1981

Derivative Use of Attorneys' Opinion Work Product in IRS Summons Enforcement Proceedings: United States v. Bonnell

Minn. L. Rev. Editorial Board

Case Comment

The Derivative Use of Attorneys' Opinion Work Product in IRS Summons Enforcement Proceedings: *United States v. Bonnell*

In February, 1977, a Minneapolis trial attorney met with a tax attorney and others associated with Cargill, Inc. to discuss possible tax litigation concerning foreign payments made by Cargill subsidiaries. Following the meeting, the trial attorney summarized his notes and made arrangements with a messenger service to deliver the typewritten memorandum to Cargill's general counsel. Without authority, the messenger photocopied the document and delivered copies to a local newspaper and to the Internal Revenue Service (IRS).[1] Based on information found in the document, the IRS issued tax summonses to Cargill[2] and subsequently commenced an action in United States District Court for their enforcement.[3] The court found that the document was an attorney's opinion work product[4]

1. United States v. Bonnell, 483 F. Supp. 1070, 1073-74 (D. Minn. 1979).

2. Issued pursuant to 26 U.S.C. § 7602 (1976), the summonses required that certain documents be produced and that testimony be given by an assistant vice-president of Cargill, Inc. and by a partner in Peat, Marwick, Mitchell & Co., Cargill's certified public accountants. 483 F. Supp. at 1073.

3. To compel compliance with a summons, the IRS must bring an enforcement action in a federal district court. 26 U.S.C. §§ 7402(b), 7604(a) (1976). *See* United States v. Powell, 379 U.S. 48, 52 (1964). Such an enforcement action is "an adversary proceeding affording a judicial determination of the challenges to the summons and giving complete protection to the witness." Reisman v. Caplin, 375 U.S. 440, 446 (1964). Provisions for judicial enforcement of IRS summonses thus stand as the principal restraints against abuse of the summons procedure. *See* United States v. Bisceglia, 420 U.S. 141, 146 (1975). *See also* Comment, *Constraints on the Administrative Summons Power of the Internal Revenue Service*, 63 IOWA L. REV. 526, 529 (1977).

4. "Work product" generally refers to any notes or materials relating to the facts or substance of a case, prepared by an attorney in reasonable anticipation of litigation. Wigmore suggests that the work product doctrine developed from the same common law origin as did the attorney-client privilege. *See* 8 J. WIGMORE, EVIDENCE § 2318 (McNaugton rev. ed. 1961). The term "work product" had its origin in 1945 when the Court of Appeals for the Third Circuit hesitatingly referred to "work product of the lawyer" as something not required to be disclosed in the course of pretrial discovery. *See* Hickman v. Taylor, 153 F.2d 212, 223 (3d Cir. 1945), *aff'd on other grounds*, 329 U.S. 495 (1947). The Supreme Court subsequently employed the term in Hickman v. Taylor, 329 U.S.

that had been obtained without authorization, but nonetheless rejected Cargill's arguments for the application of a protective exclusionary rule,[5] *holding* that, in a tax summons enforcement proceeding, the derivative use of improperly obtained work product will be allowed when the IRS acquires the work product from a private source. *United States v. Bonnell*, 483 F. Supp. 1070 (D. Minn. 1979).

The exclusionary rule prevents illegally obtained material from being admitted into evidence against those whose rights have been violated.[6] Originally designed to implement protections provided by the fourth amendment,[7] the judicially created rule has been applied to suppress not only illegally seized pri-

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495, 511 (1947), and the concept has since been partially codified at FED. R. CIV. P. 26(b)(3). *See* notes 16-27 *infra* and accompanying text.

5. Cargill resisted the enforcement of the summonses on numerous grounds, but argued primarily that the IRS' use of work product to develop other, unprivileged evidence, would effectively undermine the protections afforded work product. Underlying Cargill's argument was the contention that, like the exclusionary rule in the fourth amendment search-and-seizure context, *see* notes 6-13 *infra* and accompanying text, a protective exclusionary rule in the context of a summons enforcement proceeding would properly effectuate the policies of the work product doctrine. *See* United States v. Bonnell, 483 F. Supp. 1070, 1075 (D. Minn. 1979).

6. In the landmark case of Weeks v. United States, 232 U.S. 383 (1914), the Supreme Court determined that suppression of evidence is an appropriate tool to protect the guarantees of the fourth amendment and established what has become known as the exclusionary rule. The controversial *Weeks* holding applied only to federal prosecutions; not until 1961 was the exclusionary rule extended to apply to actions by state officials. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).

The rather significant length of time from the rule's promulgation in *Weeks* to its extension in *Mapp* can be explained, in part, by a continuing lack of consensus among the Supreme Court justices regarding the efficacy of the exclusionary rule in general. As Justice Blackmun observed in United States v. Janis, 428 U.S. 433, 446 (1976), "[t]he debate within the Court on the exclusionary rule has always been a warm one." The present Court is still wrestling with the basic issue of the need for an exclusionary rule, and a number of observers believe that the Court is on the verge of restricting the scope of the rule's application by adopting an exception for evidence obtained by government agents acting under a reasonable, good-faith belief that their conduct comports with existing law. *See generally* Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635 (1978); Note, *Impending "Frontal Assault" on the Citadel: The Supreme Court's Readiness to Modify the Strict Exclusionary Rule of the Fourth Amendment to a Good Faith Standard*, 12 TULSA L. REV. 337 (1976). *See also* United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (good faith exception to exclusionary rule adopted).

