The Privilege Against Self-Incrimination in Federal Tax Investigations

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THE PRIVILEGE AGAINST SELF-INCRIMINATION IN FEDERAL TAX INVESTIGATIONS

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INTRODUCTION

A government that relies on a system of self-assessment for the collection of its revenues must be granted broad powers to enforce its tax laws.¹ Thus, the Internal Revenue Code contains a battery of provisions that, inter alia, requires the preparation and retention of substantial records,² imposes the duty to file accurate returns³ and remit the required tax,⁴ and grants the Internal Revenue Service broad powers to examine documents and interrogate individuals for the purpose of verifying the accuracy of returns and ascertaining the liability for tax.⁵ Overall, the system works well because of a high level of voluntary compliance.⁶ However, an individual may stand firm and point to the accusatory system of justice which requires the government to prove its case against the individual without his cooperation. At this point the governmental right to investigate for the protection of the revenue clashes with the individual’s constitutional rights. Curtailment of governmental powers in tax investigations is particularly troublesome because in virtually every case, the government cannot proceed to determine civil liability, and a fortiori criminal intent, without some cooperation from the taxpayer; the needed evidence, the instrumentalities of the crime, are often within the taxpayer’s possession or within his personal knowledge. In balancing the governmental interest against the individual’s privilege

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1. “The fact is that Congress built the tax code upon the principle of self-assessment and voluntary compliance with the Code’s rules and regulations. To determine deviations from its rules, the IRS must place unusual reliance upon the taxpayer’s own records and statements.” United States v. Roundtree, 420 F.2d 845, 850 (5th Cir. 1969).
3. Id. §§ 6011-6110.
4. Id. §§ 6151-57.
5. Id. §§ 7602-09, 7402.
6. Reasons advanced for a high degree of voluntary compliance include (a) the overall fairness of revenue laws in substance and application, (b) the law-abiding character of the citizen, (c) a feeling of helplessness, and (d) fear of sanctions for noncompliance. See Lyons, Government Power and Citizens Rights in a Tax Investigation, 25 TAX LAWYER 79, 98 (1971).
against compulsory self-incrimination and other constitutional rights, the statutorily grounded governmental interest must yield to the fundamental rights of the individual. Although important policies dictate that the privilege against compulsory self-incrimination be liberally construed, it is not an absolute source of protected silence. Moreover, while a constitutional guarantee can never be subordinated to the law enforcement function, it should not be allowed to unduly frustrate legitimate governmental functions; therefore, in weighing competing interests, the courts have attempted to keep the self-incrimination right within meaningful bounds. It is in this light that we shall examine the application of the privilege against compulsory self-incrimination in tax investigations.

INTERNAL REVENUE SERVICE PROCEDURE

In order to discharge his statutory duty “to inquire after and concerning all persons . . . who may be liable to pay any internal revenue tax” the Internal Revenue Code provides the Secretary of the Treasury and his delegates with an arsenal of investigatory powers. Both internal revenue agents and special agents are granted authority to examine and summon any person to appear and produce books, records, and other relevant data for the purpose of (1) ascertaining the correctness of any return, (2) making a return where none has been made, (3) determining the liability of any person for any federal tax, and (4) collecting any tax liability. A summoned party may also be required to testify as to any information “relevant or material to such inquiry.”

9. Id. §§ 7602-08.
10. Treas. Reg. § 301.7602-1(c) (1972). It should be noted that Revenue investigators operating under authority of § 7608 have not been delegated authority to issue a summons by virtue of the regulations.
11. INT. REV. CODE OF 1954, § 7602. Although section 7601 provides that it is the duty of the Commissioner to “canvass the area” for tax violators, there is no authority for the Service to utilize the section 7602 summons power to aid in a section 7601 canvass. In United States v. Humble Oil, 488 F.2d 953 (5th Cir. 1974), the Fifth Circuit held “the Internal Revenue Service is not empowered by § 7602 to issue a summons in aid of its § 7601 research projects or inquiries, absent an investigation of taxpayers or individuals and corporations from whom information is sought.” 488 F.2d at 962. But see Tillotson v. Boughner, 333 F.2d 515 (7th Cir. 1964). Nor can the Service use the summons to conduct a “fishing expedition.” United States v. Theodore, 479 F.2d 749, 754 (9th Cir. 1973). But see United States v. Luther, 481 F.2d 429 (9th Cir. 1973); cf. United States v. Humble Oil, 488 F.2d 953 (5th Cir. 1974).
12. INT. REV. CODE OF 1954, § 7602(3).
A negligent\textsuperscript{13} or willful\textsuperscript{14} failure to appear or produce may subject the individual summoned to criminal sanctions. However, no risk of criminal sanction or contempt exists if the person appears before the "hearing examiner"\textsuperscript{15} and in "good faith" asserts that production of the evidence would violate an established privilege, that he is physically unable to comply, or any other defense.\textsuperscript{16} Since the Service lacks the power to compel compliance,\textsuperscript{17} the agent must petition the district court for enforcement.\textsuperscript{18}

If the agent believes the summoned party's defenses to the summons are without merit,\textsuperscript{19} a petition is filed with the district court for an order to show cause, directing the summoned party to appear and show why compliance with the summons should not be compelled.\textsuperscript{20} The government alleges that (a) the summons was served, (b) the investigation is pursuant to a legitimate purpose, (c) the information sought may be relevant to that purpose and not already in the Internal Revenue Service's possession,\textsuperscript{21} and (d) all administrative steps

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  \item 13. Id. § 7210. (Where a person neglects to appear at a hearing after being duly summoned to appear, he may be fined or imprisoned or both.) It is generally recognized that the person must have completely disregarded the summons before he is subjected to liability under this section. See Burroughs, The Use of Administrative Summons in Federal Tax Investigations, 9 Vill. L. Rev. 371, 376-77 (1964).
  \item 15. Reisman v. Caplin, 375 U.S. 440 (1964). The "hearing examiner" is almost always the agent who issues the summons.
  \item 16. Id.
  \item 17. Although the Revenue Service power to summons has been likened to that of a grand jury, United States v. McKay, 372 F.2d 174 (5th Cir. 1967), it is clear that a witness "who refuses to comply with the grand jury subpoena may be the immediate subject of a contempt proceeding instituted by simple notice." Fink, Use and Abuse of the Grand Jury in the Criminal Tax Investigation 50 Taxes 325, 327 (1972).
  \item 18. INT. REV. CODE OF 1954, § 7604(a). "If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records or other data." See also INT. REV. CODE OF 1954, § 7402(b).
  \item 19. Typically, where the taxpayer refuses to comply with the IRS summons to produce on the grounds of the fifth amendment, the Service will not petition for enforcement.
  \item 20. The use of show cause procedures to rule a summoned party into court has been upheld as "appropriate" and "adequate" in United States v. Newman, 441 F.2d 165 (5th Cir. 1971).
  \item 21. United States v. Powell, 379 U.S. 48 (1964). Although the Code provisions dealing with the summons power are said to be given a liberal construction, United States v. Humble Oil, 488 F.2d 953 (5th Cir. 1974); United States v. McKay, 372 F.2d 174, 176 (5th Cir. 1967); Falsone v. United States, 205 F.2d 734, 742 (5th Cir.), cert.
have been taken. Prior to the enforcement proceeding the summoned party is precluded from seeking judicial relief.

The Federal Rules of Civil Procedure govern the adversary enforcement proceeding. However, under Rule 81(a) (3) as read by the Supreme Court in Donaldson v. United States, the district court may exercise broad discretionary powers to limit application of the Rules in the enforcement proceeding. If the court orders enforcement, a refusal to comply subjects the party to contempt. Since the order enforcing the summons is a final judgment, the party may appeal the decision and request a stay of execution.

denied, 346 U.S. 864 (1953), the court has the affirmative duty to prevent an "abuse of its process." Powell requires that the material sought be both relevant and material to the inquiry. This test of relevancy was recognized as more than "an idle hope that something may be discovered" in United States v. Harrington, 388 F.2d 520, 524 (2d Cir. 1968); but "whether the inspection sought might have thrown light upon the correctness of taxpayer's return," see United States v. Matras, 487 F.2d 1271, 1274 (7th Cir. 1973) (and the cases cited therein), the burden of proving relevancy is on the government. Compare United States v. Mothe, 303 F. Supp. 1366 (E.D. La. 1969) with United States v. Vey, 324 F. Supp. 552 (W.D. Pa. 1971) (as to who has the burden to show investigation conducted with legitimate purpose). Powell answers that question by placing the burden on the government. See also United States v. Newman, 441 F.2d 165, 169 (5th Cir. 1971). "Before the Government is called upon to make this showing of legitimate purpose, the summoned party must raise in a substantial way the existence of substantial deficiencies in the summons proceedings." Is this a correct formulation of the Powell rule?

22. A summons must be served by delivery of an attested copy in hand to the person summoned, or left at his last and usual place of abode. When the summons calls for production of documents they must be described with reasonable certainty. INT. REV. CODE OF 1954, § 7603. The summons must state the time and place of the examination. The date selected for the examination shall not be less than ten days from the date of the issuance. Id. § 7605(a). No taxpayer shall be subjected to an unnecessary examination or to a second examination for the same taxable period unless taxpayer requests otherwise or the Service notifies taxpayer in writing that an additional inspection is necessary. See generally Annot., 6 A.L.R. Fed. 484 (1971). The second examination rule does not apply to third parties. United States v. Krilich, 470 F.2d 341 (2d Cir. 1972).


24. 400 U.S. 517, 528 (1971): "The Civil Rules, of course, do have an application to a summons proceeding. Rule 81(a) (3) expressly so provides. But the Civil Rules are not inflexible in this application. Rule 81(a) (3) goes on specifically to recognize that a district court, by-local rule or by order, may limit the application of the rules in a summons proceeding."


27. See generally Crowley, The Role of the Practitioner When His Client Faces a Criminal Tax Fraud Investigation, 40 J. Taxation 18 (1974).
FEDERAL TAX INVESTIGATIONS

Frequently, the person summoned is not the taxpayer but his accountant, attorney, or some other person who may possess information relevant to a determination of the taxpayer’s liability. Although taxpayer may understandably desire to intervene to prevent compliance, the Service is not required to give taxpayer notice of a summons issued to a third party, and he has no absolute right to intervene in the enforcement proceeding. It is clear, however, that the taxpayer may intervene at the examination before the hearing officer.

NATURE AND SCOPE OF THE PRIVILEGE AGAINST SELF-INCRAINATION

When Dean Griswold described the privilege against self-incrimination as “one of the great landmarks in man’s struggle to make himself civilized,” he was doubtlessly reflecting on the purposes and the policies underlying the privilege. Probably no clearer statement of reasons supporting the fifth amendment can be found than in the following passage from Justice Goldberg’s opinion in Murphy v. Waterfront Commission of New York:

It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accustorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government in its contest with the individual to shoulder the entire load... our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life, ... our distrust of self-deprecatory statements; and our realization that the privilege,

29. Donaldson v. United States, 400 U.S. 517 (1971). In United States v. Luther, 481 F.2d 429, 433 (9th Cir. 1973), the Ninth Circuit interprets Donaldson to mean “[i]ntervention is not a matter of right but the court in its discretion, upon showing by the taxpayer of some protectable interest may permit intervention.” See the text at note 171 infra for a discussion of intervention.
30. Reisman v. Caplin, 375 U.S. 440 (1964). See also the concurring opinion of Mr. Justice Douglas in Donaldson v. United States, 400 U.S. 517, 538 (1971): “Our decisions, however, make clear that the taxpayer has the right to be present at the hearing and to confront and cross-examine witnesses and inspect evidence against him.” But see United States v. Newman, 441 F.2d 165 (5th Cir. 1971).
while sometimes a shelter to the guilty, is often a protection to the innocent.

