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COMMENTS

THE EXPANDING RIGHTS OF THIRD PARTIES UNDER THE INTERNAL REVENUE SERVICE'S TAX PREPARERS PROJECT: A LIMIT ON INTERNAL REVENUE FISHING EXPEDITIONS?

GREGORY A. MAZZA

*O the gallant Fisher's life,
It is the best of any;
'Tis full of pleasure, void of strife,
And 'tis beloved of many:
Other joys
Are but toys:
Only this
Lawful is;
For our skill
Breeds no ill,
But content and pleasure.*

*The Compleat Angler*¹

The days when the Internal Revenue Service concentrated its audits primarily on taxpayers in high income brackets, gamblers, physicians and members of family partnerships have long since passed. The IRS, under the increasing burden of processing several million income tax returns each year, is now taking advantage of the resources of modern technology. With its employment of Automatic Data Processing, the IRS introduced in 1968 a new computer technique, the "discriminant function," into its auditing procedures.² The result has been not only the selection for audit of tax returns of a wide cross-section of the population, but also an increased interest for the filing of proper returns by taxpayers in middle and low income brackets as well. This widespread concern, along with the increasing complexity of the tax laws, in many instances has caused the taxpayer to seek out the

1. IZAAK WALTON, *THE COMPLEAT ANGLER* 186 (1936).

2. B. BITTKER & L. STONE, *FEDERAL INCOME ESTATE AND GIFT TAXATION*, 909, 911 (4th ed. 1972). For a description and the implications of Automatic Data Processing see *Kurio v. United States*, 27 Am. Fed. Tax R. 2d 3-1 (S.D. Tex. 1970); Barron, *How We Audit from Magnetic Tape*, 40 TAXES 83 (1972); Caplin, *The Taxpayer-Identifying Number System: The Key to Modern Tax Administration*, 49 A.B.A.J. 1161 (1963).

services of professional tax preparers or others holding themselves out to be such. Because of this new demand on the market, the business of tax preparation has expanded tremendously, and naturally, so have the evils which plague many profit motivated ventures.

Although computerized analysis now plays a major role in the IRS's examination process, there still remain less sophisticated, but ever so effective, methods for selecting returns to be audited. Under the duty imposed on the Treasury Department in section 7601(a)³ to canvass "each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax"⁴ and under the authority granted to the IRS by section 7602⁵ to summon and examine any persons and materials relevant to such an inquiry, the IRS has implemented just such an effective method in its Tax Preparers Project.

Because the procedures employed in the Tax Preparers Project raise some serious questions involving the rights of third parties⁶ in a tax investigation, a presentation of the generally accepted rights and defenses which are cognizable to third parties under such an examination will be made here. An analysis of the responsibilities and restrictions imposed upon the IRS by Section 7602 of the Internal Revenue Code, and the reluctance of courts to strictly enforce these limitations will also be set forth to point out some of the major obstacles encountered in asserting the rights of the party under investigation. This comment will examine the present legal status of these rights in light of the effects of recent litigation evolving from the govern-

3. INT. REV. CODE OF 1954. Unless otherwise specified, all references to "section" in the text are references to sections of the *Internal Revenue Code of 1954*.

4. INT. REV. CODE OF 1954, § 7601(a).

5. INT. REV. CODE OF 1954, § 7602 provides:

Examination of Books and Witnesses.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

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

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

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

6. Generally, a third party in a tax investigation is one with whom the taxpayer has engaged in a monetary or business transaction, or one who has knowledge of or is in possession of records concerning such a transaction (*e.g.*, a bank, accountant, attorney, employer, corporation, partnership).

ment's Tax Preparers Project, in the hope of providing today's legal practitioner with some guidelines for their application.

THE TAX PREPARERS PROJECT

In 1972 the IRS initiated a nationwide program aimed at investigating individual tax preparers.⁷ The purpose of the Tax Preparers Project is to determine whether commercial tax preparers have been filing accurate returns for their clients. Certain tax preparers,⁸ selected at random, are visited by special agents of the IRS's Intelligence Division under the guise of ordinary customers. The special agents then provide the preparer with a pre-established set of facts to be used for the purpose of having a federal income tax return prepared.⁹ Upon completion, the IRS carefully audits the preparer's workproduct to determine whether the information furnished him was properly used. If it appears that the information was not properly applied, but evidence of wrongdoing is insufficient to warrant immediate criminal prosecution, the case is transferred to the IRS's Audit Division. The Audit Division then promptly issues a cease and desist order and requests from the suspect preparer copies of all other returns prepared by him, the alleged purpose being to determine whether the tax liability of the preparer's other clients had been inaccurately computed as well.¹⁰ Only if he refuses to comply with this request to make the material within his possession available will the IRS resort to a summons¹¹ compelling the production of the requested information.¹² If the evidence collected during the investigation is sufficient to support criminal prosecution of the tax preparer, then the case will be referred back to the Intelligence Division to institute such proceedings.¹³

LITIGATION GROWING OUT OF THE TAX PREPARERS PROJECT

The IRS—Catching Their Limit

In two significant decisions, *United States v. Berkowitz*¹⁴ and *United*

7. *United States v. Theodore*, 479 F.2d 749, 751 (4th Cir. 1973).

8. According to the testimony of a supervisory IRS agent, the Tax Preparers Project is aimed at individuals subscribing to no "code of professional ethics," and not at attorneys and certified public accountants. *United States v. Turner*, 480 F.2d 272, 274 (7th Cir. 1973).

9. IRS, MANUAL OF INSTRUCTIONS FOR REVENUE AGENTS § 6.01(1) (Supp. 42G-303 1973). This method of identifying suspect preparers without disclosing the official identity of the special agent is known as the "shopping" technique, and the pre-established set of facts is called the "shopping package." *Id.*

10. *United States v. Theodore*, 479 F.2d 749, 752 (4th Cir. 1973).

11. This summons is issued pursuant to INT. REV. CODE OF 1954, § 7602(2).

12. *United States v. Theodore*, 479 F.2d 749, 752 (4th Cir. 1973).

13. *Id.* at 752.

14. 355 F. Supp. 897 (E.D. Pa. 1973), *aff'd*, 488 F.2d 1235 (3d Cir. 1974).

States v. Turner,¹⁵ the section 7602 summonses issued by special agents of the IRS called for an appearance by the tax preparers and also compelled production of the names, addresses and social security numbers of all clients and customers for whom returns were prepared in designated years. The summonses were allegedly issued to determine the accuracy of these returns. In both instances the tax preparers refused to comply with the summonses and set forth certain defenses challenging their validity.

The tax preparer in *Berkowitz* asserted that "the IRS has no right to issue a summons for records already in their possession."¹⁶ In response, the court conceded that the information sought was in the hands of the Commissioner, but nonetheless rejected this argument because of the unjustifiable and enormous burden which would be placed on the IRS in locating the desired information.¹⁷ As a result, the tax preparer was required to assist and facilitate the Commissioner's investigation by supplying the required data. The tax preparer also contended that he was protected by an accountant-client privilege. This argument was disposed of by the court, citing the Supreme Court's decision in *Couch v. United States*¹⁸ which held that no accountant-client privilege is recognized in federal cases.¹⁹

The next contention of the tax preparer in *Berkowitz*, that a section 7602 summons may be used only to secure information from the taxpayer under investigation and not from third parties, was also denied by the court. Under this section of the Code, it is the Commissioner's duty to ascertain "the correctness of *any* return."²⁰ The court noted the absence of any prohibition in the Internal Revenue Code and cases construing it concerning summonses issued to third parties seeking information regarding the taxpayer under investigation. The court also pointed out, citing the decision in *Couch*, that the mere fact that information is sought from an individual other than the taxpayer under investigation does not constitute sufficient ground to decline enforcement of a summons.²¹

In *United States v. Turner*²² the tax preparer, Herbert E. Turner, claimed that production of the documents would violate his constitutional right protecting him against self-incrimination. The court held this complaint to be unjustifiable. Because the inquiry was civil in nature, the court reasoned that revealing the identity of the tax preparer's clients would pose "only a

15. 480 F.2d 272 (7th Cir. 1973).

16. *United States v. Berkowitz*, 355 F. Supp. 897, 900 (E.D. Pa. 1973), *aff'd*, 488 F.2d 1235 (3d Cir. 1974).

17. *Id.* at 901.

18. 409 U.S. 322 (1973).

19. *Id.* at —, 93 S. Ct. at 619, 34 L. Ed. 2d at 558.

20. INT. REV. CODE OF 1954, § 7602 (emphasis added).

21. *United States v. Berkowitz*, 355 F. Supp. 897, 901 (E.D. Pa. 1973), *aff'd*, 488 F.2d 1235 (3d Cir. 1974).

22. 480 F.2d 272 (7th Cir. 1973).

mere possibility of incrimination.”²³ This disclosure, though helpful to the government in locating the requested returns, was held not to involve a substantial risk tantamount to the virtual admission of criminal wrongdoing on the part of the tax preparer. Even should the government, as a result of the disclosure, determine the returns prepared by Turner to be inaccurate, the burden nonetheless would still remain upon the IRS to establish that he willfully violated the internal revenue laws.²⁴ The court also pointed out that the tax preparer did not, because of the nature of the evidence sought, have an expectation of protected privacy or confidentiality which the fifth amendment would protect.²⁵ On this basis it was held that the mere possibility that his fifth amendment rights would be violated is insufficient to overcome the “strong policies in favor of disclosure.”²⁶

The tax preparers in both *Berkowitz* and *Turner* objected to the section 7602 summonses as being too vague, overbroad and as constituting a burdensome “fishing expedition” on the part of the government. The court in *Berkowitz* rejected this argument, concluding that the summons was precise and limited to the specific information directly related to the investigation of the tax liabilities of the preparer’s clients.²⁷ This court also referred to the “potentially fruitless” search with which the IRS would be faced, unless the tax preparer produced the requested information, stating that the burden “would be significantly less” upon the tax preparer.²⁸ In a similar

23. *Id.* at 278.

24. *Id.* at 277.