7. In establishing the exclusionary rule as the appropriate remedy for fourth amendment violations the Supreme Court observed that if unlawfully seized evidence is not suppressed "the protection of the Fourth Amendment . . . might as well be stricken from the Constitution." Weeks v. United States, 232 U.S. 383, 393 (1914). Exclusionary rules have subsequently been applied outside the fourth amendment search-and-seizure context. *See* note 14 *infra*.

mary evidence, but also any secondary evidence derived from such primary evidence—so-called "fruit of the poisonous tree."[8] Because the suppression of evidence impedes the truth-seeking process,[9] the exclusionary rule is viewed as a drastic remedy. Reassessing the propriety of applying such a severe sanction, the Supreme Court has recently begun to restrict the scope of the rule's operation.[10] In *United States v. Calandra*,[11] for example, the Court refused to extend the rule's application in the context of a grand jury investigation. The Court held that a grand jury witness could not refuse to answer questions on the ground that such questions were based on evidence obtained

8. First coined by Justice Frankfurter in Nardone v. United States, 308 U.S. 338, 341 (1939), the phrase "fruit of the poisonous tree" refers to evidence obtained through the use of illegally seized primary evidence. This well-established fourth amendment doctrine generally determines the limits of the exclusionary rule in the trial setting. *See generally* Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579 (1968).

9. *See* Stone v. Powell, 428 U.S. 465, 490 (1976); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 429 (1974).

10. The Burger Court has demonstrated its disfavor of the application of exclusionary rules by limiting the areas to which such rules are applicable and by narrowing the range of defendants entitled to invoke them. *See, e.g.*, United States v. Payner, 100 S. Ct. 2439 (1980) (refusal to allow a federal district court's use of its supervisory power to exclude evidence seized unlawfully from a third party not before the court); Michigan v. DeFillippo, 443 U.S. 31 (1979) (exclusionary rule held inapplicable despite a judicial determination that the municipal ordinance under which the search was conducted was unconstitutionally vague); Stone v. Powell, 428 U.S. 465 (1976) (exclusionary rule held inapplicable in federal habeus corpus review of state convictions); United States v. Janis, 428 U.S. 433 (1976) (exclusionary rule held inapplicable to an IRS assessment proceeding where the illegal search had been conducted by state law enforcement agents); United States v. Peltier, 422 U.S. 531 (1975) (refusal to extend the exclusionary rule retroactively in cases in which law enforcement agents have acted in good faith). *See generally* note 6 *supra*.

In each of these decisions the Court critically examined the deterrence policies underlying the exclusionary rule, *see* note 35 *infra*, and refused to suppress evidence when these policies were not furthered. Unable to develop a consensus on the fundamental rationale for the rule, the Burger Court's approaches have been markedly inconsistent. The confusion thus created has generated both concern and criticism. *See, e.g.*, Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151, 190-91 (1979); Schlesinger & Wilson, *Property, Privacy and Deterrence: The Exclusionary Rule in Search of a Rationale*, 18 DUQ. L. REV. 225, 227 (1980).

11. 414 U.S. 338 (1974). The grand jury in *Calandra*, investigating illegal loansharking activities, subpoenaed a witness to ask him questions regarding records that had been illegally seized by government agents during a search of the witness' place of business. *Id.* at 341. Both the district court, in *In re* Calandra, 332 F. Supp. 737 (N.D. Ohio 1971), and the Court of Appeals for the Sixth Circuit, in United States v. Calandra, 465 F.2d 1218 (6th Cir. 1972), held for the witness, suppressing both the evidence and its "fruit." 465 F.2d at 1227; 332 F. Supp. at 746.

from an unlawful search and seizure.[12] The *Calandra* Court reasoned that since a grand jury does not adjudicate, but merely investigates to determine probable cause, it should remain free from some of the evidentiary and procedural restrictions otherwise applicable at trial.[13]

Although originally conceived as a remedy for fourth amendment violations, exclusionary rules have also been used as remedies for statutory and procedural violations.[14] In determining whether an exclusionary rule is appropriate in any given proceeding, courts have often employed a balancing test: weighing the nature of the proceeding and the necessity for the information against the values to be fostered by an order preventing disclosure.[15] Thus, the privileged status of any dis-

12. 414 U.S. at 354.

13. The Court stated:

> It is evident that this extension of the exclusionary rule would seriously impede the grand jury. Because the grand jury does not finally adjudicate guilt or innocence, it has traditionally been allowed to pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial.

Id. at 349. The *Calandra* Court's decision to restrict the scope of the exclusionary rule may have been made easier, however, because the subject evidence was not privileged. *See id.* at 353-54.

14. As the Supreme Court has stated: "While the general common-law practice is to admit evidence despite its illegal origins, this Court in a number of areas has recognized or developed exclusionary rules where evidence has been gained in violation of the accused's rights under the Constitution, federal statutes, or federal rules of procedure." United States v. Blue, 384 U.S. 251, 255 (1966) (citations omitted). More specifically, the exclusionary rule has been used to suppress evidence gained through abuse of the IRS summons process, *see* United States v. Genser, 582 F.2d 292, 307 (3d Cir. 1978), *cert. denied*, 444 U.S. 928 (1979), and a number of courts have found that suppression is a theoretically proper safeguard against governmental abuse of the Internal Revenue Code. *See, e.g.*, United States v. Serubo, 604 F.2d 807, 813-14 (3d Cir. 1979) (remedy of suppression available when the IRS' investigative authority is not restricted to non-criminal purposes); United States v. Di Orio, 484 F. Supp. 22, 25 (E.D. Pa. 1979) (remedy of suppression available to claimant who can meet burden of showing that IRS summons was issued in bad faith); United States v. Oaks, 360 F. Supp. 855, 858 (C.D. Cal. 1973) (suppression remedy available when an IRS summons is being used for the improper purpose of investigating only criminal behavior); *In re* Leonardo, 208 F. Supp. 124, 127 (N.D. Cal. 1962) (remedy of supression available to taxpayers claiming violation of I.R.C. § 7605(b) (1958), irrespective of coincidental constitutional violations).

15. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 492-95 (1976); United States v. Calandra, 414 U.S. 338, 349 (1974). The *Bonnell* court stated that if an exclusionary rule were applied "a substantial cost would be imposed on the societal interest in enforcement of the nation's revenue laws." 483 F. Supp. at 1082. The court's use of a balancing test rather than a fixed fourth amendment standard is consistent with recent Supreme Court exclusionary rule cases in which the Court balanced the individual's interest in personal liberty or privacy against the governmental interest served by the search or seizure. *See, e.g.*, 428 U.S. at 492-95; 414 U.S. at 349.

The Burger Court's recent balancing approach to exclusionary rule claims

puted evidence has been a significant consideration in the review of claims for its suppression.

Attorneys' opinion work product enjoys a privileged status that some courts have recognized as a valid ground upon which to refuse either a grand jury subpoena[16] or an IRS summons.[17] Recognized initially in the context of civil discovery, the work product doctrine now is applied in both civil and criminal proceedings[18] to protect materials developed by an attorney "in the course of preparation for possible litigation."[19] The privileged status afforded opinion work product stems from a recognition that an adversarial system of justice functions best when lawyers work with a certain degree of privacy, preparing legal theories and strategies free from the demoralizing apprehension that sensitive files and notes can be revealed to opposing parties.[20] Because the work product doctrine safeguards lawyers' notes and mental impressions against disclosure, it ensures that attorneys are not inhibited in their representation of clients, and that clients are not reluctant to disclose all facts, favorable and unfavorable, to their counsel.[21] The doctrine also

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has resulted consistently in the balance being struck in favor of the governmental interest. Apparently, the Court intends to further restrict the scope of the exclusionary rule's application by using this balancing approach. *See* Burkoff, *supra* note 10, at 158-59.

16. *See, e.g., In re* Grand Jury Investigation, 599 F.2d 1224, 1228 (3d Cir. 1979); *In re* Grand Jury Subpoena, 599 F.2d 504, 509 (2d Cir. 1979); *In re* Grand Jury Proceedings [Duffy], 473 F.2d 840, 845 (8th Cir. 1973); *In re* Grand Jury Subpoena, 484 F. Supp. 1099, 1102 (S.D.N.Y. 1980); *In re* Grand Jury Investigation, 412 F. Supp. 943, 946 (E.D. Pa. 1976).

17. *See* Upjohn Co. v. United States, 49 U.S.L.W. 4093, 4096-97 (U.S. Jan. 13, 1981); United States v. Amerada Hess Corp., 619 F.2d 980, 987 (3d Cir. 1980); United States v. Brown, 349 F. Supp. 420, 430 (N.D. Ill. 1972), *aff'd* 478 F.2d 1038, 1041 (7th Cir. 1973).

18. *See* United States v. Nobles, 422 U.S. 225, 236 (1975).

19. Hickman v. Taylor, 329 U.S. 495, 505 (1947). *See also* FED. R. CIV. P. 26(b)(3), adopted by the Supreme Court in 1970, which codifies that aspect of *Hickman* and its progeny relating to "ordinary" or "materials" work product. *See* note 26 *infra* and accompanying text.

20. As the Supreme Court stated in Hickman v. Taylor, 329 U.S. 495 (1947), "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney." *Id.* at 510. *See* note 21 *infra*.

21. Although compelling, the policy considerations underlying the work product doctrine are largely intangible and subtle, and efforts to establish a jusitification for the privilege must be made by reference to policy goals that are only vaguely defined. As Judge Goodrich suggests in the circuit court opinion of Hickman v. Taylor, 153 F.2d 212 (6th Cir. 1945), *aff'd on other grounds*, 329 U.S. 495 (1947):

> Those members of the public who have matters to be settled through lawyers and through litigation should be free to make full disclosure to their advisers and to have those advisers and other persons concerned in the litigation free to put their whole-souled efforts into the business

ensures vigorous, independent preparation on the part of opposing counsel.[22] If the immunity of opinion work product were not vigorously protected, "[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial."[23] Work product protection thus plays an important role in maintaining the integrity of the adversary system.[24]

Although the parameters of the work product doctrine are

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while it is carried on. The soundness of this policy is not capable of laboratory demonstration. . . . We believe it is sound policy; we know that it is irrefutably established in the law.

153 F.2d at 223 (footnotes omitted). For a useful survey of the policy goals that the work product doctrine is designed to promote, see Hickman v. Taylor, 329 U.S. 495, 510-11 (1947). *See also* Gardner, *Agency Problems in the Law of Attorney-Client Privilege: Privilege and "Work Product" Under Open Discovery (pt. II)*, 42 U. DET. L.J. 253, 268-82 (1965).