The protection of the fifth amendment privilege extends only to (1) compulsory revelations of (2) a testimonial or communicative character (3) which may potentially incriminate (4) the individual who is the object of the compulsion.\textsuperscript{33} The component parts of this statement define the parameters of the protection afforded by the privilege.

The principle that the privilege is applicable only when there exists an element of governmental compulsion generally eliminates any fifth amendment issue where the taxpayer voluntarily provides information to revenue agents.\textsuperscript{34} Moreover, since the compulsion must be exerted upon the person potentially incriminated, the privilege cannot be invoked by a third person on the grounds that it might incriminate the taxpayer.\textsuperscript{35} Similarly, only natural persons may assert its shield; thus impersonal organizations such as corporations,\textsuperscript{36} partnerships,\textsuperscript{37} and labor organizations\textsuperscript{38} are excluded. The personal character rationale has been utilized by the courts to defeat the privilege where individual taxpayers conduct their affairs in an essentially personal manner but through a corporation. Thus, subchapter S corporations,\textsuperscript{39} professional corporations,\textsuperscript{40} and one-man

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\item[33.] 8 J. Wigmore, Evidence § 2250 (McNaughton ed. 1961).
\item[34.] See text at note 183 infra.
\item[35.] Duly summoned third parties are required to comply with an administrative summons regardless of their incriminating character. First Nat. Bank v. United States, 160 F.2d 532 (5th Cir. 1947); McMann v. Securities Ex. Comm’n, 87 F.2d 377 (2d Cir. 1937). The party ought to be able to invoke the privilege to prevent the production of evidence tending to incriminate him. But see United States v. Cromer, 483 F.2d 99 (9th Cir. 1973) (attorney unsuccessful in asserting privileges in his own behalf as to taxpayer’s records).
\item[36.] Wilson v. United States, 221 U.S. 361 (1911); Hale v. Henkel, 201 U.S. 43 (1906).
\item[38.] United States v. White, 322 U.S. 694 (1944).
\item[39.] United States v. Richardson, 72-2 U.S. Tax Cas. 85,935 (10th Cir. 1972); United States v. Mid-West Bus. Forms, Inc., 73-1 U.S. Tax Cas. 80,496 (8th Cir. 1973).
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corporations\textsuperscript{11} have all been denied the protection of the constitutional privilege. To hold that an individual forfeits his constitutional rights by choosing a corporate form of business evidences a failure to examine the pivotal elements of the privilege.\textsuperscript{42} The better approach would be to examine the size, nature, and character of the organization to determine application of the privilege.\textsuperscript{42.1}

The personal character of the privilege has also been used by the courts to deny protection to individuals in possession of corporate records.\textsuperscript{43} This may be a practical extension of the rule which denies protection to impersonal organizations, since corporations and other impersonal organizations act only through officers and employees. This rule appears to run afoul of the purposes and policies\textsuperscript{44} of the privilege in cases where an individual is compelled to produce records in his possession that may incriminate him.\textsuperscript{45} According to Couch v. United States,\textsuperscript{46} possession, not ownership, is the proper touchstone of the privilege. While a custodian may be compelled under present law to produce corporate records in his possession, he may not be compelled to testify regarding their content, since "[b]y accepting custodianship . . . he has voluntarily assumed a duty which over-

\textsuperscript{41.} Wright v. Detwiler, 345 F.2d 1012 (3d Cir. 1965); Hair Ind., Inc. v. United States, 340 F.2d 510 (2d Cir.), cert. denied, 381 U.S. 950 (1965); Christianson v. United States, 226 F.2d 646 (8th Cir. 1955). \textsuperscript{42.} See the dissenting opinion of Judge Madden in Wild v. Brewer, 329 F.2d 924, 925 (9th Cir. 1964).

\textsuperscript{42.1} Apparently, the Supreme Court has adopted this approach. See Bellis v. United States, 42 U.S.L.W. 4788, 4793 (May 28, 1974): "Every State has now adopted laws permitting incorporation of professional associations, and increasing numbers of lawyers, doctors, and other professionals are choosing to conduct their business affairs in the corporate form rather than the more traditional partnership. Whether corporation or partnership, many of these firms will be independent entities whose financial records are held by a member of the firm in a representative capacity. In these circumstances, the applicability of the privilege should not turn on an insubstantial difference in the form of the business enterprise. See In re Grand Jury Subpoena Duces Tecum, 358 F. Supp. 661, 668 (Md. 1973)." Unfortunately, the Court has used the approach to deny the privilege.

\textsuperscript{43.} Wilson v. United States, 221 U.S. 361 (1911).

\textsuperscript{44.} Where the records are not in the possession of the person summoned, and their location might incriminate him, the summoned party cannot be forced to testify as to the material's whereabouts. Curcio v. United States, 354 U.S. 118 (1957).

\textsuperscript{45.} A partial solution to this problem is offered by Wigmore. The summons should be served on the corporation which could respond through an officer or agent who could respond to the summons without fear of self-incrimination. 8 J. WIGMORE, EVIDENCE § 2200 (1961). Unfortunately, in many small corporations, there may be no one who fits the description.

\textsuperscript{46.} 409 U.S. 322 (1973).
rides his claim of privilege, only with respect to the production of the records themselves."

The fifth amendment privilege does not afford protection against production of evidence of a "nontestimonial" or "noncommunicative" character. Thus, individuals suspected of crime have been forced to remove their clothing in order to display identifiable physical characteristics, demonstrate their voice and handwriting, and yield the contents of their blood stream for purposes of determining alcohol.

Finally, it is important to understand when the privilege may be invoked. While the language of the fifth amendment appears to limit the privilege to testimony in "a criminal case," an individual may refuse to testify or produce information at any time or in any proceeding if the information furnished might incriminate him, unless immunity has been granted.

**Testing Assertion of the Privilege**

When an individual summoned believes his best interests are served by invoking the privilege against self-incrimination, he must appear before the hearing examiner and assert his defenses to the summons. In many instances, the hearing examiner will proceed to interrogate the witness from a set of typewritten questions. Because the privilege creates no absolute sanctuary of protected silence, the

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50. United States v. Mara, 410 U.S. 19 (1973); Gilbert v. California, 388 U.S. 263 (1967). Special agents occasionally insist that they have the right to demand that taxpayer identify his handwriting upon request on the theory such evidence is physical and thus unprotected by the constitutional privilege. It is doubtful that taxpayer must respond. The agent has the right to require a handwriting exemplar and have it identified as that of the taxpayer.
52. See text at note 15 supra.
53. It might be argued that the taxpayer should have an absolute right to remain silent. The Miranda warning states that the individual has the right to remain silent and Mathis indicates that no distinction is to be made between tax fraud and other crimes. The reasons for allowing the summoned party to remain silent may be stated as follows: (1) Interrogation places the individual under stress. If he is forced to determine the applicability of the privilege on a question by question basis, he may become confused and reveal evidence which the privilege was designed to shield. Special agents understand the problem and use it to the government's advantage. See Inbau, Police Interrogation — A Practical Necessity, 52 J. Crim. L.C. & P.S. 16 (1961). (2) The rules place an almost impossible burden on the trial court judge. How can he know whether a particular answer will be incriminating or lead to incriminating evidence? Is he in a better position to make the judgment than the taxpayer? The answer to a seemingly
summoned individual cannot make a blanket refusal to testify. Only when the answer to a particular question would be incriminating per se, tend to incriminate, or otherwise lead to incriminating evidence may the witness properly refuse to answer. Thus, the hearing proceeds and the witness must invoke the privilege after each question. If the government believes invocation of the privilege is unwarranted, it may petition the district court to order the witness to respond. The court becomes the final arbiter of the privilege.

The standard for determining the validity of the privilege in a particular case was established by the Supreme Court in Hoffman v. United States:

innocuous question may provide the special agent with the clue he needs. Justice Marshall recognized the problem in the trial of Aaron Burr: "Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any of them against himself." United States v. Burr, 25 F. Cas. 38, 39-40 (C.C. Va. 1807).

The countervailing arguments are: (1) the purposes and policies of the privilege are diluted when protection is afforded to frivolous claims of self-incrimination; (2) the nature of the self-assessment system of taxation places a premium on being able to secure evidence from the taxpayer; (3) the summons is generally being used prior to the time the investigation becomes "a criminal case" (hardly persuasive because the evidence can be used in the criminal case); (4) there are no inference problems at the agent level. The agent's suspicion that the taxpayer has something to hide is not a real problem because he is not the ultimate trier of fact and his recommendation for prosecution must be based on legally admissible evidence, not suspicion of wrongdoing; (5) If the taxpayer is represented by counsel, there is a reasonable probability that interrogation will be fairly conducted and the taxpayer will not be bullied. After all, as Justice Cardozo said in Palko v. Connecticut, 302 U.S. 319, 326 (1937). "Justice... would not perish if the accused were subject to a duty to respond to orderly inquiry."


56. See 8 J. WIGMORE, EVIDENCE § 2271 (McNaughton ed. 1961). The principle is clearly articulated in United States v. Reynolds, 345 U.S. 1, 8-9 (1953); "Indeed, in the earlier stages of judicial experience with the problem, both extremes were advocated, some saying that the bare assertion by the witness must be taken as conclusive and others saying that the witness should be required to reveal the matter behind his claim of privilege to the judge for verification. Neither extreme prevailed, and a sound formula of compromise was developed. This formula received authoritative expression in this country as early as the Burr trial. There are differences in phraseology but in substance it is agreed that the court must be satisfied from all the evidence and circumstances, and 'from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure would result.' (Citations omitted.) If the court is so satisfied the claim of the privilege will be accepted without further disclosure." See also Uniform Rule of Evidence 8 (1953).

57. 341 U.S. 479 (1951).
To sustain the privilege, it need only be evident from the implication of the question, in the setting in which it was asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosures could result... [It must be]... perfectly clear, from a careful consideration of all the circumstances in the case, that the answer cannot possibly have such tendency to incriminate.58

The approach of the Supreme Court in Hoffman has been consistently approved in principle by the courts,59 but, in application, the Fifth Circuit appears to have strayed from its teachings.