25. *Id.* at 277-78. Justice Harlan, in *Katz v. United States*, 389 U.S. 347 (1967), pointed out the increasing trend of the courts to apply constitutional protections wherever they have determined that an individual has a “reasonable expectation of privacy” in an area subject to governmental intrusion. *Id.* at 360-62 (concurring opinion). See generally *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 117 (4th ed. 1971) and cases contained therein.

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

27. *United States v. Berkowitz*, 355 F. Supp. 897, 901 (E.D. Pa. 1973), *aff’d.*, 488 F.2d 1235 (3d Cir. 1974). The court pointed out that where the examination exceeds the government’s investigative power because it is overbroad or unrelated to the matter under inquiry, the issuance of a section 7602 summons is precluded. *Id.*, citing *United States v. Harrington*, 388 F.2d 520, 523 (2d Cir. 1968).

28. *United States v. Berkowitz*, 355 F. Supp. 879, 901 (E.D. Pa. 1973), *aff’d.*, 488 F.2d 1235 (3d Cir. 1974). In effect, the court is penalizing the tax preparer because it believes he would have less difficulty in locating the requested information. Under the circumstances the court appears to be balancing the burden on both parties in order to determine whether the requested documents should be forthcoming. The Court of Appeals for the Fourth Circuit takes a dim view of such reasoning. It criticized a district court decision which reasoned that the Commissioner would have an “enormous and unjustifiably expensive undertaking” (*United States v. Theodore*, 479 F.2d 749, 755 (4th Cir. 1973) to search all of the returns in the regional filing center to find those prepared by the tax preparer. “There is nothing in the record to support the conclusion that when IRS knows the name and social security number of a taxpayer, the Service cannot readily obtain his return.” *Id.* at 755. The court therefore remanded its reversal to the district court to determine whether or not the IRS has any reasonable or practical means to compile the desired lists. *Id.* at 755.

manner, the Court of Appeals for the Seventh Circuit rejected this same argument asserted by Turner. He, too, claimed that the government's "fishing expedition" amounted to an illegal search and seizure and that the summons was legally insufficient as it failed to name the persons whose returns were to be examined. In reply the court upheld both the reasonableness and legality of the summons by referring to the authority granted the IRS under section 7602, to examine any person, records or data which may be relevant or material to such inquiry. Furthermore, by showing that the inspection of the records in question "might throw light upon the correctness of a taxpayer's return,"²⁹ the government met its burden as to the relevancy and materiality of the investigation. The court denied the necessity of specifically naming in the summons the persons whose returns are desired for examination, stating a "John Doe" summons to be sufficient.³⁰

The tax preparers in *Berkowitz* and *Turner* also attacked the summonses of the IRS as having been issued in bad faith, pursuant to an investigation being conducted for the improper purpose of obtaining evidence for their criminal prosecution. The court in *Berkowitz* rejected this argument as did the court in *Turner*. In so doing, both courts referred to the decision of the Supreme Court in *Donaldson v. United States*³¹ which established that a section 7602 summons need only be issued (1) in good faith, and (2) prior to a recommendation for prosecution³² in order to be issued in connection with a tax investigation. The courts in both cases further pointed out that the tax preparers were neither under indictment nor had they been recommended for criminal prosecution. Consequently, the government's purpose in each case was found to be proper. Even beyond this, the decision in *Turner* required the tax preparer to make a showing that the summons was totally lacking in any civil purpose.³³

Berkowitz then, condones the procedures of the IRS's Tax Preparers Project, at least insofar as it involves the production of names, addresses and social security numbers of a tax preparer's clients, especially where the burden of locating such information would be greater upon the IRS than it would be upon the tax preparer. It also stands for the proposition that the IRS is entitled to do *some* "fishing" into the records of the tax preparer where he has erred in the preparation of a *single* (sham) tax return.

The basic foundation of the *Turner* decision is the government's alleged "legitimate purpose" of determining the "civil tax liability" of the tax preparer's clients. The court interprets this legitimate purpose to indicate that the issuance of a section 7602 summons is therefore proper, in good faith,

29. *United States v. Turner*, 480 F.2d 272, 279 (7th Cir. 1973).

30. *Id.* at 279.

31. 400 U.S. 517 (1971).

32. *Id.* at 536.

33. *United States v. Turner*, 480 F.2d 272, 275 (7th Cir. (1973)).

and enforceable, even if it should result in criminal prosecution of the tax preparer. Such legitimate purpose, according to the court, also negates the preparer's right to assert his fifth amendment privilege where self-incrimination is but a possibility. Finally, it is this same legitimate purpose once again which denies the tax preparer an opportunity to assert his fourth amendment rights. The government is given "license to fish" for *any* information which a tax preparer might possess so long as it is relevant to the civil tax liability of his clients, whether they be named or not.³⁴

The IRS—Limiting Their Catch

Unlike the decisions in *Berkowitz* and *Turner*, the Court of Appeals for the Fourth Circuit in *United States v. Theodore*³⁵ did not enforce the section 7602 summons issued to the tax preparer.³⁶ Unlike *Berkowitz* and *Turner*, however, the summons issued in *Theodore* compelled the production of more than merely the names, addresses and social security numbers of the tax preparer's clients. It additionally called for the production of

(1) All accounting records, workpapers, correspondence, memoranda and other documents in your possession or used by you in connection with the preparation of all Federal Income Tax returns for your customers and clients for the years 1969, 1970, and 1971.

(2) All retained copies of 1969, 1970 and 1971 Federal Income Tax returns, the originals of which were prepared by you for your customers and clients.³⁷

A primary objection against the summons in *Theodore* was that it was too vague and overly broad to be enforceable,³⁸ and it was on the merits of this argument that the court denied enforcement of the summons. This decision limits the authority of the IRS under section 7602 to acquire only information relating to the correctness of a "particular return or to a particular person."³⁹ The court also denied sanction of open-ended "John Doe" summonses where they invoke more than a single or small group of unidenti-

34. Note that the court, in finding a John Doe summons to be sufficient, relied upon *United States v. Theodore*, 347 F. Supp. 1070, 1075 (D.S.C. 1972), *rev'd*, 479 F.2d 749 (4th Cir. 1973). See also *United States v. Carter*, CCH STAND. FED. TAX. REP., U.S. TAX CAS. ¶ 9154, at 83, 167 (5th Cir. Dec. 26, 1973).

35. 479 F.2d 749 (4th Cir. 1973).

36. *Id.* at 755.

37. *Id.* at 751.

38. *Id.* at 754. The tax preparer also argued that the fifth amendment constituted a valid ground for refusing to produce the records of his accounting firm. The court rejected this argument, stating that "the privilege of self-incrimination is a purely personal one which cannot be invoked by or on behalf of a corporation or professional association." *Id.* at 753. As for the contention that the summons was issued to conduct a criminal investigation of the tax preparer, the court again denied the objection, citing *Donaldson* and giving the same reasons offered in *Berkowitz* and *Turner*. *Id.* at 753-54.

39. *United States v. Theodore*, 479 F.2d 749, 755 (5th Cir. 1973).

fied taxpayers.⁴⁰ In answer to Theodore's final claim that the Commissioner already had copies of the requested returns in his possession, the court pointed out that it would be an abuse of process to enforce a section 7602 summons unless the Commissioner could demonstrate that such records were not in his possession or that he had "no practical way of obtaining the desired item."⁴¹ The court did state, however, that Section 7602 of the Internal Revenue Code authorizes the Commissioner to obtain the names of such taxpayers, but again, only if the information is not otherwise accessible to him.⁴²

Theodore, then, rejects the reasoning which granted "fishing licenses" to the IRS by the courts in *Berkowitz* and *Turner*. It upholds the tax preparer's fourth amendment protection against unreasonable searches and seizures, and stands in opposition to the tactics used by the IRS in their Tax Preparers Project.

RIGHTS OF THE TAX PREPARER

Because of the relative infancy of the IRS's Tax Preparers Project, and the virtual absence of any previous cases comparable to the litigation arising from this IRS enforcement procedure, *Berkowitz*, *Turner* and *Theodore* presented problems unique to any prior adjudication.⁴³ While the courts have tended to treat third parties in the same manner as taxpayers with regard to the issuance of a section 7602 summons,⁴⁴ a review of the cases and

40. *Id.* at 754.

41. *Id.* at 755.

42. *Id.* at 755.

43. Somewhat similar is *United States v. Dupont*, 169 F. Supp. 572 (D. Mass. 1959). Here the court denied the motion of a defendant tax preparer to exclude evidence obtained by IRS agents from examining copies of his client's tax returns which he had presented to them. In this case, however, the tax preparer was informed at the *beginning* of the investigation that it was *his own* tax liability which was in question, and not that of his clients.

44. In *United States v. Berkowitz*, 355 F. Supp. 897 (E.D. Pa. 1973), *aff'd*, 488 F.2d 1235 (3d Cir. 1974) the court stated that "the mere fact that information is sought from a person other than the taxpayer under investigation is an insufficient ground upon which to decline to enforce a summons." *Id.* at 901. Section 7602 summonses were enforceable in the following cases against third parties: *Couch v. United States*, 409 U.S. 322 (1973); *Donaldson v. United States*, 400 U.S. 517 (1971); *United States v. Powell*, 379 U.S. 48 (1964); *United States v. Hickok*, 481 F.2d 377 (9th Cir. 1973); *United States v. Luther*, 481 F.2d 429 (9th Cir. 1973); *United States v. Turner*, 480 F.2d 272 (7th Cir. 1973); *United States v. Egenberg*, 443 F.2d 512 (3d Cir. 1971); *United States v. Artman*, 435 F.2d 1375 (6th Cir. 1970); *United States v. Held*, 435 F.2d 1361 (6th Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); *DiPiazza v. United States*, 415 F.2d 99 (6th Cir. 1969), *cert. denied*, 402 U.S. 949 (1971); *United States v. DeGrosa*, 405 F.2d 926 (3d Cir.), *cert. denied*, 394 U.S. 973 (1969); *United States v. Harrington*, 388 F.2d 520 (2d Cir. 1968); *Hinchcliff v. Clarke*, 371 F.2d 697 (6th Cir.), *cert. denied*, 387 U.S. 941 (1967); *Tillotson v. Boughner*, 333 F.2d 515 (7th Cir.), *cert. denied*, 379 U.S. 913 (1964). *United States v. Oaks*, 360 F. Supp. 855 (C.D. Cal. 1973); *United States v. Buck*, 356 F. Supp. 370 (S.D. Tex. 1973), *aff'd*,

legal literature⁴⁵ displays that some confusion has been generated as to which principles, defenses, and rights are applicable.