22. Traditionally, the lawyer's role as an advocate and the resulting duty of loyalty to his or her client, were viewed as predominant features of the adversary system. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 1.2, at 4-5 (2d ed. 1977). This perception of the adversary system is changing, however, and the current view concerning the attorney's proper role in litigation places more emphasis on the attorney's role as an officer of the court and less emphasis on his or her role as an independent advocate. *See* Patterson, *An Analysis of the Proposed Model Rules of Professional Conduct*, 31 MERCER L. REV. 645, 665 (1980). Motivated at least in part by crowded court dockets, the drafters proposed new standards of professional conduct aimed at discouraging delay tactics, spurious claims, and false evidence. *See* ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.1 (discussion draft 1980). These proposed rules impose a duty upon the advocate to be "honest" in litigation, but nonetheless support the essential feature of the adversary system: "the advocate's duty in the adversary system is to present the client's case as persuasively as possible, leaving presentation of the opposing case to the other party." *Id.* at Rule 3. The advocate's ability to perform this duty would be severely threatened if opposing parties were allowed access to, or use of, the attorney's thoughts and legal strategies prepared in anticipation of litigation. The protection of opinion work product thus remains an essential feature of a properly functioning adversary system.

23. Hickman v. Taylor, 329 U.S. 495, 511 (1947).

24. By helping to protect independent litigants in the uninhibited prosecution of their claims, the privileged status of opinion work product is of great importance to the proper functioning of the adversary system. As the Court of Appeals for the Fourth Circuit explained:

> We know that our adversary system of justice relies heavily on the attorneys for its very functioning. . . . In every instance in which an attorney is consulted . . . he must be free to give his candid, dispassionate opinion, and equally free to record it and his mental impressions and conclusions. No other rule is compatible with the interests of justice. The client seeking the opinion must be similarly uninhibited. . . . The restriction on the attorney in giving advice, and the inhibition on the client in seeking it, is simply not compatible with our adversary system.

Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 735-6 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

still largely undeveloped,[25] it is clear that the general concept encompasses two distinct types of work product: "opinion," comprising an attorney's thoughts and strategies, and "ordinary," encompassing other factual material gathered by the attorney. Opinion work product enjoys nearly absolute protection, but ordinary work product receives only conditional protection.[26] The Federal Rules of Civil Procedure reflect this distinction by shielding opinion work product from discovery, but allowing limited access to ordinary work product.[27]

The district court in *Bonnell* accepted the questioned document as an attorney's opinion work product,[28] finding it to be "a personal recollection or memorandum" prepared in reasonable anticipation of litigation and containing the mental impressions of an attorney.[29] The court did not, however, acknowledge any contradiction between its statement that "an assertion of the work-product doctrine would have been a valid defense had the summonses required production of the questioned document itself,"[30] and its holding that the IRS should not be barred from using work product to obtain other, unprivileged materials.

The *Bonnell* court gave four reasons supporting its refusal

25. The previous split of authority among the circuit courts of appeals on the issue of the applicability of work product defenses to IRS summonses is an example of the ongoing development of the work product doctrine. *See* note 60 *infra* and accompanying text.

26. *See generally* Note, *Protection of Opinion Work Product Under the Federal Rules of Civil Procedure*, 64 VA. L. REV. 333 (1978). The court in *Bonnell* recognized the common distinction between "opinion" and "ordinary" work product. 483 F. Supp. at 1078. Although this distinction can be decisive on issues involving the scope of pretrial discovery under FED. R. CIV. P. 26(b)(3), the court in *Bonnell* found it was not determinative on the issue before the court.

27. *See* FED. R. CIV. P. 26(b)(3), Advisory Comm. Note, 48 F.R.D. 487, 499-502 (1970). Rule 26(b)(3) provides in part:

> (3) *Trial preparation: materials.* . . . A party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, *the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.*

FED. R. CIV. P. 26(b)(3) (emphasis added).

28. 483 F. Supp. at 1078.

29. *Id.* (quoting *In re* Grand Jury Proceedings, 473 F.2d 840, 848 (8th Cir. 1973)).

30. 483 F. Supp. at 1079.

to apply a work product fruits exclusionary rule in the IRS summons enforcement proceeding. Initially, the court noted that because the IRS was conducting an administrative investigation, its power to investigate was not limited by potential restrictions upon the admissibility of the evidence at trial. The court reasoned that such restrictions at trial provide adequate protection against the misuse of privileged material.[31] The court then drew an analogy between IRS summons proceedings and grand jury investigations,[32] citing *United States v. Calandra*,[33] which permitted derivative use of unlawfully obtained evidence in a grand jury proceeding, as "the controlling case."[34] The court suggested that in the present case, disallowing IRS use of the private document would not further the policies[35] underlying exclusionary rules. Finally, the court noted the general judicial aversion to rules sanctioning the suppression of

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31. *Id.* at 1079-80.

32. There are many shared characteristics between IRS proceedings and grand jury probes. As the *Bonnell* court notes, the grounds on which an administrative summons and a grand jury subpoena are issued are essentially the same. *See* 483 F. Supp. at 1080 (citing United States v. Rosinsky, 547 F.2d 249, 252 n.1 (4th Cir. 1977)). Moreover, the grounds for challenging an IRS summons, *see* Donaldson v. United States, 400 U.S. 517, 526 (1971), are quite similar to the grounds for challenging a grand jury subpoena, *see* United States v. Dionisio, 410 U.S. 1, 11-12 (1973). *See* 483 F. Supp. at 1080. Both procedures also interpose a neutral tribunal between the investigating agency and the subject in order to help prevent abuses. Because of these similarities, other courts have drawn the summons proceeding/grand jury investigation analogy. *See* cases cited in *Bonnell*, 483 F. Supp. at 1080. *But see* notes 45-50 *infra* and accompanying text.

33. 414 U.S. 338 (1974). *See* notes 11-13 *supra* , 45-53 *infra*, and accompanying text.

34. 483 F. Supp. at 1080.