The Fifth Circuit's current view of the privilege and the standards applicable to testing the validity of the privilege defense in tax proceedings originate in United States v. Roundtree.60 The court rejected the privilege as a defense to the summons prior to a recommendation for criminal prosecution despite the fact that the evidence gained might be used against the taxpayer in a subsequent criminal proceeding, provided the government established the civil nature of the tax investigation.61 This decision confuses the "improper purpose" test, the standard determining whether the service can use the summons, with the Hoffman approach for testing the validity of the privilege as a defense.62 The confusion created by Roundtree was continued in United States v. Prudden63 where the Fifth Circuit re-

58. Id. at 486, 487, 488 (1951). (Emphasis added.)
59. See the discussion by Chief Judge Friendly in In re Horowitz, 482 F.2d 72, 85 (2d Cir. 1973).
60. 420 F.2d 845 (5th Cir. 1969).
61. "We may quickly dispose of Roundtree's contention as to self-incrimination and the objections of the IRS... We have already pointed out that if Roundtree is able to prove that the sole purpose of the summons is to build a criminal prosecution, the summons must fall... If the IRS sustains its contention that this is a civil investigation, the mere fact that the evidence might be used against Roundtree in a later prosecution will not support a claim of self-incrimination." United States v. Roundtree, 420 F.2d 845, 852 (5th Cir. 1969).
62. See text accompanying note 153 infra. In Roundtree the court cited Venn v. United States, 400 F.2d 207 (5th Cir. 1968), for the proposition that information obtained by governmental compulsion supported by court sanctions and without granting immunity may be admissible at a subsequent criminal prosecution. However, Venn involved no fifth amendment issue, and the court relied on Sanford v. United States, 358 F.2d 685 (5th Cir. 1966), for its rule that evidence obtained for an improper purpose may be admissible at a criminal trial. Sanford concerned no privilege against compulsory self-incrimination because the court expressly stated "[n]o Fifth Amendment rights are involved."
63. 424 F.2d 1021 (5th Cir. 1970), cert. denied, 400 U.S. 831 (1971). It is interesting to note that Prudden involved a joint investigation where a revenue agent continued his audit after referral to the Intelligence Division without notice to the taxpayer.
quired the taxpayer to prove that the "proceeding had become an inquiry with dominant criminal overtones" before assertion of the privilege. In a subsequent district court opinion, *United States v. Ruente*, the privilege against self-incrimination was further emasculated when a summons was enforced against a taxpayer and the production of his private records was compelled. The district court cited *Donaldson* and *Roundtree* for the proposition that the privilege cannot be invoked in a civil tax investigation; but what *Donaldson* said was that the existence of the civil determination would negate an improper purpose argument. *Donaldson* did not involve a summons directed to a party claiming protection of the privilege, but rather intervention when the summons was directed to a third party. Nor did *Donaldson* involve protection of the constitutional privilege.

Although *Roundtree* indicated that a summons would be enforced over a self-incrimination defense if the government could demonstrate the civil character of the investigation, *Prudden* shifts the burden to the taxpayer and requires him to prove that the investigation is purely criminal. In *United States v. Ponder*, the Fifth Circuit refused to overrule a district court order compelling compliance with a summons because the taxpayer "advanced no evidence indicating how production of the requested documents and records would incriminate him." *Hoffman* does not require an individual to introduce evidence to establish the privilege, but recognizes that such evidence or an explanation of why it cannot be produced may be as incriminating as the evidence sought and result in dangerous disclosures. *Roundtree, Prudden, Ponder, and Ruente* are wrong because the privilege against self-incrimination is available to prevent compulsion of

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64. *Id.* at 1031.
65. 31 A.F.T.R. 2d 73-701 (W.D. La. 1973), aff’d. 33 A.F.T.R. 2d 74-332 (5th Cir. 1973). What does this decision do to the principles announced in *Boyd*?
66. In *Donaldson v. United States*, 400 U.S. 517, 522 (1971), the Supreme Court made clear at the outset that there was "no constitutional issue in the case."
67. 73-1 U.S. Tax Cas. 80,896 (5th Cir. 1973). One of the authors believes that *Ponder* and *Roundtree* are incorrect for an additional reason: requiring an in camera inspection to aid in its determination whether the taxpayer was properly invoking his privilege. This may be a necessity, particularly in a taxation case, but the Supreme Court has not held the taxpayer must devolve part of the otherwise protected materials in order to salvage the remainder. See *Malloy v. Hogan*, 378 U.S. 1 (1964). Moreover, it has been stated that the privilege against compulsory self-incrimination has become almost "self-operating and there is nothing for the trial court to determine." B. George, *Constitutional Limitations on Evidence in Criminal Cases* 236 (1969). But see *United States v. Moore*, 485 F.2d 1165, 1167 (5th Cir. 1973): "Even the court’s offer to inspect in camera was declined."
68. If the government's need for the information is overriding, the government can always grant the taxpayer immunity as a *quid pro quo* for waiver. See *Lefkowitz v. Turley*, 410 U.S. 924 (1973); *McCarthy v. Ardneitn*, 262 U.S. 355 (1923).
potentially incriminating evidence regardless of the nature of the proceeding in which the evidence is sought; the rule applies to books and records as well as oral testimony.69

DOCUMENTS IN TAXPAYER’S POSSESSION

Since Boyd v. United States70 private books and papers of the individual have been protected by the privilege against compulsory self-incrimination and against unreasonable searches and seizures. Thus, a Revenue Service summons directing taxpayer to produce his own records and documents in his possession can generally be resisted

69. See the following passage from McCarthy v. Ardneistein, 266 U.S. 3440 (1924): “The privilege is not ordinarily dependent upon the nature of the proceedings in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings wherever the answer might tend to subject to criminal responsibility him who gives it.” In Lefkowitz v. Turley, 410 U.S. 924 (1973), the Supreme Court recognized McCarthy as “the settled view in this Court.” See Guy v. Abdulla, 58 F.R.D. 1, 2 (N.D. Ohio 1973) (“[S]cope of protection afforded by the Fifth Amendment is sufficiently broad to encompass civil pre-trial discovery.”) In short, at enforcement proceedings the taxpayer has the right to withhold incriminating data, and the courts must liberally favor and respect invocation of the privilege. It makes no difference what type proceeding it is, and should the court require the individual to succumb to the Service’s demands or face contempt, any evidence obtained or tainted thereby is inadmissible in a subsequent criminal proceeding.

70. 116 U.S. 616, 630 (1886): “The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the Government and its employees of the sanctity of a man’s home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of this offense; but it is the invasion of his indefensible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense, — it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden’s judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man’s own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard, the Fourth and Fifth Amendments run almost into each other.

“We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For the ‘unreasonable searches and seizures’ condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man ‘in a criminal case to be a witness against himself’, which is condemned in the Fifth Amendment, throws light on the question as to what is an ‘unreasonable search and seizure’ within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man’s private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. . . .” Id. at 633.
on fifth amendment grounds. The scope of the protection afforded extends from taxpayer's home to his business office, provided his enterprise is not a corporation or large partnership.

To what extent does the privilege protect documents owned by another but in possession of the taxpayer? In Couch v. United States, the Supreme Court in holding that the taxpayer may not invoke the privilege against compulsory self-incrimination to prevent production of records in her accountant's possession, affirmed the basic rule that possession, not ownership, is determinative of the privilege because the necessary element of compulsion is on the possessor. If an accountant transfers his workpapers to taxpayer before the summons is issued, he should be able to invoke the privilege so long as he is in possession.11 Underlying Couch is the Ninth Circuit


72. In Katz v. United States, 389 U.S. 347 (1967), the Supreme Court indicated that the Fourth Amendment "protects people, not places." See Weeks v. United States, 232 U.S. 383 (1914). The decisions dealing with the protection afforded at business establishments have not been entirely consistent. The outcome of a particular case may depend on the nature of the business. In Davis v. United States, 328 U.S. 582, 592 (1946), Justice Douglas' well attuned sensitivities were not offended by the search of a service station: "And the search was of the office adjacent to the pumps—the place where petitioner transacted his business. . . . The facts distinguish this case from such cases as Amos v. United States, 255 U.S. 313 where officers without a search warrant swoop down on a private residence. . . . The filling station was a place of business, not a private residence." In United States v. Biswell, 406 U.S. 311 (1972), the court permitted warrantless inspection of a federally licensed firearms dealer on grounds he must have expected such inspections when he entered the business and because the inspections "pose only limited threats to the dealer's justifiable expectations of privacy."


74. The notion that rightful possession as opposed to legal title is the proper standard for determining whether taxpayer may invoke his privilege to prevent enforcement of a service summons was recognized at least as early as Application of House, 144 F. Supp. 95, 101 (W.D. Cal. 1956): "The argument of the government is that the application of the privilege against self-incrimination turns on the difference between rightful indefinite possession and legal title. Nothing in the cases substantiates this notion that a narrow concept of property law should determine the availability of Constitutional guarantees against self-incrimination." However, the court concluded that even assuming property concepts were involved "there was an express agreement between the accountant and the taxpayer that ownership in the papers should become vested in the taxpayer at the moment of transfer of the papers
decision, *United States v. Cohen* which indicated that even "wrongful possession" of incriminating materials suffices for invoking the fifth amendment privilege. However, this rationale was modified in *Couch* by the Court's admonition that it was not deciding "what qualifies as rightful possession." The Court in *Couch* also rejected legal title theories often relied on by lower courts to deny the applicability of the privilege where the accountant transfers his workpapers after the investigation begins. The lower courts must use the standard of rightful possession in ascertaining whether a taxpayer may validly invoke the self-incrimination right. As a general rule if the taxpayer is in possession of material when a summons is issued, he is protected against the production by invoking his privilege. If the accountant or other person makes a "frantic pre-summons pitch-out" to taxpayer under facts similar to *Cohen*, taxpayer ought not to be protected on the theory that he lacks rightful possession.

**REQUIRED RECORDS DOCTRINE**

Not all the records in an individual taxpayer's possession at the time a summons is issued are protected by his constitutional rights. to the taxpayer's agents." *Id. at 102. See also United States v. Zakutansky, 401 F.2d 68 (7th Cir. 1968) (and cases cited therein); Deck v. United States, 339 F.2d 739 (D.C. Cir. 1964); In re Fahey, 300 F.2d 383 (6th Cir. 1961); United States v. Fisher, 352 F. Supp. 731 (E.D. Pa. 1972). See Note, 23 Sw. L.J. 728 (1969). 75. 388 F.2d 464, 468 (9th Cir. 1967). In *Cohen*, special agents presented themselves to the taxpayer and requested to examine his books and records. The taxpayer informed them the records were in the hands of his accountant in Beverly Hills. Before the agents could get to the accountant's office the taxpayer appeared and demanded his records and workpapers. The accountant obliged and when the agents appeared, he informed them taxpayer had the records. The agents served a summons on taxpayer to produce and he refused. The Ninth Circuit affirmed the lower court denial of enforcement holding the privilege against compulsory self-incrimination barred forced production of the documents even though they were not owned by taxpayer. See Note, 20 Hast. L.J. 1001 (1969). In *United States v. Widelski*, 452 F.2d 1 (6th Cir. 1971), the Sixth Circuit expressly rejected the *Cohen* decision.

76. In *Boschour v. United States*, 316 F.2d 451 (8th Cir. 1963), the court relied heavily upon an ownership theory to deny the assertion of the privilege. See also *United States v. Boccuto*, 175 F. Supp. 886 (D. N.J.), aff'd, 274 F.2d 880 (3d Cir. 1959).

77. For the proposition that "the rights and obligations of the parties became fixed when the summons was served" see *Couch v. United States*, 409 U.S. 322 (1973); *United States v. Cromer*, 483 F.2d 99, 101 (9th Cir. 1973); *United States v. Zakutansky*, 401 F.2d 68, 72 (7th Cir. 1968).