Generally, objection to a section 7602 summons is raised on the grounds that it violates: (1) statutory limitations, (2) protection under privileged communications, (3) fifth amendment privilege against self-incrimination or (4) fourth amendment protection against unreasonable searches and seizures. Each ground for objection, however, is not always appropriate for every issuance of a section 7602 summons, and whether the recipient is a taxpayer or third party will influence the availability of these defenses to him.⁴⁶

Statutory Limitations

The first statutory limitation that could possibly give rise to a successful defense to a section 7602 summons involves a time limitation. Under section 6501(a),⁴⁷ assessment of tax liability for the year under investigation must be made within 3 years after the return is filed. However, the mere showing that the statute has run will not necessarily terminate the government's authority to issue a section 7602 summons.⁴⁸ The burden still re-

479 F.2d 1327 (5th Cir.); *United States v. Jones*, 351 F. Supp. 132 (M.D. Ala. 1972); *United States v. Crespo*, 281 F. Supp. 928 (D. Md. 1968).

45. See generally Barney, *The Protection of Documents in Criminal Tax Fraud Cases*, 44 TAXES 626 (1966); Cohen, *Accountant's Workpapers in Federal Tax Investigations*, 21 TAX. L. REV. 183 (1966); Fahey, *Testimonial Privilege of Accountants in Federal Tax Fraud Investigations*, 17 TAX. L. REV. 491 (1962); Fuller, *Taxation: Discovery of Documents Relating to the Tax Liability of the Taxpayer in the Possession of His Attorney*, 17 OKLA. L. REV. 125 (1964); Gilbert, *Emanations of the "Shift-of-emphasis" Theory—The "Improper Purposes" Doctrine Revisited: Taxpayers' Rights to Challenge Special Agents' Summonses of "Third Party" Bank Records*, 5 SUFFOLK U.L. REV. 35 (1970); Note, *Constitutional Aspects of Federal Tax Investigations*, 57 COLUM. L. REV. 676 (1957); Note, *Criminal Tax Fraud Investigations: Limitations on the Scope of the Section 7602 Summons*, 25 U. FLA. L. REV. 114 (1972); Comment, *Constitutional Law—Taxpayer Does Not Have Fifth Amendment Privilege When His Private Records are in the Hands of an Accountant*, 3 MEMPHIS ST. L. REV. 383 (1973); Note, *Constitutional Law—Fourth Amendment—Evidence Obtained by Illegal Search and Seizure is Inadmissible in Civil Tax Proceeding—Government has Burden of Going Forward with Untainted Evidence to Support Deficiency Notice*, 48 N.Y.U.L. REV. 197 (1973); Note, *Constitutional Law—Self Incrimination—Fifth Amendment Protection Does Not Extend to Documents in Possession of Taxpayer's Attorney*, 5 ST. MARY'S L. REV. 337 (1973).

46. The cases cited in note 44 and the discussion of these and other cases by the literature cited in note 45 show the confusion that litigants involved in tax investigations have experienced in defending their position. It is beyond the scope of this paper to deal with each objection which might be raised in every situation concerning a section 7602 summons, but those defenses which are applicable to the tax preparer in this area will be discussed.

47. INT. REV. CODE OF 1954.

48. *United States v. Powell*, 379 U.S. 48, 58 (1964); *United States v. Giordano*, 419 F.2d 564, 568 (8th Cir.), cert. denied, 397 U.S. 1037 (1970); *Foster v. United States*, 265 F.2d 183, 187 (2d Cir.), cert. denied, 360 U.S. 912 (1959). In cases in which the understatement of gross income exceeds 25 percent, the general 3 year stat-

mains upon the recipient of the summons to show that the court abused its discretion in enforcing it.⁴⁹ The Commissioner is entitled to an examination of the records of a taxpayer or third party⁵⁰ where his stated purpose is the determination of the liability of "any person for any internal revenue tax" whether or not it has been barred by the time limitation.⁵¹ Consequently, the pleading of this time limitation as a defense will be of little service to *any* summoned party where the section 7602 summons has been issued for a "proper purpose."⁵²

Another statutory limitation on the issuance of this summons, at least from the taxpayer's standpoint, is that which precludes unnecessary examination of his books of account without written notice from the IRS.⁵³ There has been considerable discussion, however, as to what constitutes an unnecessary examination under Section 7605(b) of the Internal Revenue Code.⁵⁴ Because only one inspection of a taxpayer's books is permitted for each taxable year, government arguments generally focus on the "continuing" nature of the investigation. In sustaining this contention, the courts have held that subsequent examinations do not constitute a second inspection requiring written notice where the IRS investigation has not been completed.⁵⁵

ute has been extended to 6 years. INT. REV. CODE OF 1954, § 6501(e). In cases of fraudulent returns no time limitation is applicable. INT. REV. CODE OF 1954, § 6501(c).

49. *United States v. Powell*, 379 U.S. 48, 58 (1964).

50. *Foster v. United States*, 265 F.2d 183, 187 (2d Cir.), *cert. denied*, 360 U.S. 912 (1959).

51. *Id.* at 187, *quoting* INT. REV. CODE OF 1954, § 7602.

52. *See* discussion of proper purpose pp. 789-91 *infra*.

53. INT. REV. CODE OF 1954, § 7605(b) provides:

No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless an authorized internal revenue officer, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

54. *United States v. Nashban*, 32 Am. Fed. Tax R.2d 5308, 5309 (E.D. Wis. 1973); *United States v. Fordin*, 30 Am. Fed. Tax R.2d 5249, 5251 (E.D.N.Y. 1972); *United States v. Schwartz*, 469 F.2d 977, 985 (5th Cir. 1972); *United States v. Giordano*, 419 F.2d 564, 567 (8th Cir.), *cert. denied*, 397 U.S. 1037 (1970); *Hinchcliff v. Clarke*, 371 F.2d 697, 700 (6th Cir.), *cert. denied*, 387 U.S. 941 (1967); *In Application of Magnus*, 299 F.2d 335, 337 (2d Cir. 1962); *United States v. Crespo*, 281 F. Supp. 928, 933 (D. Md. 1968).

55. *United States v. Crespo*, 281 F. Supp. 928, 933 (D. Md. 1968); *see United States v. Giordano*, 419 F.2d 564, 567 (8th Cir.), *cert. denied*, 397 U.S. 1037 (1970); *In Application of Magnus*, 299 F.2d 335, 337 (2d Cir. 1962). *But see United States v. Fordin*, 30 Am. Fed. Tax R.2d 5249 (E.D.N.Y. 1972) where the court criticized the IRS's interpretation of a completed investigation. It held "any repetitive exam" to be untenable under the Supreme Court's decision in *United States v. Powell*, 379 U.S. 48 (1968) where the required notice was not forthcoming. As the court in *Fordin* points out, the hands of the recipient of the summons are virtually tied under the relevant definition of a closed case contained in Rev. Proc. 68-28, 1968-2 CUM. BULL. 912. This definition as applied in *Fordin*

permits the Internal Revenue Service to exercise total discretion in determining

This reasoning, however, has been criticized on the basis that courts have confused the meaning of a *continuing investigation* with that of a *continuing inspection*.⁵⁶ Section 7605(b) provides for only one *inspection* (regardless of whether an investigation is continuing or not). Hence, where an internal revenue agent has examined the records in question, the statutory notice must be given before doing so again.⁵⁷

Presently, the usefulness of this limitation to the tax preparer is non-existent, for it has been held that the single inspection rule does not apply to the workpapers of an accountant nor to the records of a taxpayer in an accountant's possession.⁵⁸ This section of the statute relates solely to the taxpayer and his books, and is not applicable to third party investigations.⁵⁹

Privileged Communications

The right to assert confidentiality, another source of objection to enforcement of a section 7602 summons, finds its roots in the attorney-client privilege.⁶⁰ However, as the individuals summoned under the Tax Preparers Project are generally not attorneys,⁶¹ this particular privilege remains inaccessible to them. An offshoot of the attorney-client relationship, often referred to as the accountant-client relationship, has in some instances provided relief for summoned third parties.⁶² Under the defense of this privilege, the refusal to produce a taxpayer's records, which have been prepared by an accountant, has been sustained by the courts, but only under

"closure" of a case

. . . . [T]he Internal Revenue Service has only to refuse to settle a case and then forbear from issuing a deficiency notice to permit it, under its own rules, to continue investigation as long as it wishes, however tiresome it may be for the taxpayer and without notice required by statute.

United States v. Fordin, 30 Am. Fed. Tax R.2d 5249, 5252 (E.D.N.Y. 1972).

56. United States v. Fordin, 30 Am. Fed. Tax R.2d 5249, 5251 (E.D.N.Y. 1972); United States v. Schwartz, 332 F. Supp. 820, 822 (N.D. Ga. 1971), *rev'd*, 469 F.2d 977 (5th Cir. 1972).

57. United States v. Fordin, 30 Am. Fed. Tax R.2d 5249, 5253 (E.D.N.Y. 1972). *But see* United States v. Crespo, 281 F. Supp. 928, 933-34 (D. Md. 1968).

58. Hinchcliff v. Clarke, 371 F.2d 697, 700 (6th Cir.), *cert. denied*, 387 U.S. 941 (1967); *accord*, Guerink v. United States, 354 F.2d 629, 631 (7th Cir. 1965); Bouschor v. United States, 316 F.2d 451, 457 (8th Cir. 1963); De Masters v. Arend, 313 F.2d 79, 86 (9th Cir.), *petition for cert. dismissed*, 375 U.S. 936 (1963).