35. The *Bonnell* court considered deterrence to be the "prime policy of the Fourth Amendment exclusionary rule." *Id.* at 1081. When originally conceived, however, the most widely recognized policy underlying the exclusionary rule was that of judicial integrity. This rationale was first clearly articulated in the dissenting opinion of Justice Brandeis in Olmstead v. United States, 277 U.S. 438 (1928). Brandeis proposed that "[w]hen the Government, having full knowledge, [seeks] . . . to avail itself of the fruits of [illegal searches and seizures] in order to accomplish its own ends, it assume[s] moral responsibility for the officers' crimes." *Id.* at 483 (Brandeis, J., dissenting). Although often repeated over the years, this "imperative of judicial integrity," Elkins v. United States, 364 U.S. 206, 222 (1960), gradually fell into disfavor. Increasingly, courts began to focus instead on the exclusionary rule's deterrent value. *See* Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 U.C.L.A. L. REV. 1129, 1130, 1142-43 (1973). Thus, the *Bonnell* court's emphasis on the deterrant effect of the exclusionary rule, *see* note 71 *infra* and accompanying text, is consistent with the current view of a majority of Supreme Court justices. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 492 (1976); United States v. Janis, 428 U.S. 433, 446 (1976); United States v. Peltier, 422 U.S. 531, 538-39 (1975); United States v. Calandra, 414 U.S. 338, 347 (1974).

evidence,[36] and found that in the instant case "the summonses [would] likely result in reliable evidence."[37] The court thus concluded that the societal interest in the enforcement of the nation's revenue laws outweighed any effect that enforcement of the summonses would have on the scope of the work product doctrine.[38]

The *Bonnell* decision is based primarily on Supreme Court cases evidencing disfavor toward exclusionary rules, but there are problems with the court's analysis. First, the court rejected the position of *United States v. Bank of Commerce*,[39] in which the Court of Appeals for the Third Circuit disallowed the use of the "fruit" of unlawfully seized evidence in the context of IRS summons enforcement proceedings.[40] Although *Bank of Commerce* is a fourth amendment case in which an unauthorized seizure was instigated by government agents and not by a third party, the *Bonnell* court erred in supporting its dismissal of the case[41] solely on the basis of recent Supreme Court exclusionary rule decisions. The *Bonnell* court also summarily rejected other cases cited by Cargill on the ground that they "were handed down prior to the Supreme Court's more careful tailoring of the Fourth Amendment exclusionary rule,"[42] but failed to cite specific decisions to support this assertion. Although the Supreme Court has begun to reject attempts to extend the scope of exclusionary rules outside the context of criminal tri-

36. "Exclusionary rules are receiving mounting criticism from judges and scholars because they undermine the truth-seeking process." 483 F. Supp. at 1082.

37. *Id.* While undoubtedly true, this argument is hardly persuasive, for probative evidence invariably is suppressed whenever exclusionary rules are invoked to protect privileged material.

38. *Id.*

39. 405 F.2d 931 (3d Cir. 1969). In *Bank of Commerce* the IRS sought enforcement of tax summonses for records that had been called to the attention of the IRS by data that allegedly had been obtained illegally by IRS agents. The defendant taxpayer sought to prevent the production of the summoned bank records on the ground that they were the fruit of an illegal search and seizure and that their disclosure would thus violate his fourth amendment rights. The court refused to enforce the IRS summons because district court consideration of the fourth amendment claim was absent. *Id.* at 933-35.

40. Admittedly, the traditional deterrence rationale of discouraging illegal government searches is missing in *Bonnell*. *See* note 71 *infra* and accompanying text. *But see* note 55 *infra*.

41. "*Bank of Commerce* is no longer good law in light of Supreme Court exclusionary rule cases since 1969." 483 F. Supp. at 1082.

42. *Id.* at 1082 n.22. The court also rejected cases on the basis of their being either "criminal cases" or cases "contain[ing] no discussion of the rationale for suppression of fruits." *Id.*

als,[43] there is no foundation for the *Bonnell* court's suggestion that the exclusionary rule recently has been restricted in the context of work product defenses to administrative summonses.[44]

Several difficulties are also presented by the *Bonnell* court's analogy of IRS administrative investigations to grand jury proceedings such as those in *United States v. Calandra*.[45] Although some courts have employed this type of analogy in the context of administrative investigations,[46] it is clear that the IRS' function to both investigate *and* prosecute revenue law violations is different from the grand jury's solely investigative role. Moreover, the historical and constitutional foundations that underlie these respective functions are distinct.[47] The grand jury was developed to prevent investigative abuses—providing a safeguard between the individual and the imposing power of the state.[48] As an arm of the executive and a party to the investigation, the IRS is far from an impartial inquisitor.[49] These basic differences between grand jury investigations and IRS summons procedures suggest that it is inappropriate to extend to the IRS the grand jury's broad powers of inquisition solely on the ground that the two agencies are performing similar functions.[50]

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43. *See* Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1403 (1977).

44. Although recent Supreme Court decisions appear to establish a significant trend toward limiting the areas to which exclusionary rules may be applied, *see* notes 6 & 10 *supra*, the Court's effort is far from "carefully tailored." Rather, the Court's recent decisions reflect a marked lack of consensus and, as a result, fourth amendment doctrine has been characterized as "unstable and unconvincing." Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 49 (1974); *see* Burkoff, *supra* note 10, at 192.

45. 414 U.S. 338 (1974). *See* note 11 *supra* and accompanying text.

46. For example, in United States v. Bisceglia, 420 U.S. 141 (1975), the Supreme Court examined the broad scope of the investigatory power of the IRS and compared it to the scope of the power of a grand jury that can investigate without cause "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *Id.* at 148 (quoting United States v. Powell, 379 U.S. 48, 57 (1964)). *See also* cases cited by the *Bonnell* court, 483 F. Supp. at 1080.