In *Shapiro v. United States,*80 an individual operating his business in noncorporate form was compelled by subpoena to produce certain documents relating to the sale of commodities. The records were required to be kept by the Emergency Price Control Act. After production of the documents and the ensuing investigation, petitioner was convicted of criminal violations of the Act. In a five to four decision, the court held the privilege against self-incrimination inapplicable:

The question still remains with respect to the nature of the documents and the capacity in which they are held. It may yet appear that they are of a character which subjects them to the scrutiny demanded and that the custodian has voluntarily assumed a duty which overrides his claim of privilege. . . . *The principle applies* not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulations and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained.81

The *Shapiro* decision has spawned a great deal of comment82 and it is beyond the scope of this article to explore all its ramifications. The Internal Revenue Service has generally not attempted to apply the required records doctrine to income tax investigations83 although the Internal Revenue Code clearly requires the taxpayer to keep records.84

80. 335 U.S. 1 (1948).
81. Id. (Emphasis added.)
83. In *Stuart v. United States,* 416 F.2d 459 (5th Cir. 1969), the Fifth Circuit noted: "The Government's brief cites Falsone v. United States . . . for the proposition that a taxpayer is not protected from production of his own records, since he is required to keep such papers . . . and then adds that 'the Department of Justice has, however, refrained from making that argument in recent years.' In any event, *Falsone* was a wholly civil proceeding in which there was no indication, as there is here, that a criminal investigation had begun." Query, what difference does it make what type proceeding for fifth amendment purposes if there exists the danger of relinquishing incriminating data? *But see* Stern v. Robinson, 262 F. Supp. 13 (W.D. Tenn. 1966), *appeal dism'd,* 391 F.2d 601 (6th Cir. 1968).
84. INT. REV. CODE OF 1954, § 6001. "Although § 6001 . . . requires that every person liable for any tax must keep books and records and make returns as may be
One wonders, however, to what extent the required records doctrine will be resurrected by the Internal Revenue Service when agents attempt to compel production of records required by other laws and Executive Orders now within its jurisdiction to enforce. For example, both the Economic Stabilization Act of 1970 and certain regulations issued pursuant to Executive Orders arising out of the recent energy crisis require certain persons to keep extensive records in order to promote declared public policies. In both instances, the Internal Revenue Service is charged with enforcing compliance and has issued extensive regulations requiring detailed records. If production of the records is necessary to investigate violations of laws that require records to be maintained, the privilege should not be available because of Shapiro. Suppose, however, that an agent summons the records pursuant to an alleged violation of the Economic Stabilization Act and discovers evidence of income tax evasion. Can the government proceed with the income tax case? Although the authors question the soundness of the Shapiro doctrine, we submit that if it is to be retained it should be a narrowly construed exception to the privilege against self-incrimination. Evidence gained from so-called “quasi-public records” should be used only to foster the public purpose of the statute which originally required the keeping of the records.

required and to file such a return and indicate the amount of income he receives, the taxpayer is free to refuse to fill in particular items on his return and when subsequently questioned as to those admissions, he may assert his Fifth Amendment privilege against self-incrimination.” Justin A. McNamara, 32 CCH Tax Ct. Mem. 11 (1973). In Marchetti v. United States, 390 U.S. 39, 57 (1967), the Supreme Court appeared to have dispelled any governmental hope that Shapiro is applicable to tax records. The court concludes: “The government’s anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the Government has formalized its demands in the attire of a statute; if this alone were sufficient the constitutional privilege could be entirely abrogated by any Act of Congress.” But see, United States v. Turner, 480 F.2d 272 (7th Cir. 1973). “[T]rue that Turner may be able to assert a Fifth Amendment defense to production of his records that is unavailable to a person holding corporate records or documents belonging to another. . . . But this defense depends upon the nature of the documents themselves rather than the reasons for which the government may wish to examine them.” Id. at 276. See also Couch v. United States, 409 U.S. 322 (1973) (no expectation of privacy in system depending so heavily upon self-assessment).

86. See, e.g., Exec. Order No. 11743 § 6, ¶ 310, CCH 306 ENERGY MANAGEMENT.
88. It should be noted in passing that where the taxpayer knows his records are incriminating, he may be inclined to destroy them. A contempt for wrongful conduct is appropriate in this case. See United States v. Boudreaux, 71-2 U.S.T.C. 87209 (E.D. La. 1971). Although the government has the burden to show that records existed and were available at issuance of the summons, United States v. Silvio, 333 F. Supp. 264 (W.D. Mo. 1971), such action of destruction creates an inference of guilt.
SEARCH WARRANTS

The Internal Revenue Service is currently testing the extent to which a search warrant issued pursuant to section 7608(a) may be substituted for a section 7602 administrative summons. In several cases, the government has argued that a reasonable search conducted pursuant to a warrant issued on "probable cause" within the meaning of the fourth amendment does not trigger the fifth amendment privilege. In *Hill v. Phillpot*, a special agent persuaded a federal district judge to issue a warrant to search a physician's home and office for financial records by presenting affidavits of four former employees that indicated the records would be destroyed if the summons process was employed. Apparently, Dr. Hill had instructed his employees to keep "any tax man" busy in the reception area so that the records could be placed in the incinerator before they could be inspected. According to the affidavits, the doctor kept separate "Red Letter Folders" for certain patients. There was also evidence that checks from these patients were negotiated without being deposited in the doctor's account. Armed with warrants, Internal Revenue Service agents searched the doctor's home and office and seized and removed thirty-five cartons of books, records, and papers. The next day, the physician petitioned the district court for an order to show cause why the property seized should not be returned on grounds that the seizure was in violation of his fourth and fifth amendment rights. The court rejected the constitutional arguments. On appeal, the Seventh Circuit reversed on the grounds that the search and seizure violated the privilege against self-incrimination.

The government admitted that the privilege would have effectively blocked production of the records had they been sought by administrative summons. The government argued, however, that since the warrant issued, the inquiry should be limited to the question whether there were reasonable grounds under the fourth amendment. "In short, the government takes the position that once validity

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90. *Hill v. Phillpott*, 445 F.2d 144 (7th Cir. 1971); *Vonder Abe v. Howland*, 73-1 U.S. Tax Cas. 80,716 (9th Cir. 1973).


92. In *Warden v. Hayden*, 387 U.S. 294, 303 (1967), the Supreme Court left open the question "whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure."

93. 445 F.2d 144 (7th Cir. 1971).
of a search is established under the Fourth Amendment . . . the Fifth Amendment is not and cannot be violated." In rejecting this argument, the Seventh Circuit stressed the relationship between the fourth and fifth amendments and held the search violative of the fifth amendment. Rejecting Wigmore's contention that there is no testimonial compulsion when records are seized since the proof of their authenticity must be made by the testimony of others, the Court stated that the jury knows the books and records belong to the defendant and the entries therein speak against him as clearly as his own voice.

Similar attempts to use the search warrant technique have been rejected by the Ninth Circuit, which follows the Hill v. Phillpot rationale, and approved by the Sixth Circuit which favors the Wigmore approach. There appears little logic in the proposition that the fifth amendment privilege depends on the form deployed to obtain the incriminating evidence involving testimonial communications.

TAXPAYER'S RIGHTS WITH RESPECT TO SUMMONS DIRECTED TO THIRD PARTY

The search for incriminating evidence conducted by special agents does not stop with the taxpayer. Regardless of the degree of taxpayer cooperation in the investigation, the Service will generally examine the records of banks, brokerage houses, savings and loan companies, and other financial institutions to make the investigation as complete as possible. These financial institutions usually cooperate and no summons is issued. It is well settled that absent special circumstances such third parties have no right to refuse pro-

94. Id. at 146.
95. 8 J. WIGMORE, EVIDENCE § 2264 (McNaughton ed. 1961).
96. Vonder Ahe v. Howland, 73-1 U.S. Tax Cas. 80716 (9th Cir. 1973).
97. United States v. Blank, 459 F.2d 383, 385 (6th Cir. 1972): "We believe that there is a valid and important distinction between records sought by subpoena and records sought by search warrant. The subpoena compels the person receiving it by his own response to identify the documents delivered as the ones described in the subpoena. The search warrant involves no such element of compulsion upon an actual or potential defendant." See also, United States v. Scharfman, 448 F.2d 1352 (2d Cir. 1971).
98. The fifth circuit opinion in Stuart v. United States, 416 F.2d 459 (5th Cir. 1969), is illustrative of the special circumstances exception. In Stuart the court refused to compel production of taxpayer's records although in possession of the accountant at the time the summons issued. The taxpayer worked nights and placed the data in the accountant's possession for the convenience of the agents. In upholding the protection afforded by the privilege, the court stressed the purpose for which the papers
duction of the documents on the grounds that such information might incriminate the taxpayer.99 It is equally clear that the taxpayer has no right to object to the production of the information merely because such data produced will incriminate him. As Justice Holmes said: "A party is privileged from producing the evidence but not from its production."100 Wigmore justifies the rule on the rationale that the proof of authenticity must be made by the testimony of others "without employment of the accused's oath or testimonial responsibility."101 The Supreme Court recently stated the reason more clearly when it pointed out that requiring a third party to produce evidence involves no element of personal compulsion against the accused.102

When the special agent encounters resistance from the taxpayer in his search for evidence, he knows that information relative to the taxpayer's financial affairs can usually be uncovered by examining the files of the taxpayer's attorney, accountant, or tax preparer. The scope of the government's right to examine the attorney's files for incriminating evidence is generally circumscribed by the ownership and nature of the documents in the attorney's possession at the time the summons is served. If the taxpayer has placed his personal and private papers in the hands of his attorney for purposes of seeking legal advice regarding the tax investigation, the records should be protected by the privilege against self-incrimination.103 In United

were delivered to the accountant. In Couch v. United States, 409 U.S. 322, 333 (1973), the Supreme Court posited the following exceptions to the rule: "[1] where constructive possession is so clear or [2] relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact."

99. "The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person." Hale v. Henkel, 201 U.S. 43, 69-70 (1906). See also Rogers v. United States, 340 U.S. 367, 371 (1951); McAlister v. Henkel, 201 U.S. 90 (1906); United States v. Schmidt, 360 F. Supp. 339, 344 n.10 (M.D. Pa. 1973).

101. 8 J. WIGMORE, EVIDENCE § 2264 (McNaughton ed. 1961).
102. Couch v. United States, 409 U.S. 322 (1973). In Couch, taxpayer's bank statements, payroll records, and reports of sales and expenditures were customarily placed in the accountant's possession for preparation of annual tax returns. Although all records were admittedly owned by taxpayer, the Court refused to grant immunity under the fifth amendment since without possession there was no governmental compulsion placed upon the taxpayer. Since the opinion has been fully discussed in other legal periodicals we shall not further discuss the case in this paper. See note 72 supra.
103. "[I]f the Service can secure documents and records from the attorney which they could not obtain if in the possession of the taxpayer, chaos would result. The attorney would be unduly hampered in the preparation of the case. He would not want
States v. Judson,\textsuperscript{104} the Ninth Circuit articulated the reasons for this rule:

But instead of closeting himself with his myriad tax data drawn up around him, the taxpayer retained counsel. Quite predictably, in the course of the ensuing attorney-client relationship the pertinent records were turned over to the attorney. The government would have us hold that the taxpayer walked into his attorney's office unquestionably shielded with the Amendment's protection, and walked out with something less. The way was clear, according to appellant, for an enforcement officer to gather up the evidence which otherwise would have been beyond his reach. The taxpayer's only recourse would be the marathon footwork indicated in House.\textsuperscript{105}

But all of the taxpayer's records in the possession of his attorney are not protected. In many instances a law firm may have represented a client for a long period of time and accumulated records over the years. It is true that the attorney's letters and memoranda to the client may be protected by the attorney-client privilege, but the files may contain deeds, agreements with third parties, corporate charters, stock certificates, bank and financial statements, and other information which might tend to incriminate the client. Most of these documents are not within the protection afforded by the attorney-client privilege.\textsuperscript{106} Are they protected by the privilege against self-incrimination?