59. Hubner v. Tucker, 245 F.2d 35, 38-39 (9th Cir. 1957); *accord*, United States v. Howard, 360 F.2d 373, 380 (3d Cir. 1966).

60. For discussion of the development of confidential relationships and the attorney-client privilege, see Fuller, *Taxation: Discovery of Documents Relating to the Tax Liability of the Taxpayer in the Possession of His Attorney*, 17 OKLA. L. REV. 125 (1964); Note, *Constitutional Aspects of Federal Tax Investigations*, 57 COLUM. L. REV. 676 n.6 (1957). *See also* United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950).

61. United States v. Turner, 480 F.2d 272, 274 (7th Cir. 1973).

62. *See generally* Fahey, *Testimonial Privilege of Accountants in Federal Tax Fraud Investigations*, 17 TAX. L. REV. 491 (1962).

highly qualified circumstances.⁶³ No accountant-client privilege per se exists at common law,⁶⁴ nor is that privilege recognized in the federal court system.⁶⁵ Hence, recourse to such a confidential relationship as a defense in a federal tax investigation can only be had where the accountant can show that he was acting in the capacity of a professional legal advisor,⁶⁶ or where the records in question were produced subsequent to the taxpayer's hiring of counsel, and in contemplation of litigation.⁶⁷ In other words, if the accountant is not an attorney, it is imperative that he be assisting an attorney in rendering legal services to the taxpayer with litigation in mind. As this would seldom be the case with regard to the tax preparer investigated under the Tax Preparers Project, and because the workpapers prepared by an accountant are clearly the property of the accountant himself,⁶⁸ the defense of accountant-client privilege would be virtually unavailable to a tax preparer.

Privilege Against Self-Incrimination

Probably no objection to enforcement of a section 7602 summons has created more confusion than the application of fifth amendment privileges. The Supreme Court, however, in *Couch v. United States*⁶⁹ has recently cleared up many of the misconceptions concerning the assertion of this constitutional protection against self-incrimination. In the past, the use of this privilege by accountants and third parties has been more significant in behalf of the taxpayer rather than the party asserting the privilege.⁷⁰ The de-

63. *Reisman v. Caplin*, 375 U.S. 440, 449 (1964); *United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972); *United States v. Judson*, 322 F.2d 460, 462 (9th Cir. 1963); *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961); *accord*, *Colton v. United States*, 306 F.2d 633, 639 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); *United States v. Schmidt*, 360 F. Supp. 339, 346 (M.D. Pa. 1973).

64. *Couch v. United States*, 409 U.S. 322, —, 93 S. Ct. 611, 617, 34 L. Ed. 2d 548, 556 (1973); *accord*, *Lustman v. Commissioner*, 322 F.2d 253, 259 (3d Cir. 1963).

65. *Falsone v. United States*, 205 F.2d 734, 741-42 (5th Cir.), *cert. denied*, 346 U.S. 864 (1953); *Himmelfarb v. United States*, 175 F.2d 924, 939 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949); *United States v. Bowman*, 236 F. Supp. 548, 550-51 M.D. Pa. 1964), *aff'd*, 358 F.2d 421 (3d Cir. 1966); *United States v. Culver*, 224 F. Supp. 419, 434 (D. Md. 1963); *Petition of Borden Co.*, 75 F. Supp. 857, 860 (N.D. Ill. 1948).

66. *United States v. Schmidt*, 360 F. Supp. 339, 346 (M.D. Pa. 1973), *quoting* 8 J. WIGMORE, EVIDENCE § 2292, at 554 (McNaughton rev. ed. 1961); *accord*, *Reisman v. Caplin*, 375 U.S. 440, 449 (1964); *United States v. Judson*, 322 F.2d 460, 462 (9th Cir. 1963); *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961).

67. *United States v. Judson*, 322 F.2d 460, 467 (9th Cir. 1963); *Colton v. United States*, 306 F.2d 633, 637 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961).

68. *United States v. Zakutansky*, 401 F.2d 68, 70 (7th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969). *See also* *Sale v. United States*, 228 F.2d 682, 686 (8th Cir. 1956); *United States v. Boccuto*, 175 F. Supp. 886, 890 (D.N.J.), *appeal dismissed*, 274 F.2d 860 (3d Cir. 1959).

69. 409 U.S. 322 (1973).

70. *See* *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906); *United States v. White*, 477

cision in *Couch* reaffirmed the decisions of several lower courts,⁷¹ establishing fifth amendment rights to be purely *personal*,⁷² and therefore, incapable of being asserted for another. Although this privilege has extended to the production of records, papers and writings since 1886,⁷³ its personal nature precludes application to the records of corporations or professional associations.⁷⁴ Where the tax preparer is such a business entity, the privilege against self-incrimination cannot be asserted for his own protection nor that of the corporation.⁷⁵

The crucial aspect of the fifth amendment privilege comes into play where the tax preparer is not organized under this type of business association.⁷⁶ Under these circumstances, it must be remembered that he is asserting this privilege *in his own behalf* and not for a third party. Consequently, there is no reason why the tax preparer should be compelled to give evidence against himself.⁷⁷ According to *Turner*, however, if the thrust of the summons is directed at an "essentially civil area of inquiry," the tax preparer is virtually without constitutional protection, since government policies favor disclosure.⁷⁸ Where the IRS alleges that determination of civil liability is an aspect of the investigation, the courts have been more than willing to

F.2d 757, 759 (5th Cir. 1973); *United States v. Judson*, 322 F.2d 460, 463 (9th Cir. 1963); *United States v. Schmidt*, 360 F. Supp. 339, 344 (M.D. Pa. 1973); *In re Brumbaugh*, CCH 1962 STAND. FED. TAX. REP. U.S. TAX CAS. (62-2, at 85,183) ¶ 9521 (S.D. Cal. May 31, 1962); *United States v. Boccuto*, 175 F. Supp. 886, 889 (D.N.J.), *appeal dismissed*, 274 F.2d 860 (3d Cir. 1959); *United States v. Willis*, 145 F. Supp. 365, 368 (M.D. Ga. 1955).

71. *United States v. Egenberg*, 443 F.2d 512, 516 (3d Cir. 1971); *United States v. Goldfarb*, 328 F.2d 280 (6th Cir.), *cert. denied*, 377 U.S. 976 (1964); *Bouschor v. United States*, 316 F.2d 451, 458 (8th Cir. 1963); *In re Fahey*, 300 F.2d 383 (6th Cir. 1961); *United States v. Boccuto*, 175 F. Supp. 886, 888 (D.N.J.), *appeal dismissed*, 274 F.2d 860 (3d Cir. 1959); *United States v. Willis*, 145 F. Supp. 365, 368 (M.D. Ga. 1955).

72. *Couch v. United States*, 409 U.S. 322, —, 93 S. Ct. 611, 616, 34 L. Ed. 2d 548, 553 (1973).

73. *Boyd v. United States*, 116 U.S. 616, 634-35 (1886).

74. *United States v. White*, 322 U.S. 694, 699 (1944); *Wilson v. United States*, 221 U.S. 361, 383 (1911); *Hale v. Henkel*, 201 U.S. 43, 69 (1906); *United States v. Held*, 435 F.2d 1361, 1365-66 (6th Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

75. *United States v. Theodore*, 479 F.2d 749, 753 (4th Cir. 1973).

76. In *United States v. Turner*, 480 F.2d 272 (7th Cir. 1973) the court stated: "It is true 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." *Id.* at 274. The privilege against self-incrimination has also been held to apply to the personal records owned by a partnership. *United States v. Slutsky*, 352 F. Supp. 1105, 1107 (S.D.N.Y. 1972), *appeal docketed*, 26 U.S.L.W. 3389 (U.S. Jan. 8, 1974) (No. 1032).

77. The courts have often recognized the importance of protecting the individual's rights against compulsory self-incrimination. *Miranda v. Arizona*, 384 U.S. 436 (1966); *accord*, *Mathis v. United States*, 391 U.S. 1, 4 (1968); *Malloy v. Hogan*, 378 U.S. 1 (1964); *United States v. Dickerson*, 413 F.2d 1111, 1116 (7th Cir. 1969).

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

sustain their claim.⁷⁹ The reason for this is that all such inquiries into records and tax returns are readily susceptible to allegations of civil tax liability.⁸⁰ The tax preparer's only defense in this situation is to establish that the government's investigation is directed towards him and pervaded with "dominant criminal overtones."⁸¹ By placing the purpose of the inquiry at issue in this manner, the tax preparer should be permitted to conduct discovery proceedings in order to establish the government's motive in issuing the summons, thereby discerning whether prosecution has been recommended.⁸² The Federal Rules of Civil Procedure govern in such situations, giving a party the right to examine a deponent on any matter not privileged which is relevant to the subject matter involved in the pending action.⁸³ The federal rules, however, also grant the district courts considerable discretion to suspend or limit discovery,⁸⁴ as was the case in *Turner*.⁸⁵

79. See *DiPiazza v. United States*, 415 F.2d 99, 103 (6th Cir. 1969), *cert. denied*, 402 U.S. 949 (1971); *accord*, *United States v. Powell*, 379 U.S. 48, 58 (1964); *United States v. Ryan*, 379 U.S. 61, 62 (1964); *United States v. Turner*, 480 F.2d 272, 279 (7th Cir. 1973); *United States v. Held*, 435 F.2d 1361, 1364 (6th Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971). See also *United States v. Mothe*, 303 F. Supp. 1366 (E.D. La. 1969) and cases cited therein.

80. *United States v. Billingsley*, 469 F.2d 1208 (10th Cir. 1972). Therein the court stated "the potential for civil liability necessarily accompanied the potential for criminal prosecution . . . the civil aspects are inextricably associated with the criminal." *Id.* at 1209-10.

81. *United States v. Roundtree*, 420 F.2d 845, 852 (5th Cir. 1959). Sometimes establishing even dominant criminal overtones is insufficient. In *United States v. Held*, 435 F.2d 1361 (6th Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) the court held that even where the primary purpose of the summons was to further a criminal investigation, a secondary purpose of determining civil tax liability would nonetheless support the validity of the summons. *Id.* at 1364.