47. *See* Donaldson v. United States, 400 U.S. 517, 537-40 (1971) (Douglas, J., concurring); Comment, *supra* note 3, at 534.

48. *See* United States v. Dionisio, 410 U.S. 1, 17 (1973). Although the grand jury's theoretical role is that of a neutral investigator, in practice its role has been abused. *See generally* Rodis, *A Lawyer's Guide to Grand Jury Abuse*, 14 CRIM. L. BULL. 123 (1978). Such abuse, however, does not eliminate the theoretical distinction between its role and that of the IRS.

49. *See* Comment, *supra* note 3, at 534.

50. *See* Miller, *Administrative Agency Intelligence-Gathering: An Appraisal of the Investigative Powers of the Internal Revenue Service*, 6 B.C. INDUS. & COM. L. REV. 657, 708-09 (1965).

The *Bonnell* court's reliance on *Calandra* is also unfounded in light of the radical difference in the type of evidence involved in the two cases. *Calandra* did not involve work product or any other privileged material.[51] Indeed, the Court in *Calandra* specifically noted that a grand jury may not violate a valid privilege.[52] If the evidence in *Calandra* had been derived from illegally seized attorney's opinion work product, it is not clear that the *Calandra* Court would still have rejected the motion to suppress. Thus, *Calandra* provides only questionable precedent for the holding in *Bonnell*.[53]

More fundamentally, the *Bonnell* court failed to articulate the policy considerations underlying its willingness to allow the subsequent use of opinion work product illegally seized by a private party. The court correctly noted that an unauthorized private seizure resulting in evidence being transferred to the government does not violate the fourth amendment,[54] but the court failed to discuss whether the government's subsequent, expanded use of that evidence implicates other protectable interests. Although no court has yet adopted the view that the government's subsequent use of privately seized evidence to gain derivative evidence implicates fourth amendment interests, such use arguably constitutes an independent governmental search that infringes upon fourth amendment interests.[55] Merely because privileged material was privately seized should not give the IRS a license to invade further a privileged area.

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51. *See* note 11 *supra*.

52. 414 U.S. 338, 346 (1974).

53. Because the work product doctrine is firmly established as a common law privilege and many courts have applied it to protect evidence in grand jury proceedings, *see* note 16 *supra*, the *Bonnell* court's reliance on *Calandra* is less than persuasive.

54. 483 F. Supp. at 1076. *See* Burdeau v. McDowell, 256 U.S. 465, 476 (1921). *See also* Coolidge v. New Hamphsire, 403 U.S. 443, 487 (1971).

55. *See* Comment, *United States v. Roberts—Private Search and Seizure—Expectations of Privacy Have Gone to "Pot,"* 25 S.D. L. REV. 403, 407-10 (1980). *Cf.* United States v. Entringer, 532 F.2d 634, 637 (8th Cir. 1976) (government's acceptance of privately-seized first amendment materials constituted a search that must be analyzed under fourth amendment principles), *cert. denied*, 429 U.S. 820 (1976); United States v. Kelly, 529 F.2d 1365, 1375 n.5 (8th Cir. 1976) (FBI examination of materials in possession of UPS considered unreasonable search and seizure). *But see* United States v. Roberts, No. 79-1396 (8th Cir., filed Nov. 13, 1979) (refusing to extend fourth amendment protection to privately seized marijuana). Arguably, work product deserves such extended protection because of the policies underlying the work product doctrine. *See* text accompanying notes 20-24 *supra*. As the Supreme Court recently stated: "The notion that private searches insulate from Fourth Amendment scrutiny subsequent governmental searches of the same or lesser scope is inconsistent with traditional Fourth Amendment principles." Walter v. United States, 100 S. Ct. 2395, 2403 (1980) (White, J., concurring).

Of course, a third party seizure of the type that occurred in *Bonnell* is a rare event. Nevertheless, in assessing the effect of an unauthorized seizure of opinion work product with reference to the policies that the work product doctrine is designed to promote, it is of little consequence that the initial seizure was made by a third party.[56] Of overriding importance is the fact that the opinion work product *was* obtained by an adverse party. By permitting an adverse party's free use of its opponent's mental impressions and legal theories, the *Bonnell* court allowed one party to rely on its opponent's presumptively confidential trial preparations, and the court thus impeded the attainment of the goals of the adversary system.[57] The court's willingness to allow derivative use of opinion work product on the ground that the privileged material had been initially seized by a third party was therefore incompatible with the underlying policies of the work product privilege.[58] If opinion work product is to be properly protected, both the work product itself and any information derived from it must be consistently and constantly protected. Such protection should be denied only in the face of clearly superior policy goals.[59]

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56. Of course, whether the seizure was made by private or by governmental parties is a question central to the determination of whether the deterrence rationale for the exclusionary rule applies in the given situation. *See* note 71 *infra*.

57. In describing the specific ways in which a party's use of his or her opponent's opinion work product impairs the adversary system, one commentator explains that in the context of pre-trial discovery

> [p]ermitting discovery of opinion work product frustrates the adversary system in several ways. First, if opinion work product were freely discoverable, a lawyer could rely on the work and thoughts of his opponent, the prospect of which could discourage the opponent from exerting his own best efforts. Second, knowing that his opinion work product could be discovered, a lawyer might refrain from written preparation. This would result in work of poor quality, injuring the interests of the client. Third, allowing discovery would cause a decline in the morale of the legal profession . . . .

Note, *supra* note 26, at 335 (footnotes omitted).