Although the facts in Couch involved the possession of the tax-

\textsuperscript{104} 322 F.2d 460 (9th Cir. 1963).
\textsuperscript{105} Id. at 466.
\textsuperscript{106} The reason why such information is not protected by the attorney-client privilege stems from the traditional rule that documents are not covered by the privilege, particularly pre-existing ones. In United States v. White, 477 F.2d 757, 762 n.9 (5th Cir. 1973), the Fifth Circuit noted "an alternative reason for not obeying the summons, White might have argued that the documents were protected by the attorney-client privilege. This argument has been uniformly rejected by the courts on the ground that pre-existing documents such as an accountant's workpapers cannot constitute a confidential communication between the attorney and his client." For a general discussion of the area see Lofts, The Attorney-Client Privilege in Federal Tax Investigations, 19 TAX L. REV. 405 (1964); Peterson, Attorney-Client Privilege in Internal Revenue Service Investigations, 54 MINN. L. REV. 67 (1969). See also Note, 19 CATH. U.L. REV. 540 (1970); Note, 74 YALE L.J. 539 (1965).
payer's records by her accountant, the Court stressed the duration and purpose of the accountant's possession. In Judson, the theory that the taxpayer's fifth amendment privilege could be asserted by the attorney in possession of the records appears partly founded on the purpose for which the records were delivered to the attorney. Extrapolating from Couch and Judson, records owned by the taxpayer, but in possession of his attorney for many years, and not placed with counsel in connection with pending tax investigation or trial preparation, may not be protected by the fifth amendment privilege, unless there exist sound reasons justifying the extension of the client's privilege to his attorney.

Recognizing the exception it was making to the general rule barring the assertion of the privilege by third parties, the Judson court nonetheless felt justified because:

No other 'third party,' nor 'agent' nor 'representative' stands in such a unique relationship between the accused and the judicial process as does the attorney . . . . The attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry. 107

If Couch stands for the rule that actual possession is the necessary element, then materials out of the taxpayer's hands would have to be relinquished. However, the Supreme Court in Couch did not discuss the issue of an attorney's possession, and in fact appears to have afforded a reasonable rationale for maintaining the Judson rule under the notion that the taxpayer constructively possesses materials in his attorney's hands. 108

Counsel retained by the taxpayer to assist in the defense of an ongoing tax investigation will often request delivery of the accountant's workpapers. In this instance, the attorney is in possession of material neither owned nor actually possessed by taxpayer, and the

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106. In Bellis v. United States, 42 U.S.L.W. 4788, 4793 (May 28, 1974), the Supreme Court emphasized that the subpoenaed records had been out of the taxpayer's possession for three years.

107. 322 F.2d at 467. (Emphasis added.)

108. This view is rejected in Note, 40 Brooklyn L. Rev. 211, 218 n. 40 (1973): "In respect to the raison d'être of the self-incrimination privilege, such an approach is hardly satisfactory, and apparently not consonant with the Couch Court's implied notion of constructive possession, for there is no clear basis for distinguishing the attorney's relation to his client from that of other agents, including accountants." The Couch exception means something, and the authors believe as the Judson court, that the attorney is in a "unique relationship between the accused and the judicial process." See note 103 supra.
majority of the decisions have held the fifth amendment inapplicable.109 Indicative of this rule is the recent Fifth Circuit opinion in *United States v. White*110 where workpapers of an accountant were turned over to taxpayer’s attorney who had been retained to prepare a defense in a continuing tax investigation. The court ruled that since the records were not owned by nor in actual or constructive possession of taxpayer, there was no compulsion that would enable the attorney to successfully assert the taxpayer’s fifth amendment privilege. The

109. The cases rejecting the claim of fifth amendment privilege where attorney is in possession for taxpayer are based either on the principle that an attorney may not assert the privilege on the client’s behalf or, assuming he may, no privilege against compulsory self-incrimination exists, or both. *United States v. Moore*, 485 F.2d 1165, 1168 (5th Cir. 1973) (Special agent of Revenue Service petitioned district court for enforcement of summons issued to *L* (Lawyer) of *T* (Taxpayer). *L* moved to quash on the basis *inter alia* that some of materials were owned by *T* and subject to the fifth amendment privilege. The Fifth Circuit held the claim “frivolous,” citing *Couch*); *United States v. Cote*, 465 F.2d 142, 145 (8th Cir. 1972) (*L* retained *A* (Accountant) to aid in giving adequate legal advice to *T*, and advised *T* to file amended returns which *A* prepared. Special agent summoned *A* to produce workpapers used in preparing amended returns; *A* refused, stating *L* possessed them. Service summoned *L* who refused, and sought enforcement. *T* was permitted to intervene and assert the fifth amendment privilege among other defenses. The court of appeals concluded that *T*’s invocation of the privilege was “properly denied” citing *Bouschor v. United States*, 316 F.2d 451 (8th Cir. 1963); *Deck v. United States*, 339 F.2d 739 (D.C. Cir. 1964) (*A* transferred his workpapers to *T* who subsequently gave them to *L*. Service summoned *A* to produce, but *A* informed he could not comply because he did not possess them. The agent summoned *L* who refused. In enforcement proceedings, *T* intervened and invoked his privilege against compulsory self-incrimination. The court held that *A* by demanding return of the materials from *T* left *T* without rightful possession, a prerequisite to applicability of the privilege.); *Bouschor v. United States*, 316 F.2d 451 (8th Cir. 1963) (The Service summoned *L* to produce *A’s* workpapers in *L’s* possession. *T* via *L* attempted to prevent production by asserting the fifth amendment privilege. The Eighth Circuit held *L* may not assert privilege on *T’s* behalf.); *In re Fahey*, 300 F.2d 383 (6th Cir. 1961) (After a tax investigation was under way, *T*, *L*, and *A* met and *A* turned over his workpapers to *L* upon request. *L* gave the materials to *L2*. *T* was served with a summons to produce but refused, invoking the fifth. *A* then sent a letter to *L2* to turn over his workpapers to the IRS. Summons was issued to *L2* to turn over *A’s* and *T’s* records. *L2* refused, claiming his possession was equivalent to *T*’s. The Sixth Circuit held *L2* not required to turn over *T*’s papers, but that he must do so as to *A’s* workpapers since the demand for return by *A* left *T* without rightful possession. See also *United States v. Fisher*, 352 F. Supp. 731 (E.D. Pa. 1972); *United States v. Johnson*, 73-1 U.S. Tax Cas. 80,026 (D. Fla. 1972); *United States v. Schoebel*, 335 F. Supp. 1048 (D. Md. 1971); *United States v. Merrell*, 303 F. Supp. 490 (N.D. N.Y. 1969); *United States v. Conte*, 300 F. Supp. 73 (D. Del. 1969); *United States v. Boccuto*, 175 F. Supp. 886 (D. N.J. 1959); *United States v. Willis*, 145 F. Supp. 365 (M.D. Ga. 1955). Cf. *United States v. Cromer*, 483 F.2d 99 (9th Cir. 1973). But see *United States v. Riland*, 364 F. Supp. 120 (S.D. N.Y. 1973); *United States v. Foster*, 65-1 U.S. Tax Cas. 95,512 (W.D. Tex. 1965); Application of House, 144 F. Supp. 95 (N.D. Cal. 1956).

110. 477 F.2d 757 (5th Cir. 1973).
decision might be justified on the theory that taxpayer did not have constructive possession because he neither owned nor ever actually possessed the records. Although ownership is not required to assert the fifth amendment privilege, it may be a factor in determining the existence of constructive possession.

If we assume that rightful possession is the critical element of the constitutional privilege as indicated in Couch, it seems clear the materials would have been protected had they been in taxpayer's possession when the summons was issued. Moreover, assuming Judson is good law, it should make no difference whether the taxpayer or his accountant delivers the records to his attorney.

The apparent antithesis of White is United States v. Riland where the district court quashed one of two subpoenas for workpapers of taxpayer's two accountants in the possession of his attorney. Since the first accountant owned the papers and requested their return prior to issuance of the subpoena, the court held the fifth amendment privilege inapplicable because the attorney lacked rightful possession. However, taxpayer's privilege was available to prevent production of the second accountant's papers in the attorney's possession. Apparently the court believed that the attorney's rightful possession terminated when the first accountant requested the return of his workpapers. Although Riland may be distinguished from White in that Riland involved pending litigation, the correctness of either may well depend on how the facts are viewed. If one takes the position that in the attorney's absence taxpayer had the right to invoke the fifth amendment privilege because he would have been in possession of the workpapers, the White opinion is unsound because an individual should not be required to forfeit other constitutional rights by exercising the right to retain counsel. If, however, one views the privilege unavailable in the attorney's absence because it is likely the records would have remained with the accountant and unprotected under the Couch decision, then the White decision is correct on fifth amendment principles. This distinction is supported by both the Riland and White opinions. While the Riland court found no evidence indicating defendant would not have possessed the papers had the attorney failed to obtain them, the White court (although expressly

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112. Although not entirely clear from the opinion, an actual request to return records is presumably necessary to terminate rightful possession. This is implied from the fact that the court found it unnecessary to determine whether the second accountant actually owned the documents (and therefore had the right to request their return), since he had not requested their return. But see United States v. Cohen, 388 F.2d 464 (9th Cir. 1967).
discounting its importance) found no evidence that the taxpayer would have possessed the papers in the attorney's absence.\(^{113}\) The theory simply means that an individual neither gains nor loses a constitutional right by transferring materials to his attorney.\(^{114}\) The principle is consistent with Judson since there taxpayer owned the materials declared protected by the privilege and would have been able to raise it had he retained them. The approach espoused may be fitted within the "constructive possession" exception announced in Couch and does no injustice to the "proper rule" enunciated by the White dissent that rightful possession, actual or constructive of potentially incriminating documents and papers is the standard to be resolved "on a case-by-case basis."\(^{115}\) Under the facts of the particular case the White majority concluded there was an absence of rightful possession by the taxpayer.

Moreover, the rationale is partly in line with the Eighth Circuit opinion in Bouschor v. United States\(^{116}\) that workpapers of an accountant turned over to taxpayer's attorney are unprotected by the fifth amendment privilege. What appears unsound about the Bouschor opinion is the proposition that an attorney may not raise his client's privilege.\(^{117}\) A consistent application of the above proposition mandates that if taxpayer transfers his private papers to counsel in contemplation of litigation, the attorney may always invoke the fifth amendment privilege so long as the taxpayer could have claimed it absent the transfer. Moreover, if the taxpayer is in possession of the

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114. In Edison Electric v. United States Electric Lighting Co., 44 F. 294, 297 (1890), the court states that "[i]f documents are not privileged while in the hands of a party, he does not make them privileged by merely handing them to his counsel." The corollary to this principle is "documents which were protected in the hands of the client do not lose their protection when transferred to an attorney." Peterson, Attorney-Client Privilege in Internal Revenue Service Investigations, 54 Minn. L. Rev. 67, 85 (1969).
115. Aff'd en banc, 487 F.2d 1335 (5th Cir. 1974).
116. 316 F.2d 451 (8th Cir. 1963).
117. Lay, Attorney's Assertion of His Client's Privilege Against Self-Incrimination In Criminal Tax Investigations, 21 U. Miami L. Rev. 854, 855 (1967). "Various statements may be found which embody the principle that '[t]he constitutional privilege . . . is essentially a personal one' or that '[t]he right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness.' Such forthright pronouncements may not, however, preclude an attorney from invoking this privilege on behalf of his client, under the proper set of facts, since they often have reference to the idea that it may not be asserted by a representative of a nonprivileged organization such as a corporation . . . . . A reading out of context may distort the real meaning of the concept of a personal '.privilege'" But see Couch v. United States, 409 U.S. 322 (1973). See United States v. Riland, 364 F. Supp. 120 (S.D.N.Y. 1973).
accountant’s workpapers prior to an investigation by the service and turns the materials over to the attorney retained to aid in his defense, a summons to produce the materials in attorney’s possession should likewise be ineffective, since the taxpayer could have claimed the privilege under the rightful possession approach approved by Couch. Conversely, a pre-summons “pitchout” from accountant to taxpayer to his attorney should be ineffective to permit invocation of the privilege on the grounds there exists no rightful possession.¹⁸

To avoid strained interpretations of the fifth amendment privilege and fine-line distinctions as expressed above, perhaps the best approach stems from the sixth amendment right to counsel.¹¹⁹ Since the right to counsel envisions “effective counsel,”¹²⁰ it is inconceivable to expect the attorney to adequately represent the interest of his client unless he has materials necessary to understand the case. To expect the attorney to visit the home or business of his client each time he needs to refer to data ignores realities of modern practice and places a severe strain on the attorney-client relationship. The judiciary should not lose sight of the complexity of tax law which mandates that taxpayer’s financial records be available to his attorney to assure an adequate defense.

