution. Logically, the interrelated civil-criminal nature of certain IRS investigations should have led the Court to draw the line on bad-faith issuance at the point where the agent in charge admit that the *sole* purpose for issuing the summons was to further a criminal investigation. The unworkable institutional good-faith test, which ignores the intent of the agent at the time of issuance, is nothing more than a judicial expansion of an already broad power which cannot be reconciled with the statute's express purpose.

Another problem with *LaSalle* is the Court's attempt to justify the institutional good-faith test by pointing out that at many levels along its chain of command, the Service "can abandon the criminal prosecution [and] decide instead to assert a civil penalty."\(^{239}\) This reasoning ignores the fact that the power to issue and enforce a summons is granted only to support civil, and not criminal, investigations. An after-the-fact abandonment of an admittedly illegal purpose is, notwithstanding the Service's argument, insufficient to justify enforcement of an unlawful summons.

In addition, the Court's reliance on the Service's many layers of review to "provide the taxpayer with substantial protection against the . . . overzealous judgment of the special agent"\(^{240}\) is patently absurd. It is difficult to understand how either a conference with district Criminal Enforcement Division officials,\(^{241}\) or notification that the case has been referred to the Regional Counsel with a prosecution recommendation,\(^{242}\)

\(^{237}\) 437 U.S. at 317 n.18.
\(^{238}\) *Id.*
\(^{239}\) *Id.* at 315.
\(^{240}\) *Id.*
\(^{241}\) *Id.*
\(^{242}\) *Id.* at 315-16.
protects a taxpayer from the overzealous agent whose improper collection of evidence provided the impetus for such conference or notification.

Realistically, the institutional decision to recommend criminal prosecution will be made solely on the strength of the evidence gathered by the investigating agent. Since the Court in *LaSalle* has deemed the intent of the agent irrelevant, there is no reason to suspect that the Service will consider the agent's intent in weighing the strength of its case. Rather, it will consider everything the agent has discovered, and will abandon the criminal investigation only if the evidence is insufficient.

Since the Court has left taxpayers with virtually no effective objection to IRS summonses issued pursuant to a criminal investigation, resisting taxpayers must move toward new objections calculated to separate the Service's civil enforcement motives from its criminal prosecution motives. For instance, a taxpayer with solid evidence that a summons implicating him was issued solely by an agent to further a criminal investigation should ask the trial court to make a finding to that effect. If the court complies, the taxpayer should then request that the court rule either that any evidence resulting from the summons be excluded from future criminal proceedings, or that the taxpayer be granted immunity from criminal prosecution arising from such evidence, unless the investigating agent can show probable cause at the enforcement hearing. In this way, the Service could demonstrate institutional good faith by using the information it secured for a proper purpose: to determine civil tax liability. At the same time, taxpayers would regain some realistic protection against overzealous agents who have stepped beyond the scope of their authority to secure information through judicial compulsion.

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243. The delayed recommendation objection has provided a temporary delay in enforcement in a few instances. See United States v. Chase Manhattan Bank, 598 F.2d 321 (2d Cir. 1979); United States v. Genser, 595 F.2d 146 (3d Cir. 1979). But see United States v. Genser, 602 F.2d 69 (3d Cir. 1979) (enforcing summons stayed in United States v. Genser, 595 F.2d 146 (3d Cir. 1979), since appellants failed to meet burden of disproving existence of valid civil tax purpose on part of Service). But, as the Service adapts its strategy to the delayed recommendation objection, see text accompanying notes 232-234 supra, the objection may lose any vitality. Furthermore, the difficulty in proving that a delay was in bad faith is exaggerated by the fact that courts seem inclined only to allow limited discovery by taxpayers unless a substantial case of bad faith has already been made out. See note 232 supra. See also United States v. Church of Scientology, 520 F.2d 818, 824-25 (9th Cir. 1975); United States v. McCarthy, 514 F.2d 368, 376 (3d Cir. 1975); United States v. Salter, 432 F.2d 697, 700 (1st Cir. 1970).
VII. A PROPOSAL FOR THE PARTIAL IMPOSITION OF A PROBABLE CAUSE REQUIREMENT ON IRS SUMMONSES

The problem caused by the dual function of the Service has been recognized by the Supreme Court. Its solution, however, has been to allow the proper purpose of the summons power—the determination and collection of civil liabilities—to camouflage criminal investigations that may be proceeding at the same time. The Court has refused to find that Congress intended the IRS' summons authority to end where suspected criminal liability begins, and because of the overlapping nature of the two functions of the Service, this interpretation may be pragmatic. But if Congress really meant that IRS summonses could be used to determine criminal liabilities as well as civil liabilities, the Court should be scrutinizing this summons power to ensure the applicability of constitutional safeguards, rather than assisting a government agency in circumventing them.