58. Similarly, the *Bonnell* court showed a marked insensitivity to the policy considerations underlying the privileged status of opinion work product when it suggested that the privileged material would be sufficiently protected through suppression at a subsequent trial. 483 F. Supp. at 1080; *see* text accompanying note 31 *supra*. Here again, the fact of overriding importance is that the court *did* allow the opinion work product to be used by an opposing party. Once opinion work product is exploited, the policies that support its protection have been lost, and the question of when the opinion work product is used is of relatively little consequence. The compelling policy considerations underlying the privilege apply with full force whenever one party seeks to exploit an opponent's opinion work product, regardless of the stage of the proceeding. To be fulfilled, these policy considerations require the certainty that only consistent protective treatment can provide.

59. A number of courts have recognized limited exceptions to the absolute

The Supreme Court recently held that the work product doctrine does apply to IRS summonses,[60] but failed to announce a standard for determining when the government has made a sufficient showing of necessity to overcome the protection of the doctrine.[61] The question to be addressed, then, is how far the opinion work product doctrine will extend in the context of an IRS administrative investigation. Because it raises very basic issues concerning the function of the work product doctrine and the scope of the IRS' summons authority, this question requires the consideration of competing policies—the government's interest in enforcing revenue laws and the individual's interest in the integrity of his or her attorney's preparation.[62]

At the outset, it must be conceded that a broad investigative power is necessary if the IRS is to fulfill its mission properly. Vigorous enforcement of the federal revenue laws is necessary to maintain the laws' effectiveness and integrity. Recognizing this, Congress has granted the IRS Commissioner broad statutory authority to engage freely in wide-ranging in-

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immunity of opinion work product when the need for production was unusually compelling. Included have been a crime or fraud exception, which permits the discovery of opinion work product prepared to facilitate a client's criminal or fraudulent activities, and an "at issue" exception, which permits discovery when only the opinion work product can provide direct proof on a principal issue. *See* Note, *supra* note 26, at 341. The Supreme Court has stated: "The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial." United States v. Nixon, 418 U.S. 683, 713 (1974). Work product very rarely contains inculpatory evidence of illegal or fraudulent activities or the only direct proof on a principal issue, but the possibility remains that overriding considerations of policy may dictate an exception to the strict immunity given opinion work product. As was recently explained by the Court of Appeals for the Eighth Circuit:

> In our view, opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances. . . . Our unwillingness to recognize an absolute immunity for opinion work product stems from the concern that there may be rare situations, yet unencountered by this court, where weighty considerations of public policy and a proper administration of justice would militate against the non-discovery of an attorney's mental impressions.

In re Murphy, 560 F.2d 326, 336 (8th Cir. 1977) (citation and footnote omitted). Under normal circumstances and in conventional proceedings, however, policy considerations underlying the need for protection of opinion work product will be paramount.

60. Upjohn Co. v. United States, 49 U.S.L.W. 4093, 4096-97 (U.S. Jan. 13, 1981). As the *Bonnell* court notes, prior to the Supreme Court's decision in *Upjohn* the circuit courts were split on the question of whether a work product defense could be asserted in an IRS summons enforcement proceeding. 483 F. Supp. at 1079.

61. *See* note 71 *infra* and accompanying text.

62. *See* note 13 *supra* and accompanying text.

vestigations.[63] Indeed, by virtue of this authority, the IRS possessed the requisite investigatory power to compel Cargill to release any unprivileged information that related to Cargill's potential tax liability.[64] Thus in *Bonnell*, the IRS' use of the attorney's opinion work product was not necessary for its investigation of, or determination of potential claims against, Cargill.

Balanced against the government's need for the summoned material is the taxpayer's interest in the evidence sought to be suppressed. In many cases this interest is largely personal to the individual taxpayer and an order for suppression is not appropriate. But where, as in *Bonnell*, the summonses are based on privileged opinion work product that has been seized without authorization by a private party,[65] far broader policy con-

63. The language of section 7602 of the Internal Revenue Code is quite broad, providing that "the Secretary or his delegate is authorized—(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry. . . ." I.R.C. § 7602. Citing this sweeping language, the *Bonnell* court noted that "[t]he IRS' power is arguably even greater than that of other administrative agencies. . . ." 483 F. Supp. at 1079. Other courts have similarly acknowledged the broad investigative authority given the IRS under section 7602. *See*, *e.g.*, United States v. Powell, 379 U.S. 48, 56-58 (1964); United States v. Coopers & Lybrand, 550 F.2d 615, 619 (10th Cir. 1977). Indeed, when one aggrieved taxpayer challenged an IRS summons by characterizing it as a "fishing expedition," the Eighth Circuit replied that the IRS had been "specifically licensed to fish by § 7602." United States v. Girodano, 419 F.2d 564, 568 (8th Cir. 1969), *cert. denied*, 397 U.S. 1037 (1970). Nonetheless, the IRS' investigatory powers are not absolute, and statutory provisions for judicial enforcement of IRS summonses stand as the principal restraint against abuse of the summons procedure. *See* note 3 *supra*.

64. The IRS is given broad summons authority by statute. *See* note 62 *supra*. In assessing the proper scope of this authority, the Supreme Court has established permissive guidelines. To warrant judicial enforcement, a proposed IRS investigation must meet four requirements: first, a legitimate purpose must underlie the investigation; second, the inquiry must be relevant to that purpose; third, the information sought must not already be in the IRS' possession; and fourth, proper administrative provisions under the Code must have been followed. United States v. Powell, 379 U.S. 48, 57-58 (1964). Under this broad grant of investigatory power, the IRS had the authority to obtain, through administrative summons, any unprivileged information Cargill possessed relevant to Cargill's potential tax liability. That the IRS had such authority is evidenced by the fact that, prior to the IRS issuance of summonses in *Bonnell*, Cargill had employed a trial attorney to prepare for the eventuality of such inquiries.