### Tax Preparer Project

To achieve the legitimate end of flushing out “the unscrupulous and incompetent tax preparer,” the Internal Revenue Service has commenced a project aimed at preparers who are not attorneys, certified public accountants or holders of treasury cards.¹²¹ One of the techniques employed may be described as “shop and summons.” Special agents with fictitious financial information appear at the tax

¹¹⁸. Compare United States v. Widelski, 452 F.2d 1 (6th Cir. 1971) with United States v. Cohen, 388 F.2d 464 (9th Cir. 1967). See Ord, The IRS’s Right of Access to the CPA’s Workpapers and Client Records, 1973 Tax Adviser 516, 521. See also United States v. Judson, 322 F.2d 460 (9th Cir. 1963). But see United States v. C.D. Kasmir, No. 73-1973 (5th Cir.). The Kasmir case is currently pending before the Fifth Circuit. In this unreported decision the lower court sustained enforcement of a summons where accountant transferred his workpapers to taxpayer, and taxpayer handed them over to his attorney before the special agent could summons the materials. Cf. United States v. Henry, 491 F.2d 702 (6th Cir. 1974).

¹¹⁹. Those commentators discussing the issue agreed the sixth amendment offers a viable alternative to the fifth amendment privilege. See Ord, note 118 supra; Lay, note 117 supra; Note, 74 Yale L.J. 539 (1965).


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preparer's office and request that the preparer complete an income tax return. If the return is improperly completed the agents commence an investigation and summon the preparer to produce the returns, records, names, addresses and social security numbers of his clients. Since the production of such information is likely to be incriminating, it would seem that the summons could be defeated by a properly invoked fifth amendment claim. However, the circuits considering the question have ruled the privilege must yield to the government's legitimate interest in regulating tax preparers. United States v. Turner involved a "John Doe" summons issued to a tax preparer calling for the production of names and social security numbers of his clients. After evidence indicating improprieties was gained by the shopping technique, the Seventh Circuit, relying on the approach of California v. Byers, held that the policy of disclosure outweighed the claim of privilege since the summons was directed at an "essentially civil area of inquiry with only a mere possibility of incrimination." The authors find great difficulty in accepting this approach. If the possibility of incrimination exists and the records are in possession of the individual summoned, the claim of the privilege should be an absolute defense to their production. The proper result is expressed in United States v. Lubus where a district court refused


123. 480 F.2d 272 (7th Cir. 1973).

124. The defendant in Turner contended the summons suffered from overbreadth since it failed to name the person whose returns were to be examined. The court rejected the argument, citing United States v. Humble Oil, 346 F. Supp. 944, 947 (S.D. Tex. 1972), for the proposition that a "John Doe" summons is sufficient. The Fifth Circuit reversed the lower court in Humble Oil, however, and it distinguished Turner on the basis that the special agents "had already ascertained the tax preparer's delinquency in complying with code requirements in filing his client's returns and hence placed him under investigation [while no one in this case is under investigation for filing faulty tax returns]."


126. United States v. Turner, 480 F.2d 272, 278 (7th Cir. 1973).

127. 370 F. Supp. 695 (D. Conn. 1974). Although the result in Lubus appears correct, the rationale of weighing the governmental interest against the individual's as in Byers may be inappropriate in light of Couch. It is noteworthy that the Fifth Circuit in United States v. Carter, 489 F.2d 413, 415 (5th Cir. 1973), cited the Supreme Court opinion in Couch in ruling that "Carter's Fifth Amendment right against self-incrimination was not violated by the request. Carter is merely asked to resubmit information which has been given to the Government previously under his signature as preparer of the tax returns. The privacy and confidentiality protected by the Fifth Amendment does not include information of this nature . . . . The fact that the
to follow Turner and sustained the argument that compelling the tax preparer to produce a list of his clients constituted a denial of his fifth amendment privilege. If the Lubus decision is affirmed by the Second Circuit on appeal, the circuits will be in conflict and the stage will be set for a Supreme Court review of the question whether the Byers approach is appropriate in the context of a federal tax investigation. The outcome may very well depend on the particular facts of the case which reaches the Supreme Court because in Lubus the information was readily available to the government by computer since the returns prepared by the taxpayer contained his identification number and because the personal returns of the preparer were also under investigation at the time the summons was served.128

IMPROPER PURPOSE

Owing to the personal nature of the privilege against compulsory self-incrimination, the fifth amendment rarely affords protection against an Internal Revenue Service summons to third persons.129 Nevertheless, taxpayer may have a defense available regardless of the nature of the records or who has possession if the district court finds that a summons is being used for an improper purpose. Prior to the Supreme Court opinion in Donaldson v. United States130 the doctrine that a summons may not be used for an improper purpose posed an obstacle to its issuance by special agents in criminal tax investigations.131 In Reisman v. Caplin,132 in dismissing an attorney's suit to

summons may produce evidence that subsequently may be used in a criminal prosecution is no basis for objection.” (Emphasis added.) Under the Couch rule is it compulsion or privacy that plays the critical and decisive role? See In re Horowitz, 482 F.2d 72 (2d Cir. 1973). What does the nature of the information have to do with one’s fifth amendment privilege? Is the Carter court resurrecting Shapiro?

128. See Note, 40 J. TAXATION 266 (1974). In United States v. Egenberg, 443 F. 2d 512 (3d Cir. 1971), a certified public accountant was served with twelve summonses each seeking production of a form equivalent to a tax return for a named person. The petition disclosed that the Service wanted the records in connection with an investigation of the accountant's tax liability. The Court rejected the argument against compulsory self-incrimination. However, the decision is prior to the opinion of the Court in Couch, and there may be some relevance that the documents held producible were the business records of the client, not personal records of the accountant. See the dissenting opinion of Judge Ainsworth in United States v. White, 477 F.2d 757, aff'd en banc, 487 F.2d 1335, 1337 (5th Cir. 1973).

129. See text at note 103 supra.

130. 400 U.S. 517 (1971).


enjoin the Internal Revenue Service from summoning records allegedly subject to the *Hickman* work product rule, the Court indicated that an Internal Revenue Service summons may be attacked if "the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution." \(^{133}\) Shortly after its decision in *Reisman*, the Court, in *Powell v. United States*, \(^{134}\) expanded the improper purpose doctrine to include the element of good faith:

It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. \(^{135}\)

Thus it could be argued that *Reisman* and *Powell* stood for the proposition that an Internal Revenue Service summons issued to aid in a criminal tax investigation constitutes an improper purpose, at least where the case displays "dominant criminal overtones." Lower courts took the position, however, that unless an indictment was pending or the sole purpose of the summons was to secure evidence for criminal prosecution, it was legitimate. \(^{136}\) In *Donaldson v. United States* \(^{137}\) the Supreme Court wiped "the slate clean" by rejecting the contention of taxpayer that a summons is not available for an investigation primarily criminal in scope. The Court interpreted the *Reisman* dicta to mean that only where an Internal Revenue Service summons is utilized solely for criminal tax investigation is there an improper purpose, and approved the "dual purpose" \(^{138}\) of the section 7602 sum-

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133. *Id.* at 449. In *United States v. O'Connor*, 118 F. Supp. 248 (D. Mass. 1953), a lower court refused enforcement of an Internal Revenue Service summons issued after the taxpayer was indicted on the basis that the Service was simply attempting to aid the Justice Department in making out its case. The district court expressed doubt whether Congress ever intended that an Internal Review Service summons be used in criminal tax investigations. The *Reisman* court arguably appears to have adopted the *O'Connor* position, although it cited *Boren v. Tucker*, 239 F.2d 767, 772 (9th Cir. 1956), as authority. The *Boren* court concluded that "the existence of the possibility of criminal prosecution does not necessarily mean that there will be criminal prosecution."


135. *Id.* at 58. (Emphasis added.)


138. The term "dual purpose" was coined by the Sixth Circuit in *United States v. Held*, 435 F.2d 1361 (6th Cir. 1970).
mons. So long as there exists a civil aspect to the case, there can be no abuse of process. Since the liability of a taxpayer virtually always concerns both civil and possible criminal tax liability, post-

*Donaldson* decisions have little difficulty with this aspect of the standard.\(^{139}\)

The *Donaldson* court proposed the following standard for determining a summons' propriety:

> We hold that under § 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.\(^{140}\)

The seemingly simplistic *Donaldson* standard for determining the outer limits of a summons' valid use is unsatisfactory. It does not fix the time when the recommendation for criminal prosecution takes place or what procedures are available to enable a taxpayer to meet his burden of proving acts of impropriety.\(^{141}\) Although the government and some commentators\(^{142}\) espouse the view that *Donaldson* "held that criminal use of the section 7602 summons becomes improper after a recommendation for prosecution has been sent [from Internal Revenue Service] to the Justice Department,"\(^{143}\) the authors fail to discern that position from the opinion. It is more accurate to admit that "*Donaldson* failed to identify which recommendation was critical: the initial recommendation of the special agent, the ultimate recommendation of the IRS to the Department of Justice, or some intermediate recommendation."\(^{144}\)

The various decisions considering the recommendation issue

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139. United States v. Moore, 485 F.2d 1165 (5th Cir. 1973); United States v. Cromer, 483 F.2d 99 (9th Cir. 1973); United States v. White, 477 F.2d 757, 761 (5th Cir. 1973); United States v. Weingarden, 473 F.2d 454 (6th Cir. 1973).


141. "The burden is on the taxpayer to demonstrate that the summons is being used for the improper purpose of investigating only criminal behavior." United States v. Oaks, 360 F. Supp. 855, 858 (C.D. Cal. 1973).

142. "The Court [Donaldson] concluded that in most cases the use of the summons ended at the time a formal recommendation for prosecution was made to the Justice Department." Comment, 1971 *Utah L. Rev.* 561, 566. See Note, 32 *Md. L. Rev.* 143, 152 n.48 (1972). *But see* Fink, *Use and Abuse of the Grand Jury in the Criminal Tax Investigation*, 50 *TAXES* 325, 326 (1972): "Until a taxpayer's case is actually recommended by the Special Agent for criminal prosecution, it, in theory, retains a civil aspect and the Special Agent may issue summonses for the examination of the taxpayer's books and records and of third party witnesses in order to forward his investigation." See generally E. Ord, *The IRS's Right of Access to the CPA's Workpapers and Client Records*, 1973 *Tax Adviser* 516, 520.


have held that a recommendation for prosecution occurs when (1) a criminal case is actually pending,¹⁴⁵ (2) the special agent recommends prosecution to his superior,¹⁴⁶ (3) the recommendation is forwarded in writing to the Justice Department,¹⁴⁷ and (4) “the special agent discussed the case with an Assistant United States Attorney.”¹⁴⁸ The first rule is unacceptable no matter how strictly one reads the Donaldson standard. If the pending case involves a criminal tax prosecution, a recommendation has previously occurred regardless of where one draws the line. If the case involves a criminal prosecution unrelated to tax liabilities, it is reasonable to infer that the Service may be supplying the government evidence for the case, and thus constituting an absence of good faith. To avoid any such temptation, the summons ought not be enforced unless it can be affirmatively demonstrated that material requested by the Service could not possibly have a bearing on the case. The third position appears unsatisfactory since by the time the recommendation is sent to the Justice Department a rather strong case has been built against the taxpayer with the aid of the summons.¹⁴⁹ The second rule appears the more satisfactory since it affords the taxpayer protection while still allowing the dual use of the summons, “at least in the early stages”¹⁵⁰ and thus prevents the “thwarting” of governmental interest which concerned the court in Donaldson.