82. *United States v. Roundtree*, 420 F.2d 845, 852 (5th Cir. 1959); *United States v. Nunally*, 278 F. Supp. 843, 845-46 (W.D. Tenn. 1968); *accord*, *United States v. Moriarty*, 278 F. Supp. 187, 188-89 (E.D. Wis. 1967); *Kennedy v. Rubin*, 254 F. Supp. 190, 193-94 (N.D. Ill. 1966). *But see* *United States v. Schmidt*, 360 F. Supp. 339, 343 (M.D. Pa. 1973); *United States v. Wall Corp.*, 475 F.2d 893, 895 (D.C. Cir. 1972) (discovery of special agents' purpose was denied as the taxpayers had ample opportunity to probe for bad faith of the agents at enforcement hearings). See also *Abel Investment Co. v. United States*, 29 Am. Fed. Tax R.2d 894, 895-96 (D. Neb. 1971). Since 1970, taxpayers have also been able to improve their defensive position by compelling the production of IRS manuals, code books and private rulings from the Internal Revenue Service under the Freedom of Information Act. See generally *Hawkes v. IRS*, 467 F.2d 787 (6th Cir. 1972); *Tax Analysis & Advocates v. IRS*, 362 F. Supp. 1298 (D.D.C. 1973); *Long v. United States*, 349 F. Supp. 871 (W.D. Wash. 1972).

83. FED. R. CIV. P. 26(b). The federal rules are applicable to enforcement proceedings as indicated by the Supreme Court in *Donaldson v. United States*, 400 U.S. 517, 528 n.11 (1971).

84. A district court may suspend or limit discovery in the interest of obtaining "an expedited disposition of a summons proceeding," pursuant to Rule 81(a)(3). See *United States v. National State Bank*, 454 F.2d 1249, 1252 (7th Cir. 1972); *United States v. Bell*, 448 F.2d 40, 42 (9th Cir. 1971).

85. *United States v. Turner*, 480 F.2d 272, 275-76 (7th Cir. 1973).

Protection Against Unreasonable Searches and Seizures

In light of the decision of the Court of Appeals for the Fourth Circuit in *United States v. Theodore*,⁸⁶ the most treasured right of the tax preparer is his fourth amendment protection against unreasonable searches. Though the status of this privilege is considerably clearer than that of the fifth amendment, it is still important to be cognizant of the fact that the tax preparer is seeking to protect *his own* rights and not those of a third party.

Unlike the protections of the fifth amendment, fourth amendment protections *are* applicable to corporate entities.⁸⁷ Hence, where evidence is illegally obtained from corporate records, it may be suppressed.⁸⁸ In *United States v. Humble Oil & Refining Co.*,⁸⁹ the IRS issued a section 7602 summons commanding the production of certain corporate records⁹⁰ relating to Humble's mineral lease transactions for the calendar year of 1970, in order to assess the tax liability of "John Doe" (persons unknown). Humble answered the government's petition to enforce the summons, alleging it to be fictional (as there was no specific taxpayer under investigation), arbitrary, an unwarranted invasion of personal liberty and an unreasonable search and seizure in violation of the fourth amendment.⁹¹ According to the testimony of an IRS agent, the summons was issued to gather information on the business practices of local industry to allow the IRS to keep up to date on its tax enforcement. He also testified that the summons was *not* pursuant to an audit of Humble, *nor* to investigate its business practices or tax liability, *nor* was the group, referred to in the summons as "John Doe," identifiable persons that the IRS had in mind when the summons was issued.⁹² In effect, the project was one of research (a situation not unlike the

86. 479 F.2d 749 (4th Cir. 1973).

87. *United States v. Crespo*, 281 F. Supp. 928, 935 (D. Md. 1968); *accord*, *United States v. Dauphin Deposit Trust Co.*, 385 F.2d 129 (3d Cir. 1967), *cert. denied*, 390 U.S. 921 (1968). *See also* *United States v. Northwest Pa. Bank & Trust Co.*, 355 F. Supp. 607, 610 (W.D. Pa. 1973); *United States v. First Nat'l Bank*, 173 F. Supp. 716, 720 (W.D. Ark. 1959).

88. *United States v. Crespo*, 281 F. Supp. 928, 935 (D. Md. 1968).

89. 346 F. Supp. 944 (S.D. Tex. 1972), *aff'd*, 488 F.2d 953 (5th Cir. 1974).

90. The summons issued in the matter of John Doe's tax liability commanded *Humble* as follows:

To produce records of Humble Oil & Refining Company for the calendar year 1970 concerning mineral leases surrendered during the year without production obtained on the leasehold, such records to show the following facts:

Name, address and social security number of lessor. Amount of lease bonus. Month and year lease executed. Legal description of the property leased.

The above information is requested only for leases where the lease bonus exceeded \$10,000.

United States v. Humble Oil & Refining Co., 346 F. Supp. 944, 945 (S.D. Tex. 1972), *aff'd*, 488 F.2d 953 (5th Cir. 1974).

91. *Id.* at 945.

92. *Id.* at 946.

Tax Preparers Project).

Though the court stated in its decision that it did not reach the question of whether issuance of the summons would constitute an unreasonable search and seizure under the fourth amendment,⁹³ it did refuse to grant its enforcement. In answer to the government's contention that sections 7601 and 7602 granted authority for such an investigation, the Federal District Court for the Southern District of Texas stated:

[T]he powers conferred upon the Internal Revenue Service by these statutes is [*sic*] broad, but it does not encompass situations such as the present one when the Internal Revenue Service does not have any taxpayer under investigation. There must be some nexus between the information sought and a specific investigation of specific individuals before the government can compel third parties, at their own expense, to give information to the Internal Revenue Service. . . .

. . . .
 . . . To have such a relationship between the information and an investigation of a taxpayer there must first be an actual investigation of a person or an examination of a return and here there is none. Certainly, the extraordinary power of the federal district courts in this area of summons and possible contempt for failure to comply should not be used to aid an agency of the government to obtain information in situations where no actual controversy exists between the government and any known individual.⁹⁴

The overwhelming similarity between the situation in this controversy and that created in those under the Tax Preparers Project should be an indication to the tax preparer that strong arguments are available to him in this area.

1. *Misrepresentation.* Under the IRS's Tax Preparers Project, undercover agents pose as ordinary taxpayers seeking the services of the tax preparers. Whether the courts will interpret such an activity as material misrepresentation, calling for the exclusion of any evidence subsequently obtained through this approach, remains to be seen.⁹⁵ It should be noted, however, that evidence gathered by an agent who had intentionally misled a tax preparer into believing that he was investigating other taxpayers has been suppressed as an unlawful seizure.⁹⁶

2. *Materiality and Relevancy.* In the absence of a showing that the documents requested are material and relevant to a reasonable investigation of a taxpayer, a section 7602 summons issued by the IRS will generally be

93. *Id.* at 947.

94. *Id.* at 947.

95. A recent Tax Court decision has held the exclusionary rule of *Weeks v. United States*, 232 U.S. 383 (1914) to be applicable in civil tax proceedings. See Efrain T. Suarez, 58 T.C. 792 (1972).

96. *Goodman v. United States*, 285 F. Supp. 245, 251-52 (C.D. Cal. 1968). See also *Goodman v. United States*, 369 F.2d 166, 168 (9th Cir. 1966).

held unenforceable.⁹⁷ The test of materiality and relevancy, however, is a rather lenient one and there is no necessity for establishing that probable cause existed as a basis for the inquiry.⁹⁸ The court in *Humble* set forth the appropriate standard of relevancy:

[T]he judicial protection against the sweeping or irrelevant order is particularly appropriate in matters where the demand for records is directed not to the taxpayer but to a third-party who may have had some dealing with the person under investigation. And so this court has held that a District Court asked to enforce a summons must determine not only whether this burden imposed is unreasonably onerous, but also whether the records sought were relevant to the investigation, not in the sense of an affirmative showing of probable cause, but "whether the inspection sought might have thrown light on the correctness of the taxpayer's returns."⁹⁹

The burden, then, is upon the IRS to make this showing. As the Court of Appeals for the Ninth Circuit pointed out in *Teamsters Local 174 v. United States*,¹⁰⁰

Neither the revenue agent nor the Court has authority under the statute to require the production of memoranda, books, etc., of third parties unless they have a bearing upon the return or returns under investigation.

"The agents are not the sole judges as to the scope of the examination.

They must satisfy the Court that what they seek may be actually needed. Otherwise, they would be assuming inquisitorial powers beyond the scope of the statute."¹⁰¹

3. *Proper Purpose.* In 1964 the Supreme Court held that a taxpayer could challenge a summons issued pursuant to Section 7602 of the Internal Revenue Code where the material requested is for the improper purpose of obtaining evidence to be used in a criminal prosecution.¹⁰² Later in the

97. *Venn v. United States*, 400 F.2d 207, 211 (5th Cir. 1968). See also *Teamsters Local 174 v. United States*, 240 F.2d 387, 390 (9th Cir. 1956); *United States v. Buck*, 356 F. Supp. 370, 375-76 (S.D. Tex. 1973), *aff'd*, 479 F.2d 1327 (5th Cir. 1973); *United States v. Jones*, 351 F. Supp. 132, 133-34 (M.D. Ala. 1972); *United States v. First Nat'l Bank*, 173 F. Supp. 716, 720 (W.D. Ark. 1959). In 1947 the Court of Appeals for the Fifth Circuit stated: "A third party should not be called upon to produce records and give evidence under the statute unless such records and evidence are relevant to, or bear upon, the matter being investigated . . ." *First Nat'l Bank v. United States*, 160 F.2d 532, 533 (5th Cir. 1947).

98. *United States v. Powell*, 379 U.S. 48, 57 (1964); *Foster v. United States*, 265 F.2d 183, 186 (2d Cir.), *cert. denied*, 360 U.S. 912 (1959).

99. *United States v. Humble Oil & Refining Co.*, 346 F. Supp. 944, 947 (S.D. Tex. 1972), *aff'd*, 488 F.2d 953 (5th Cir. 1974), *quoting Foster v. United States*, 265 F.2d 183 (2d Cir.), *cert. denied*, 360 U.S. 912 (1959).