The problem is that the Court has treated the criminal investigation aspect as merely incidental to the important collection function, and, in doing so, has lost sight of the real issue. The issue is not whether the imposition of criminal investigation standards would interfere with the government's right to collect taxes; it is whether the government's power to collect taxes can interfere with the constitutional protections guaranteed to an individual who is the subject of a criminal investigation. The criminal liability aspect of the tax laws is entitled to priority in any consideration of the IRS' summons power. When a government agency serves two masters, the rules of the stricter master must prevail.

The problems caused by the dual nature of the Service's mission do not lend themselves to simple solution. The unnecessary imposition of a probable cause standard on all IRS summonses would greatly hamper the Service's authority to investigate civil matters, and would open the door to increased tax evasion. There are less burdensome means, however, of achieving fairness than by imposing a probable cause standard in all cases.

In United States v. LaSalle National Bank, the Court did

245. See text accompanying notes 207-208 supra.
not feel that the appearance of a Criminal Enforcement Division agent in the investigation should be the controlling factor in the criminal/civil line of demarcation. But as a practical matter, this appearance is the most appropriate place to draw the line. The express purpose of the Criminal Enforcement Division is to "enforce the criminal statutes applicable to . . . tax laws . . . by developing information concerning alleged criminal violations thereof, . . . investigating suspected criminal violations [and] recommending prosecution when warranted."\(^{247}\)

If the Court is unwilling to limit the use of section 7602 summonses to divisions charged primarily with civil collection duties, then the summonses issued by criminal enforcement agents should have to meet a probable cause standard. It should be irrelevant that civil liability may also be found once the Criminal Enforcement Division is involved in an investigation, as it should be irrelevant that the Service may ultimately choose not to seek criminal sanctions.\(^{248}\)

The Service could circumvent such a probable cause standard, however, by delaying the Criminal Enforcement Division's involvement in a case until the Examination Division\(^{249}\) has gathered all the information needed. There are three ways to avoid this problem. First, a probable cause standard could be imposed on all Service summonses,\(^{250}\) but this would unduly hamper the Service in its vital civil enforcement function. Second, criminal sanctions for Code violations could be abolished in favor of harsher civil penalties for willful violations. This would increase IRS revenues while maintaining the monetary incentive for voluntary compliance. It would also remove any appearance of impropriety in the use of its broad powers that could tarnish the Service's image. Finally, the Service could be


\(^{248}\) In *LaSalle*, the Court, citing the 1976 Annual Report of the Commissioner of the Internal Revenue Service 33,61,152, noted that "[s]tatistics for the fiscal year 1976 show that the Intelligence Division has . . . greater involvement with civil fraud than with criminal fraud." The Court pointed out that "[o]f 8,797 full-scale tax fraud investigations in that year only 2,037 resulted in recommendations for prosecution." 437 U.S. at 309, 310 n.12 (emphasis added).

\(^{249}\) The Examination Division, at both the district and regional levels, is the division charged with selection and examination of returns for audit and generally with the determination of tax liabilities and penalties. It may also participate in investigations of civil tax fraud along with the Criminal Enforcement Division. IRS Statement of Organization and Functions, 39 Fed. Reg. 11,572, 11,601, 11,605-06 (1974).

\(^{250}\) The Supreme Court, however, has already acknowledged the inherent impracticability of this solution. *See* United States v. Powell, 379 U.S. 48, 53, 54 (1964).
required to determine, prior to the issuance of any summons, whether it was interested in possible criminal violations. If the Service elected to pursue both criminal and civil liabilities, it would be required to establish probable cause before any summons could be issued. Failure to establish probable cause prior to the issuance of a summons would bar the Service from recommending criminal prosecution based on the transaction that provided the impetus for the summons.

Of these alternatives, the third approach, the effect of which would be to impose a probable cause standard only on those summonses issued by agents of the Criminal Enforcement Division, would permit taxpayers to rely much less on the institutional good faith of the IRS. If one really must rely on the good faith of the government—an interesting substitute for constitutional rights—this compromise approach best balances the interests of government and private individuals.