Since the Donaldson criteria establish a “two-pronged” test,¹⁵¹ not only must there be an absence of recommendation for criminal prosecution, but also a lack of bad faith. Thus, if the agent delays a recommendation in order to summon incriminating evidence, the action would constitute an improper purpose.¹⁵² In United States v. Kessler,¹⁵³ the district court denied enforcement of an Internal Reve-

¹⁴⁵. United States v. Bell, 448 F.2d 40 (9th Cir. 1971).
nue Service summons when the government refused to submit its files relating to the taxpayer under investigation for *in camera* inspection:

[W]here the respondent produces some evidence adverse to the government on these issues [good faith] and seeks discovery of the government’s records for additional evidence . . . and where the government refuses without adequate justification to produce the sought after records for *in camera* inspection . . . such actions give rise to the inference that the government is withholding evidence favorable to respondent’s contentions and it therefore becomes wholly inappropriate for a court to lend its process to the enforcement of such a summons.\(^\text{154}\)

The Sixth Circuit has established its own standards for ascertaining whether issuance of a summons is improper. In *United States v. Weingarden*,\(^\text{155}\) the court of appeals concluded that the *Donaldson* dual standard “is only dictum” and that the correct standard is “whether the sole purpose of the issuance of the summons is for criminal prosecution.”\(^\text{156}\) The *Weingarden* disregard of the court’s standard is tenuous. If the Supreme Court deliberately believes it is rendering a holding, it is preferable to conclude that is the holding, unless and until a future Supreme Court decides to the contrary. A later decision by the Sixth Circuit appears to have departed from *Weingarden* in favor of the *Donaldson* standards. In *United States v. Cleveland Trust Co.*,\(^\text{157}\) the district court refused to enforce an Internal Revenue Service summons served on a trustee while in temporary possession of taxpayer’s private papers on the grounds that members of a governmental strike force investigating organized crime had prompted the issuance. In reversing the lower court, the Sixth Circuit concluded that the district court finding of bad faith was “clearly erroneous” because no indictment was pending against the taxpayer, “nor [had] any recommendation for criminal prosecution [been] made.”\(^\text{158}\) The court’s application of the *Donaldson* test seems incor-

154. Id. at 71.
155. 473 F.2d 454 (6th Cir. 1973).
156. Id. at 460.
157. 474 F.2d 1234 (6th Cir. 1973).
158. Id. at 1235. But see *United States v. Henry*, 491 F.2d 702, 704 (6th Cir. 1974), where the Sixth Circuit held that if the individual under tax investigation is under indictment for federal narcotics charges (not criminal tax law violations), and the materials sought in the summons on his attorney may assist the prosecution, enforcement would be denied. The court pointed out that in neither *Donaldson* nor *Couch* “was there a pending criminal prosecution concerning the taxpayer under investigation, nor was the summons addressed to his lawyer in that criminal case.” Compare *United State v. Henry*, 491 F.2d 702, 704 (6th Cir. 1974) with *United States v. Moore*, 485 F.2d 1165 (5th Cir. 1973).
rect owing to its failure to distinguish the two-prong test. Donaldson does not stand for the proposition that so long as the summons is issued before recommendation it is never considered improper.

Perhaps, a recommendation for criminal prosecution for Donaldson purposes is neither at the point when a report is filed with the Justice Department nor necessarily when the special agent recommends prosecution to his superior. Nonetheless, when a detailed report is submitted by the special agent to his group chief, the focus on the taxpayer as a potential criminal offender is clear, and subsequent use of an Internal Revenue Service summons sharpens the inference that it may become merely a discovery device for the Department of Justice. Certainly a summons ought not to be issued after a final conference at the district level has been held, since here the determination is made whether to forward a recommendation to the Regional Counsel.

In those cases where it is suspected that the Service is using the summons solely for criminal tax investigation purposes, a difficult intervention problem arises especially if the summons is directed at a third party to produce records in which the taxpayer has no proprietary interest. If the summoned party is otherwise willing to comply, taxpayer ought to be permitted to intervene to prevent a possible abuse of the court’s process. Moreover, as the Federal Rules of Civil Procedure are applicable to an enforcement proceeding, discovery should be available to determine whether the government is acting in good faith. Since the Donaldson opinion, taxpayer may not intervene in an enforcement proceeding unless he displays a "significantly protectable interest." Since the Internal Revenue Service is not obligated to notify the

159. "If upon completion of his investigation, the Special Agent recommends criminal prosecution, established practice and Regulations provide for hearings at both the District and Regional Counsel levels of the Internal Revenue Service. The District level conference generally referred to as the 'final conference' is held before the Assistant Chief or Staff Assistant of the District or a group Supervisor. The Special Agent is generally present at this conference but may not preside; also on occasion a Revenue Agent may attend. It is the function of this conference to establish whether or not the case should be further recommended for criminal prosecution. During the course of the hearing the presiding officer describes the charge under consideration and receives argument of fact and law from taxpayer or his counsel." Fink, Use and Abuse of the Grand Jury in the Criminal Tax Investigation, 50 Taxes 325, 327 (1972).


162. In Donaldson the court made it clear that a taxpayer qua taxpayer has no right to intervene. There must exist "a significantly protectable interest" and, to the extent the taxpayer has such an interest, whether he may intervene requires "the usual process of balancing opposing equities." 400 U.S. at 530-31.
taxpayer when it summons a third party,\(^{163}\) taxpayer's remedy may be limited to a motion to suppress at a subsequent trial.\(^{164}\) However, the attempt to exclude evidence so late in the proceedings in lieu of establishing defenses in the enforcement proceeding places an extreme burden on the taxpayer's privilege against self-incrimination and may subject taxpayer to a criminal prosecution based on evidence inadmissible at trial.\(^{165}\) The better rule would be that the Service notify the taxpayer whenever the summons is issued to third parties.\(^{166}\)

While it is settled that a recommendation for criminal prosecution during an appeal of a court order enforcing an Internal Revenue Service summons is immaterial to the question of enforceability,\(^{166}\) it is unclear whether a recommendation made subsequent to issuance but prior to compliance affects enforceability. The Supreme Court in \textit{Couch} ruled that a summons is tested as of the issuance date, and thus, a transfer to the taxpayer's attorney after a summons was served on the accountant had no effect.\(^{167}\) It is appealing to apply this principle to \textit{Donaldson}-type cases in resolving the proper cut-off date. However, the good faith standard ought to be instrumental: if the special agent prolonged recommendation in bad faith, the summons

\(^{163}\). Scarafiotti v. Shea, 456 F.2d 1052 (10th Cir. 1972); Application of Cole, 342 F.2d 5 (2d Cir. 1965); United States v. Beneford, 44 F.R.D. 231 (N.D. Ind. 1968).

\(^{164}\). In \textit{Donaldson}, the court stated that a taxpayer may “always assert that interest or that claim in due course at its proper place in any subsequent trial.” 400 U.S. at 531. In \textit{United States v. Moore}, 485 F.2d 1165, 1168 n.4 (5th Cir. 1973), the court noted that “[a] judicial decision that enforcement of the summons is proper is not a predetermination of the admissibility of evidence gained by it in a subsequent criminal proceeding.” See also \textit{Fed. R. Crim. P. 41(e)}.

\(^{165}\). In \textit{United States v. Hickok}, 481 F.2d 377, 379 (9th Cir. 1973), the defendant sought a reversal of his conviction for tax evasion on the basis that the court erred in not suppressing evidence allegedly obtained by a Revenue summons issued solely for criminal prosecution. The court rejected the contention since it lacked “any facts to substantiate his general conclusory allegation that administrative summons were improperly used solely to develop a criminal case against him. Thus, no factual issues were presented requiring an evidentiary hearing.”

\(^{166}\). See \textit{United States v. Moore}, 485 F.2d 1165, 1168 n.4 (5th Cir. 1973): “To hold otherwise would provide an added incentive to taxpayers to file appeals merely for delay, and would needlessly stultify the enforcement of federal law.”


ought to fail; if, on the other hand, there was an absence of bad faith, the issuance-recommendation sequence is immaterial to the summon's enforcement.

**INTERVENTION**

Since the taxpayer under investigation by the Service has various constitutional and nonconstitutional defenses available to prevent production of his records, and since the special agent frequently desires to gather evidence before the taxpayer is aware of the criminal investigation, the agent will turn to third parties for information. We noted earlier that the Internal Revenue Service need not give the taxpayer notice of a summons to a third person. However, if the taxpayer learns that a summons has been issued, the Supreme Court, in *Reisman v. Caplin*, indicated that taxpayer *qua* taxpayer might intervene in both the examination before the hearing officer and the enforcement proceedings. The Court's attempt in *Reisman* to establish guidelines in summons proceedings resulted in a substantial increase in the number of attempted interventions by taxpayers. Thus, in *Donaldson v. United States*, the Supreme Court redefined the *Reisman* rule and effectively limited the scope of intervention in summons *enforcement* proceedings by requiring a potential intervenor to show he possesses a "significantly protectable interest" in the subject matter. The parameters of the *Donaldson* rules have not been clearly drawn. However, one glean from the opinion that: (1)

169. See note 163 supra.


171. "In addition, third parties might intervene to protect their interest, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene." *Reisman v. Caplin*, 375 U.S. 440, 449 (1964).

172. "Reisman v. Caplin* seemed clearly to say that anyone 'affected by a disclosure' might intervene before the special agent and in the district court. Soon there was a *flood of attempted interventions* by taxpayers to challenge summons issued to third parties, such as banks and employers, with varying results among the Courts of Appeals." Lyons, *Government Power and Citizen Rights In A Tax Investigation*, 25 *TAX LAWYER* 79 (1971).


174. In *Donaldson*, a special agent summoned the taxpayer's former employer and his accountant requesting information and testimony relative to the taxpayer's dealings with his employer for the years in question. Although the employer and the accountant expressed their willingness to comply with the summons, the taxpayer was
there is no intervention of right in an Internal Revenue Service summons enforcement proceeding; (2) a taxpayer should not be permitted intervention when the summons seeks records of a third party in the party’s possession, unless there exists a significantly protectable interest; (3) even if the potential intervenor displays a significantly protectable interest, other more appropriate remedies may dictate that intervention be denied; (4) a showing by the taxpayer that he has an established privilege or a property interest satisfies the significantly protectable interest test.

Thus, under the first principle even if the taxpayer satisfies the requirements of Federal Rule 24(a)(2): that he has an interest relating to the property or transaction involved, that disposition of the action might impair his ability to protect his interest as a practical matter, and that his interest is not adequately represented; he may still be denied intervention. The Court reached this result because Federal Rule 81(a)(3) states that the rules apply in enforcement proceedings “except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.”