100. 240 F.2d 387 (9th Cir. 1956).

101. *Id.* at 390, *quoting Martin v. Chandis Sec. Co.*, 33 F. Supp. 478, 480 (S.D. Cal. 1940).

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

same year, the Supreme Court in *United States v. Powell*¹⁰³ delineated the burden which must be met by the IRS at an enforcement proceeding. The government was required to show that

the investigation will be conducted *pursuant to a legitimate purpose*, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed¹⁰⁴

Then in 1971, the Supreme Court reiterated its interpretation, holding that any internal revenue summons may be issued under section 7602 to aid an investigation, if issued in good faith and prior to a recommendation for criminal prosecution.¹⁰⁵ The Court also made it clear that only where the sole object of the investigation is to gather data for criminal prosecution is the petition to enforce the summons to be refused.¹⁰⁶ However, the Court noted that the use of the summons has been granted "*even where it is alleged that its purpose is to uncover crime,*"¹⁰⁷ so long as criminal prosecution has yet to be instituted. Thus when both a proper and an improper purpose exist, the summons will still be issued.¹⁰⁸ In this respect the recipient's hands are virtually tied, as the determination of civil tax liability can *always* be claimed to be at issue where such an investigation is made.¹⁰⁹ The purpose of gathering evidence for criminal prosecution then, is not fatal to the summons unless it constitutes the singular purpose for its issuance.¹¹⁰

According to the *Manual of Instructions for Revenue Agents*,¹¹¹ only when a special agent is involved in an investigation, is it a criminal investigation. Taxpayers and third parties have challenged the validity of a section 7602 summons on this very basis.¹¹² In *United States v. Artman*,¹¹³ the court

103. 379 U.S. 48 (1964).

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

105. *Donaldson v. United States*, 400 U.S. 517, 536 (1971).

106. *Id.* at 533.

107. *Id.* at 532, and cases cited therein. See also *United States v. Egenberg*, 443 F.2d 512 (3d Cir. 1971); *United States v. Rugeiro*, 425 F.2d 1069 (9th Cir. 1970), *cert. denied*, 401 U.S. 922 (1971).

108. The Court in *DiPiazza v. United States*, 415 F.2d 99 (6th Cir. 1969), *cert. denied*, 402 U.S. 949 (1971) stated: "Where the investigation may produce both civil and criminal evidence, the summons under section 7602 is a proper device for obtaining records." *Id.* at 103.

109. See *United States v. Billingsley*, 469 F.2d 1208, 1209-10 (10th Cir. 1972); *United States v. Held*, 435 F.2d 1361, 1364-65 (6th Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

110. See *United States v. Weingarden*, 473 F.2d 454 (6th Cir. 1973).

111. IRS, *MANUAL OF INSTRUCTIONS FOR REVENUE AGENTS* 678, cited in *United States v. Lipshitz*, 132 F. Supp. 519, 521 (E.D.N.Y. 1955). See also *United States v. Moriarty*, 435 F.2d 347, 348-49 (7th Cir. 1970).

112. *DiPiazza v. United States*, 415 F.2d 99 (6th Cir. 1969), *cert. denied*, 402 U.S. 949 (1971). See also *United States v. Kessler*, 338 F. Supp. 420 (S.D. Ohio 1972), *rev'd*, 474 F.2d 995 (6th Cir. 1973); *United States v. Gower*, 271 F. Supp. 655 (M.D.

rejected such an argument stating that the burden to show that the summons was issued for an unlawful purpose is on the party objecting to the summons. "That burden is not met by merely showing that the agent issuing the summons is a special agent of the IRS."¹¹⁴

Objecting to a section 7602 summons for reasons of *improper purpose*, then, offers little protection for the tax preparer. According to *Donaldson*, legitimate purpose can be established merely with a showing of good faith in the absence of a recommendation for prosecution.¹¹⁵ With discovery procedures being reserved for the discretion of the court,¹¹⁶ the tax preparer's burden to negate the existence of proper purpose¹¹⁷ approaches the realm of the impossible.

4. *Unwarranted Fishing Expeditions.* In *United States v. Harrington*,¹¹⁸ the court pointed out that

[T]he Government may not exercise its investigative and inquisitorial power without limit—the examination is "unreasonable" and impermissible if it is overbroad, "out of proportion to the end sought," or if it is "so unrelated to the matter properly under inquiry as to exceed the investigatory power."¹¹⁹

Where a third party is in possession of documents which relate to a taxpayer being investigated by the IRS, he may object to the attempt to enforce a section 7602 summons on the ground that the request made is so vague as to constitute an unreasonable search and seizure.¹²⁰ In holding the gov-

Pa. 1967); *United States v. Turzynski*, 268 F. Supp. 847 (N.D. Ill. 1967); *Tillotson v. Boughner*, 225 F. Supp. 45, 47 (N.D. Ill. 1963), *aff'd*, 333 F.2d 515 (7th Cir.), *cert. denied*, 379 U.S. 913 (1964).

113. 435 F.2d 1375 (6th Cir. 1970).

114. *United States v. Artman*, 435 F.2d 1375, 1377 (6th Cir. 1970). See *Donaldson v. United States*, 400 U.S. 517, 534-35 (1971); *United States v. Kessler*, 338 F. Supp. 420 (S.D. Ohio 1972), *rev'd*, 474 F.2d 995 (6th Cir. 1973). However, in *United States v. Kleckner*, 273 F. Supp. 251 (S.D. Ohio), *appeal dismissed*, 382 F.2d 1022 (6th Cir. 1967), the court denied enforcement of the IRS summons and sustained the taxpayer's argument that the special agent's purpose was to obtain information for criminal prosecution, and not to assess any civil tax liability. *Id.* at 252.

115. *Donaldson v. United States*, 400 U.S. 517, 536 (1971).

116. *United States v. National State Bank*, 454 F.2d 1249, 1252 (7th Cir. 1972); *United States v. Bell*, 448 F.2d 40, 42 (9th Cir. 1971).

117. See *United States v. Berkowitz*, 355 F. Supp. 897, 900 (E.D. Pa. 1973), *aff'd*, 488 F.2d 1235 (3d Cir. 1974), and cases cited therein; *accord*, *United States v. Powell*, 379 U.S. 48, 58 (1964); *United States v. Weingarden*, 473 F.2d 454, 461 (6th Cir. 1973); *United States v. Ferrone*, 438 F.2d 381 (3d Cir.), *cert. denied*, 402 U.S. 1008 (1971); *United States v. Artman*, 435 F.2d 1375, 1377 (6th Cir. 1970); *DiPiazza v. United States*, 415 F.2d 99, 103 (6th Cir. 1969), *cert. denied*, 402 U.S. 949 (1971); *United States v. Oaks*, 360 F. Supp. 855, 858 (C.D. Cal. 1973); *United States v. Nunally*, 278 F. Supp. 843, 846 (W.D. Tenn. 1968).

118. 388 F.2d 520 (2d Cir. 1968).

119. *Id.* at 523 (citations omitted); *accord*, *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

120. See *United States v. DeGrosa*, 405 F.2d 926, 928 (3d Cir.), *cert. denied*, 394 U.S. 973 (1969); *United States v. Harrington*, 388 F.2d 520, 523 (2d Cir. 1968); *Foster v. United States*, 265 F.2d 183 (2d Cir.), *cert. denied*, 360 U.S. 912 (1959); *First Nat'l*

ernment to a standard of strict compliance one federal district court has stated that the IRS must specify just what records it wants.¹²¹ There, enforcement of a summons requiring production of several clients' records from a bank was denied because the IRS failed to specify the *exact* names of these individuals.¹²² The court characterized the request as "unnecessarily broad," stating that its enforcement would be unduly burdensome on the bank.¹²³

The requirement that a summons be specific is rooted in the constitutional requirement that it should not be *unreasonably burdensome*.¹²⁴ In associating this aspect with relevancy, the court in *United States v. Third Northwestern National Bank*,¹²⁵ denied enforcement of a section 7602 summons, stating that a burden on a third party to search voluminous records is unreasonable where the likelihood of discovering documents bearing on the taxpayer's liability has not been shown.¹²⁶ Again, in characterizing such tactics as "fishing expeditions," it was held in *United States v. Northwest Pennsylvania Bank & Trust Co.*,¹²⁷ that

The bank does have the right to complain of unreasonable burdens thrust upon it in attempting to comply with a summons "[T]he government is not entitled to go on a fishing expedition through appellant's records. It must identify with some precision the documents it wishes to inspect."¹²⁸

The same principle is brought out in *Stark v. Connally*¹²⁹ where it was

Bank v. United States, 160 F.2d 532, 534 (5th Cir. 1947); *United States v. Crespo*, 281 F. Supp. 928, 935 (D. Md. 1968); *United States v. First Nat'l Bank*, 173 F. Supp. 716, 720 (W.D. Ark. 1959).

121. *United States v. Northwest Pa. Bank & Trust Co.*, 355 F. Supp. 607, 614 (W.D. Pa. 1973); *accord*, *United States v. DeGrosa*, 405 F.2d 926, 928-29 (3d Cir.), *cert. denied*, 394 U.S. 973 (1969); *United States v. Dauphin Deposit Trust Co.*, 385 F.2d 129, 131 (3d Cir. 1967), *cert. denied*, 390 U.S. 921 (1968); *First Nat'l Bank v. United States*, 160 F.2d 532, 534 (5th Cir. 1947); *United States v. Buck*, 356 F. Supp. 370, 375 (S.D. Tex. 1973), *aff'd*, 479 F.2d 1327 (5th Cir. 1973); *United States v. First Nat'l Bank*, 173 F. Supp. 716, 720 (W.D. Ark. 1959). *But see* *United States v. Anderson Clayton & Co.*, 31 Am. Fed. Tax R.2d 1330, 1331 (S.D. Miss. 1973).

122. *United States v. Northwest Pa. Bank & Trust Co.*, 355 F. Supp. 607, 614 (W.D. Pa. 1973).

123. *Id.* at 614.