65. Because it involved the unique circumstance of a private seizure of opinion work product by a third party not before the court, the precedential effect of the holding in *Bonnell* can be minimized if confined to its facts. Restricting the IRS' use of opinion work product to such extraordinary circumstances would not have an appreciable inhibiting effect on attorneys preparing for possible tax litigation. On the other hand, the unique fact situation, standing alone, is hardly a compelling justification for allowing the IRS use of opinion work product. This is particularly true when one considers both the policies

siderations are relevant. As noted earlier,[66] when one attorney is permitted to use the legal theories and strategies of his or her opponent, the opponent may be discouraged from engaging in written preparation or from exerting his or her best efforts. Similarly, an attorney who has the benefit of an opponent's trial strategies and legal theories may feel relieved of the burden of independently exerting his or her own best efforts. Finally, clients who know that materials comprising their attorneys' trial preparation may be used by an opposing party may be discouraged from revealing unfavorable but essential facts to their counsel. Thus, allowing expanded use of opinion work product contravenes the principle underlying the adversary system: vigorous and independent preparation.[67]

The *Bonnell* court's use of a balancing test to resolve these competing interests increases the uncertainty concerning work product protection. Although the competing policy considerations are clear, and although the use of such a test might encourage courts to articulate more concisely the policy choices underlying their analyses, this case-by-case approach also vests considerable discretion at the trial court level and will inevitably lead to inconsistent results. Such inconsistency is particularly inappropriate when used to determine the scope and integrity of privileged materials, because an effective privilege requires the certainty that only consistent protective treatment can provide.[68]

Strictly prohibiting the use of opinion work product by an opposing party, whether such use is sought in the course of pre-trial discovery or in the course of an IRS investigation, would be a better approach. By preventing one party from using its opponent's thoughts and trial strategies, a court would be advancing the value of independent preparation—so central

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underlying the work product doctrine and the other options the IRS possesses to gain information regarding potential tax liability. The *Bonnell* court, however, gave no indication that its refusal to protect the fruits of work product was limited to the unique facts at issue. Thus, *Bonnell* might be used as precedent to restrict further the scope of the protections afforded work product.

66. *See* notes 20-24 *supra* and accompanying text.

67. Courts often have noted that the attorney's need for protection of work product outweighs the public's need for the information. *See* note 14 *supra* for cases in which work product has been protected in the context of grand jury proceedings. One observer has stated that "the foundation of a healthy, truth-ascertaining adversary legal system requires a strong adherence to the policy of protection of the 'lawyer's work product.'" Kane, *The Work Product Doctrine—Cornerstone of the Adversary System*, 31 INS. COUNSEL J. 130, 130 (1964). *See also* text accompanying notes 20-24 *supra*.

68. *See* Note, *supra* note 26, at 344-45.

to the adversary system. Specific, limited exceptions to this blanket immunity would be recognized when the need for production was unusually compelling.[69] The Supreme Court has recently adopted this position in *Upjohn Co. v. United States*,[70] holding the work product defense can be asserted as protection against an IRS summons. Further, the Court found that to overcome this defense something more than a "showing of substantial need and inability to obtain the equivalent without undue hardship"[71] is required. If the *Bonnell* court had adopted this approach, it is unlikely that the court would have allowed the derivative use of the attorney's memorandum.[72] The IRS did not argue that any unusual circumstances of particular need existed for the document's use. The Service merely contended that the document's private seizure eliminated any reason for the application of an exclusionary rule.[73]

Although the *Bonnell* court correctly noted that the application of an exclusionary rule under the unique facts presented would not be likely to provide the desired deterrent effect upon private seizures,[74] the court failed to consider the beneficial effects that an order for suppression would have had on the probity of attorneys' opinion work product, and thus on the legal profession and the adversary system generally.[75] In this respect, the application of an exclusionary rule would have done far more than advance a limited deterrent function. In refusing to apply an exclusionary rule to the fruits of work product, the *Bonnell* court decided that "the societal interest in enforcement of the nation's revenue laws"[76] outweighed the individual's interest in the work product privilege. Although the court's refusal to recognize a work product fruits defense in a tax summons enforcement proceeding appears consistent with the Supreme Court's general disfavor of exclusionary rules,[77]

69. *See* note 59 *supra*.

70. 49 U.S.L.W. 4093 (U.S. Jan. 13, 1981).

71. *Id.* at 4098.

72. *See* notes 19-27 *supra* and accompanying text.

73. *See* 483 F. Supp. at 1078 n.14.

74. 483 F. Supp. at 1081. Because private individuals are less likely than government agents to have knowledge of the exclusionary rule, or even to have evidentiary use as an objective of their search, it is apparent that the application of an exclusionary rule to unauthorized private seizures would not be justified solely on a deterrence rationale.

75. *See* note 66 *supra* and accompanying text.

76. The full quote is as follows: "But to the extent that a work-product fruits defense would hinder this investigation and preclude the discovery of relevant information, a substantial cost would be imposed on the societal interest in enforcement of the nation's revenue laws." 483 F. Supp. at 1082.

77. *See* note 10 *supra* and accompanying text.

the *Bonnell* court's holding, if not confined to the specific facts of the case, gives the legal profession proper cause for concern. Increased access to opinion work product can only serve to impair an attorney's ability to function with independence and integrity as an advocate in an adversary system.