Under principles two and three, displaying a “significantly protectable interest” will not assure intervention. The taxpayer “may
always assert that interest or that claim in due course at its proper place in any subsequent trial.\textsuperscript{177} Since the taxpayer in \textit{Donaldson} sought to intervene on the grounds the summons was being utilized for the improper purpose of gaining evidence for criminal prosecution, the court is indicating "that if the Internal Revenue Service abuses the courts' process through unlawful use of the section 7602 summons, evidence obtained should be excluded at any subsequent criminal trial."\textsuperscript{178} Unquestionably, an individual abused by a court's process has a "significantly protectable interest,"\textsuperscript{179} and perhaps the proposition that taxpayer's remedy is pre-trial suppression appears a suitable alternative. Nonetheless, it is submitted that such a rule may be unfair because the taxpayer is prevented from avoiding an indictment based on evidence legally inadmissible at the criminal trial. It does not seem justifiable to place such a stigma on the individual in the name of the effective administration of the tax laws when an earlier stage is available for the determination of the issue.\textsuperscript{180}

\textbf{Waiver}

Despite the battery of powers possessed by Revenue agents,\textsuperscript{181} resort to the administrative summons is rarely necessary since most taxpayers approach the routine audit in a cooperative spirit, and provide the agent with the information requested. Cooperation ordinarily stems from the belief that it buys the good will of the agent and assures an expeditious determination of one's tax liability. Moreover, there is a general misconception that the Service can obtain any information not willingly provided.\textsuperscript{182} However correct this notion may be statistically, in his act of cooperating, the taxpayer may be waive constitutional safeguards, and providing the government

\textsuperscript{177} Donaldson v. United States, 400 U.S. 517, 531 (1971). The court in \textit{Donaldson} states that what is a proper situation for intervention must be tested by the "usual process of balancing opposing equities." \textit{Id.} at 530.

\textsuperscript{178} Note, 32 Md. L. Rev. 143, 145 (1972).

\textsuperscript{179} "Intervention is thus precluded unless the intervenor can show the records summoned are within his fifth amendment privilege, subject to the attorney-client privilege or that the court's process has been abused." Note, 25 U. Fla. L. Rev. 114, 117-18 (1972). (Emphasis added.) It does not necessarily follow that intervention under such a showing will be permitted. See notes 171, 172, 173 supra.


\textsuperscript{181} See text at note 1 supra.

with evidence needed to establish a criminal case against him. It is obvious that many taxpayers would not be so willing to comply with the Service’s request for an interview, or production of material, if they understood the implications. Nonetheless, experience indicates that often the Service will gain a great deal of information before counsel is consulted and the flow has been stopped.

Since information voluntarily provided pursuant to an agent’s request technically involves no compulsion upon the taxpayer, no violation of the individual’s constitutional privilege against self-incrimination has occurred. Thus the potentially incriminating evidence may be used in a subsequent criminal proceeding. Moreover, there has been no unreasonable search or seizure since the taxpayer has voluntarily consented to the search.

To what extent do these rather facile answers to difficult waiver problems disappear when the focus of the investigation changes from primarily civil to criminal? If the revenue agent discovers evidence of fraud in the course of a routine audit, he is instructed to suspend the audit, and refer the case to the Intelligence Division. However,

183. Although it is sometimes stated that where a taxpayer voluntarily turns over his books and records to a revenue agent he has waived his privilege against compulsory self-incrimination, Glotzbach v. Klavans, 196 F. Supp. 685 (D. Va. 1961), there is technically no waiver, simply because there has been no compulsion. Grant v. United States, 291 F.2d 227 (2d Cir. 1961); United States v. Young, 215 F. Supp. 202 (E.D. Mich. 1963). It is noteworthy that the decision in Glotzbach appears imminently incorrect. In the case, Revenue agents requested T’s (Taxpayer) consent to examine his books and records on his business premises. The agents advised T that he need not produce, and if he did, they could be used against him. T granted his consent to the on-site examination, but the agents were unable to complete the examination, and informed T of their intent to return. T transferred the material to L (Lawyer) who informed the agents of his possession, and his refusal to permit further examination. The agent summoned T and L to produce. L appeared but refused to comply on the grounds that it would violate T’s fifth amendment privilege. The Service petitioned for enforcement, and the court upheld the summons, concluding that T had waived his privilege by consenting to the original examination. There was no waiver of the privilege in Glotzbach because there was an absence of compulsion.

184. Has there been a valid waiver of the fourth amendment if the taxpayer is not informed of his right to refuse to consent to the inspection of his books and records? See Schoepflin v. United States, 391 F.2d 390 (9th Cir. 1968). But see United States v. Thriftimart, Inc., 429 F.2d 1006, 1008 (9th Cir. 1970). See especially Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (unnecessary to a voluntary consent to search that police advise individual of his right to refuse to give consent).

it may be that he will continue the audit until he finds substantial evidence of criminal guilt. In this light, is there not a point where the agent should give the *Miranda* warnings? Surely such a rule would be difficult to apply. Once the special agent enters the investigation, the need for *Miranda* warnings becomes more apparent. Although the Supreme Court has not squarely ruled on the matter, most circuit court decisions have refused to require the giving of *Miranda* warnings when the special agent first contacts the taxpayer. The rationale of these cases is usually based on an absence of custody or limitation of freedom. This approach unduly restricts the true spirit of the *Miranda* decision which was to assure that an individual is aware of his rights in situations of governmentally instigated stress.


187. In *United States v. Sclafani*, 265 F.2d 408 (2d Cir.), cert. denied, 360 U.S. 918 (1959), the Second Circuit held the government need not advise the taxpayer when the nature of the investigation changes from civil to criminal. See also Lloyd v. United States, 226 F.2d 9 (5th Cir. 1955); Legatos v. United States, 222 F.2d 678 (9th Cir. 1955). But see United States v. Guerrina, 112 F. Supp. 126, 129 (E.D. Pa. 1953).

188. See *Couch v. United States*, 409 U.S. 322 (1973), where the Court noted that the agent had given taxpayer "her Miranda warnings as required by IRS directive." (Emphasis added.)

189. The requirement of *Miranda* warnings in criminal tax investigations has been held inapplicable in 9 of 10 Circuit Courts of Appeals. United States v. Engle, 458 F.2d 1017 (8th Cir. 1972); United States v. Stamp, 458 F.2d 759 (D.C. Cir. 1971); United States v. Ramantanin, 452 F.2d 670 (4th Cir. 1971); United States v. Nemetz, 450 F.2d 924 (3d Cir. 1971); United States v. Stribling, 437 F.2d 765 (6th Cir. 1971); United States v. Chikata, 427 F.2d 385 (9th Cir. 1970); United States v. Prudden, 424 F.2d 1021 (5th Cir. 1970); United States v. Shlom, 420 F.2d 263 (2d Cir. 1969); Taglianetti v. United States, 398 F.2d 558 (1st Cir. 1968). Only the Seventh Circuit has held that *Miranda* warnings were required when investigation includes a special agent. United States v. Dickerson, 413 F.2d 1111 (7th Cir. 1969). In *Dickerson* the court concluded: "We understand the teaching of *Miranda* to be that one confronted with governmental authority in an adversary situation should be accorded the opportunity to make an intelligent decision as to the assertion or relinquishment of those constitutional rights designed to protect him under precisely such circumstances." 413 F.2d at 1114 (Emphasis added.) In rejecting what it labeled the "overbroad" *Dickerson* rationale, the Fifth Circuit in *United States v. Prudden*, 424 F.2d 1021, 1028 (5th Cir. 1970) exemplifies the rationale of many of the circuits. The court states that: "We cannot agree that every administrative official who confronts a citizen with a request for information that might disclose criminal conduct, thereby exerts compulsion on the citizen that must be dispelled by the *Miranda* placebo." In all due respect, the court in *Prudden* might easily have distinguished "every administrative official" from the special agent whose function is clearly criminal investigative in nature. He is a law enforcement officer as significantly as the local police investigator. Moreover, when the focus of the criminal investigation becomes centered upon the taxpayer, there is quite a difference from the *Prudden* analogy of a bank examiner's questioning of a teller whose figures are out of balance. There are a number of recent commentaries dealing with the *Miranda* require-
In *Mathis v. United States*, the Supreme Court expressly rejected the government's contention that tax investigations are immune from the *Miranda* mandate. However, since the defendant in *Mathis* was incarcerated at the time the revenue agent had questioned him, the circuit courts have narrowly interpreted the opinion. Nevertheless, the "badges of intimidation" are present when a special agent examines a taxpayer as surely as when a plain-clothes policeman interrogates the potential criminal offender. There can be no voluntary relinquishment of a known right if the individual taxpayer has no idea he is the object of a criminal tax investigation, and is unaware that he need not produce the materials requested or respond to the special agent's inquiries.

Although special agents are now instructed to give comprehensive *Miranda*-type warnings, and a few decisions have held that failure to follow published administrative procedures may constitute a denial of due process, we suggest the rule ought to be that if the
special agent does not give the taxpayer a full explanation of his rights at the initial contact, all evidence gained should be inadmissible at trial.\footnote{196}

Should the taxpayer refuse to consent to an agent's request for information, he may be summoned to appear before the hearing examiner. At the return date of the summons, it is clear \textit{Miranda} warnings are mandatory since the taxpayer's freedom has been significantly limited in that he faces criminal sanctions for a contumacious refusal to appear.\footnote{197} If the taxpayer makes the deliberate and informed choice to testify and produce records, he has waived his privilege against self-incrimination as to the relinquished materials,\footnote{198} and cannot subsequently suppress their introduction at trial. However, he should be able to stop the inquiry at any time by invoking the privilege if he believes that what he says or produces might tend to incriminate him.\footnote{199}

Experienced defense counsel rarely permit clients to appear in person and testify. However, if a degree of cooperation appears desir-
able, and is handled by counsel under a power of attorney, can counsel effectively waive the client’s constitutional privilege by making damaging admissions, concessions or by turning over the taxpayer’s materials? The authors are unaware of a decision on point. If an attorney can invoke the client’s privilege against self-incrimination, it is logical to conclude he may effectively waive it. Cases on the question whether the attorney may raise the privilege in the taxpayer’s absence are in conflict, but the better view would allow the attorney to raise the privilege. Thus waiver by the attorney becomes a potentially troublesome constitutional question.

privilege against compulsory self-incrimination. See McCarthy v. Arndstein, 262 U.S. 355 (1923); 8 J. Wigmore, Evidence § 2276 (McNaughton ed. 1961). See United States v. Buck, 356 F. Supp. 370 (S.D. Tex.), aff’d, 479 F.2d 1327 (5th Cir. 1973). In Buck a taxpayer had cooperated with another federal agency by turning over his books and records for copying. The district court held that such a relinquishment constituted a waiver of his privilege against self-incrimination at a proceeding to enforce a revenue summons seeking the same materials. The Fifth Circuit affirmed without opinion. The lower court recognized that “[a]lthough waiver of the privilege against self-incrimination during one official investigation does not normally bar its assertion during a later investigation, here the waiver extended to the allowance of extensive document copying during the investigation. . . . For the court to refuse access to the originals would be illogical and irrational.” Id. at 379. The decision in Buck is surprising. To permit inter-governmental trading of information is one thing; to say, however, that by allowing a governmental agency to copy one’s records where there was no danger of incrimination, and later find you have waived the privilege for all times is something different. Under the approach espoused by the Supreme Court in Couch v. United States, 409 U.S. 322 (1973), the element of compulsion would not be lacking by requiring the person to furnish the government incriminating evidence. See United States v. Burch, 490 F.2d 1300, 1303 (8th Cir. 1974).

Compare Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963) with United States v. Judson, 322 F.2d 460 (9th Cir. 1963).