124. *United States v. Dauphin Deposit Trust Co.*, 385 F.2d 129, 131 (3d Cir. 1967), *cert. denied*, 390 U.S. 921 (1968). *See also* *United States v. DeGrosa*, 405 F.2d 926, 929 (3d Cir.), *cert. denied*, 394 U.S. 973 (1969); *Hubner v. Tucker*, 245 F.2d 35, 41 (9th Cir. 1957); *United States v. Buck*, 356 F. Supp. 370, 375 (S.D. Tex. 1973), *aff'd*, 479 F.2d 1327 (5th Cir. 1973); *United States v. Northwest Pa. Bank & Trust Co.*, 355 F. Supp. 607, 610 (W.D. Pa. 1973).

125. 102 F. Supp. 879 (D. Minn. 1952).

126. *United States v. Third Northwestern Nat'l Bank*, 102 F. Supp. 879, 883 (D. Minn. 1952).

127. 355 F. Supp. 607 (W.D. Pa. 1973).

128. *Id.* at 610, *quoting* *United States v. Dauphin Deposit Trust Co.*, 385 F.2d 129, 131 (3d Cir. 1967), *cert. denied*, 390 U.S. 921 (1968).

129. 347 F. Supp. 1242 (N.D. Cal. 1972).

noted that "fishing expeditions" into private papers, or dragnet searches carried out on the mere suspicion of possibly finding incriminating evidence, have never been condoned by the courts.¹³⁰ Courts, however, have held that a certain amount of fishing is justified if reasonable grounds for examination are shown.¹³¹ "But the 'fishing' cannot amount to an inquisitorial or arbitrary inquiry on the part of the tax investigators. A reasonable basis for making the inquiry must exist."¹³²

The crucial question for the courts in applying this reasonable basis test to the IRS's Tax Preparers Project, therefore, is whether or not the scope of the examination is merely arbitrary or inquisitorial. Does the error of the tax preparer in filling out a *single* tax return for a *fictional* taxpayer constitute a substantial reason to launch an unlimited fishing expedition into the personal records of the tax preparer in order to supposedly determine the liability of yet *another* party? The court in *Theodore* thinks not.¹³³

SIGNIFICANCE OF BERKOWITZ, TURNER AND THEODORE

In considering the objectives of the IRS in initiating the Tax Preparers Project, it appears that the standards of good faith and proper purpose established by the Supreme Court in *Donaldson v. United States*¹³⁴ have played the most influential role bearing upon the decisions coming forth from the cases relating to the government's investigation of tax preparers. Both *Turner* and *Theodore* have subscribed to the reasoning set forth in *Berkowitz* which requires that the summons be (1) "issued by the IRS pursuant to section 7602 in furtherance of a legitimate purpose in good faith and prior to a recommendation for criminal prosecution,"¹³⁵ and (2) that it be "precisely and narrowly drawn so as not to place a burden on respondents [the tax preparers] out of proportion to the objective sought to be obtained."¹³⁶

130. *Id.* at 1250. See also *FTC v. American Tobacco Co.*, 264 U.S. 298, 305-06 (1924).

131. *In re Keegan*, 18 F. Supp. 746, 748 (S.D.N.Y. 1937); accord, *United States v. Third Northwestern Nat'l Bank*, 102 F. Supp. 879, 881 (D. Minn. 1952).

132. *United States v. Third Northwestern Nat'l Bank*, 102 F. Supp. 879, 881-82 (D. Minn. 1952).

133. *United States v. Theodore*, 479 F.2d 749, 754-55 (4th Cir. 1973).

134. 400 U.S. 517 (1971).

135. *United States v. Berkowitz*, 355 F. Supp. 897, 902 (E.D. Pa. 1973), *aff'd*, 488 F.2d 1235 (3d Cir. 1974); see *United States v. Turner*, 480 F.2d 272, 277-78 (7th Cir. 1973); *United States v. Theodore*, 479 F.2d 749, 753 (4th Cir. 1973).

136. *United States v. Berkowitz*, 355 F. Supp. 897, 902 (E.D. Pa. 1973), *aff'd*, 488 F.2d 1235 (3d Cir. 1974); see *United States v. Turner*, 480 F.2d 272, 279 (7th Cir. 1973); *United States v. Theodore*, 479 F.2d 749, 755 (4th Cir. 1973). Though the court in *Turner* did not find it necessary for the IRS to specifically name those persons whose returns it sought to examine, it did require the summons to be specific in the sense of compelling only those records which were material and relevant to the investigation. *United States v. Turner*, 480 F.2d 272, 279 (7th Cir. 1973).

Under these circumstances, all three courts have also recognized that the alleged purpose of the government to determine the *civil tax liability* of the taxpayer is legitimate and in good faith.¹³⁷ Because of this interpretation by the courts, the tax preparer has in fact lost all access to his fifth amendment rights, regardless of the incriminating nature of the materials sought.

In the past, the courts have permitted the summons to issue (even where there exists a strong likelihood of criminal prosecution) so long as it included the proper civil purpose.¹³⁸ In those cases, the likelihood of criminal prosecution referred to, however, pertained only to the taxpayer himself and not to third parties. Of crucial significance then, is that the courts involved in litigation stemming from the Tax Preparers Project have failed to attribute any great importance to the fact that the tax preparer may later be compelled to avail himself for criminal prosecution because he has relinquished his own personal property to assist in the investigation of "others."

Section 7602 authorizes the summons and examination of books, papers, or other data "for the purpose of ascertaining the correctness of any return . . . in respect of any internal revenue tax . . ."¹³⁹ Assessing civil tax liability, then, is the only authorized justification for issuing a section 7602 summons, and by simply alleging that the assessment of a taxpayer's civil tax liability is the reason for the investigation, the IRS can thereby acquire the authority to criminally prosecute a defenseless third party. Such application of this summons is contrary to the meaning of the statute.

It is not the civil tax liability of the tax preparer which is under investigation here.¹⁴⁰ By allowing such issuance of the summons, the courts have made it an instrument which can be used by the government to gather crim-

137. *United States v. Turner*, 480 F.2d 272, 278 (7th Cir. 1973); *United States v. Theodore*, 479 F.2d 749, 753 (4th Cir. 1973); *United States v. Berkowitz*, 355 F. Supp. 897, 901-02 (E.D. Pa. 1973), *aff'd*, 488 F.2d 1235 (3d Cir. 1974).

138. *Donaldson v. United States*, 400 U.S. 517, 532 (1971) and cases cited therein. See also *United States v. Held*, 435 F.2d 1361, 1364-65 (6th Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); *United States v. Artman*, 435 F.2d 1375, 1377 (6th Cir. 1970); *DiPiazza v. United States*, 415 F.2d 99, 103 (6th Cir. 1969), *cert. denied*, 402 U.S. 949 (1971).

139. INT. REV. CODE OF 1954, § 7602.

140. The court in *Theodore* attaches no merit to this fact and dismisses it without discussion, citing *Hinchcliff v. Clarke*, 371 F.2d 697 (6th Cir.), *cert. denied*, 387 U.S. 941 (1967); *United States v. Theodore*, 479 F.2d 749, 754 (4th Cir. 1973). What the court failed to state, however, was the fact that in the *Hinchcliff* case, though the court there considered the summons to be valid and enforceable against a third party in possession of pertinent records, none of the evidence gathered could be used for criminal prosecution.

By brief and at oral argument the IRS seeks to assure this court (as it did the District Judge) that its investigation in the *Hinchcliff* matter has no purpose of possible criminal prosecution. . . . However this may be, our decision in this case is squarely planted upon the representation made to us. Hence, *no information secured as a result of this decision may be employed in any criminal prosecution.* *Hinchcliff v. Clarke*, 371 F.2d 697, 701 (6th Cir.), *cert. denied*, 387 U.S. 941 (1967) (emphasis added).

inal evidence against any third party, compelling him to give up his own property under the guise of an investigation of another taxpayer. In the eyes of the IRS, the tax preparer is supposedly a third party. He has the duties of a third party (here the production of the requested materials), yet because the summons is not, from outward indications, directed at *his* criminal liability (though criminal prosecution might certainly be the end result), he has not the right to protect himself. In actuality, the summons is issued directly to the tax preparer as an interested party, and the very controversy involved is the fact that it is his own liability which is being questioned.¹⁴¹ Where the possibility of criminal prosecution concerns parties other than the taxpayer under investigation, the government should be estopped from utilizing evidence obtained under the authority of a section 7602 summons. Such use of this summons goes far beyond the purpose of "ascertaining the correctness of any return,"¹⁴² with respect to any internal revenue tax, and must be considered an abuse of statutory power.¹⁴³

141. This, in effect, was Turner's second defense but the court flatly rejected the argument stating that the summons was directed "at an essentially civil area of inquiry." *United States v. Turner*, 480 F.2d 272, 278 (7th Cir. 1973). Yet in reality the tax returns of Turner himself are not being examined. The civil liability at issue is not his own, but that of other taxpayers. The only effect that this investigation could have on Turner would be of a criminal nature, which is totally unrelated to the "essentially civil area of inquiry." An examination of the Tax Preparers Project operational procedures reveals that this is the case. Where the IRS's audit uncovers errors in the tax preparer's computations of the returns, the affected taxpayers are contacted to pay any additional tax (undoubtedly the result of an essentially civil inquiry). On the other hand, where the evidence collected during this very same audit supports criminal prosecution of the tax preparer, the Intelligence Division of the IRS takes charge just for that purpose. *United States v. Theodore*, 479 F.2d 749, 752 (4th Cir. 1973). In other words, the tax preparer is in actuality being deprived of his constitutional rights for although the IRS is conducting a civil inquiry which does not concern him, with respect to the tax preparer, the inquiry of the Intelligence Division is undoubtedly criminal in nature. This is not to say that the tax preparer should not be made to account for his activities in the preparation of returns for the public. However, he should at least be afforded the rights which are guaranteed to all citizens under our legal system. In litigation of this type, the courts would do well to seriously consider the words of Judge Weinman, in *United States v. Kleckner*, 273 F. Supp. 251 (S.D. Ohio), *appeal dismissed*, 382 F.2d 1022 (6th Cir. 1967) concerning the production of records for a supposed civil investigation which smacked of criminal implications. In upholding the constitutional protections of the taxpayer, he denied enforcement of the summons stating:

The purpose of the subpoenas cannot be said to be the obtaining of financial records *relevant* to a civil proceeding for the collection of income tax; the discovery is directed toward the obtaining of information for the filing of a criminal action. The Court would be naive to come to any other conclusion. Therefore, Logan cannot be required to produce the papers because of his privilege against self-incrimination.

Id. at 252.

142. INT. REV. CODE OF 1954, § 7602.

143. This does not mean that the IRS should always be precluded from obtaining books, papers, records, etc. for examination merely because the evidence is being gathered for criminal prosecution. It simply means that where this is the case, a section 7602 summons is not the proper tool; IRS agents may instead obtain a search warrant

With regard to the issue of whether the summons is so "precisely and narrowly drawn so as not to place a burden on respondents [tax preparers] out of proportion to the objective sought to be obtained,"¹⁴⁴ the courts go their separate ways. *Turner* held that a "John Doe" summons was sufficiently precise and narrow in this situation.¹⁴⁵ In so doing, this court relied on the decision of the federal district court in *United States v. Theodore*,¹⁴⁶ which found a "John Doe" summons, calling for all the returns of a tax preparer's clients, to be valid.¹⁴⁷ On appeal of *Theodore*, however, the Court of Appeals for the Fourth Circuit expressly rejected this interpretation as applied to the Tax Preparers Project.¹⁴⁸ "Courts have in the past sanctioned the use of John Doe summonses, but all such cases involved either a single unidentified taxpayer or a small group of unknown taxpayers."¹⁴⁹ In reversing the lower court's decision the court in *Theodore* limited the interpretation of a section 7602 summons:

We hold that this language only allows IRS to summon information relating to the correctness of a particular return or to a particular person and does not authorize the use of open-ended Joe Doe summonses. Therefore, we find the summons directing Charles Theodore to produce all of the returns and all of the work records relating to all of his clients for the years 1969-1971 is too broad and too vague to be enforced.¹⁵⁰

Note, however, that the court in *Theodore* did agree that the IRS was authorized to obtain from the tax preparer, via a section 7602 summons, the names, addresses, and social security numbers of the taxpayers in question, if the Commissioner could show that he has no other means of attaining this information.¹⁵¹ As this was the only information sought in *Berkowitz* and *Turner*, it would appear that, under the Tax Preparers Project, a section 7602 summons can be considered appropriate in procuring such data.

The operations of the Tax Preparers Project, however, do go beyond the mere acquisition of names, addresses and social security numbers,¹⁵² and it is in this regard that the most dramatic change in the course of the law

governed by Rule 41 of the Federal Rules of Criminal Procedure, which will afford the party under investigation ample opportunity to be apprised of his rights. See INT. REV. CODE OF 1954, § 7609(b); *Vonder Ahe v. Howland*, 31 Am. Fed. Tax R.2d 1075 (9th Cir. 1973).

144. *United States v. Berkowitz*, 355 F. Supp. 897, 902 (E.D. Pa. 1973), *aff'd*, 488 F.2d 1235 (3d Cir. 1974).

145. *United States v. Turner*, 480 F.2d 272, 279 (7th Cir. 1973).

146. 347 F. Supp. 1070 (D.S.C. 1972), *rev'd*, 479 F.2d 749 (4th Cir. 1973).

147. *United States v. Theodore*, 347 F. Supp. 1070, 1075 (D.S.C. 1972), *rev'd*, 479 F.2d 749 (4th Cir. 1973).

148. *United States v. Theodore*, 479 F.2d 749, 754-55 (4th Cir. 1973). *But see* *United States v. Carter*, CCH STAND. FED. TAX REP., U.S. TAX CAS. ¶ 9154, at 83,167 (5th Cir. Dec. 26 1973).

149. *Id.* at 754.

150. *Id.* at 755.

151. *Id.* at 755.

152. *Id.* at 752.

has occurred. The interpretation given by the Court of Appeals for the Fourth Circuit in *Theodore* virtually destroys this government project as an enforcement tactic of the IRS where it seeks more than merely this limited information.¹⁵³ Therein the court stated:

[T]he Internal Revenue Service is not to be given unrestricted license to rummage through the office files of an accountant in the hope of perchance discovering information that would result in increased tax liabilities for some as yet unidentified client. Section 7602 summonses were not meant to give the IRS such investigative and inquisitorial power.

. . . The Government cannot go on a "fishing expedition" through appellants' records, and where it appears that the purpose of the summons is "a rambling exploration" of a third party's files, it will not be enforced. . . .

Section 7602 summonses are not meant to serve as a tool to police the accounting profession. Nor are they to be used to obtain from large accounting firms the complete records of all clients so that the IRS might determine if there is an error in the return of some unknown taxpayer.¹⁵⁴

*United States v. Theodore*¹⁵⁵ avails the tax preparer and any third party the first significant opportunity to protect himself against the unwarranted breadth of a section 7602 summons. It establishes their right to object to such a summons where it does not relate to a particular return or a particular person. This decision in effect pronounces that the IRS has gone too far, it has "caught its limit" and has lost its "license to fish." *Theodore* has removed the unprecedented barb from the section 7602 summons which has been indiscriminately used to hook its recipients.

Future of Tax Preparers Project

In light of the conflicting authority among the circuits concerning the rights of the tax preparer, his defenseless susceptibility to criminal prosecution under a section 7602 summons, and the very extensiveness of the Tax Preparers Project itself,¹⁵⁶ it appears to be almost inevitable that the issues involved in these cases will eventually reach the Supreme Court, especially if the IRS continues in seeking to compel the production of records, workpapers, documents, etc. Whether the high court would sustain the holding in *Theodore* remains to be seen, but the decision does present very strong arguments for the protection of the constitutional rights which are thwarted by the Tax Preparers Project. The constitutionality of the very Tax Preparers Pro-

153. See *United States v. Theodore*, 479 F.2d 749, 755 (4th Cir. 1973).

154. *Id.* at 754 (citations omitted).

155. *Id.*

156. According to the testimony of a supervisory IRS agent in *Turner*, about 175 tax preparers had been summoned in the Chicago area alone. *United States v. Turner*, 480 F.2d 272, 274 (7th Cir. 1973).

ject itself is also not beyond reproach. In addition to the fourth amendment violation against unreasonable searches and seizures as noted in *Theodore*,¹⁵⁷ there is some indication that the misrepresentation made to the tax preparer by the IRS's undercover agents in the initial stages of these investigations is also violative of fourth amendment protections.¹⁵⁸

CONCLUSION

The characterization of the investigative power of the Internal Revenue Service as being inquisitorial is by no means a misnomer. The government's authority to summon and examine documents, records and other materials has been almost unlimited in scope. The courts have readily supported the IRS's acquisition of information from both taxpayers and third parties alike where the government simply alleges civil tax liability to be a purpose of their investigation, even when a strong possibility of criminal prosecution exists. Because of this tendency of the courts to sustain the government's authority in these tax investigations, the weakness of the summons recipient in defending his position is rather evident.

Under these circumstances, taxpayers and third parties as well have encountered considerable difficulty in effectively asserting their constitutional rights. Often the uncertainty as to which rights are to be applicable in the litigant's own situation interferes with his assertion of appropriate defenses.¹⁵⁹ The courts have been quick to analogize from the rights of the taxpayer to the rights of third parties, and now even to those of the tax preparer. Yet do all these parties stand in the same position? It is suggested here that the position of the tax preparer is distinguishable from that of other third parties, as he has a personal stake in the investigation in protecting himself from criminal prosecution. If the tax preparer himself is not a part of the

157. *United States v. Theodore*, 479 F.2d 749, 754 (4th Cir. 1973).

158. *See Goodman v. United States*, 285 F. Supp. 245 (C.D. Cal. 1968).

159. *See, e.g., United States v. Buck*, 356 F. Supp. 370 (S.D. Tex. 1973), *aff'd*, 479 F.2d 1327 (5th Cir. 1973) where the taxpayer saw his valuable fifth amendment privilege slip through his fingers because he failed to assert his rights completely. In *Buck*, the taxpayer "asserted the privilege as to two safety deposit boxes and their contents Other records which taxpayer or his counsel deemed to be incriminating could have received similar protection." *Id.* at 377. Also in *Foster v. United States*, 265 F.2d 183 (2d Cir.), *cert. denied*, 360 U.S. 912 (1959) a London bank lost out on a fourth amendment challenge. "[T]he Bank makes no claim that compliance will cause it undue hardship." *Id.* at 188. In *Dipiazza v. United States*, 415 F.2d 99 (6th Cir. 1969), *cert. denied*, 402 U.S. 949 (1971), the taxpayer failed to take advantage of the possibility of improper purpose. "The appellants did not even undertake to develop any facts to show that the summonses were issued for an unlawful purpose." *Id.* at 102-03. In *United States v. Schmidt*, 360 F. Supp. 339 (M.D. Pa. 1973) the taxpayer neglected to assert fifth amendment privileges available to him. "Since Schmidt *does not contend* that he would incriminate *himself* by testifying . . . it would be inconsistent with the policy of the privilege to allow him to assert it." *Id.* at 344-45 (emphasis added).

IRS's investigation to determine civil tax liability, he must be afforded access to his constitutional rights, especially if he is to be compelled to reveal information which may result in his criminal prosecution. This reasoning should also apply to any third party subject to the same criminal liability.

The litigation evolving from the recently established Tax Preparers Project of the Internal Revenue Service has raised serious issues. Though the availability of fifth amendment privileges still appears to be burdened under the efficaciousness of the government's pleadings, the decision of the Court of Appeals for the Fourth Circuit in *United States v. Theodore*,¹⁶⁰ with its strict interpretation of the language in *Harrington* and its application of the principles espoused in *Humble*, has taken a needed step toward restoring the protection guaranteed under the fourth amendment to its proper place. This decision may also be the turning point in the case law, leading to a more rigid interpretation by the courts of the government's authority in issuing and enforcing a section 7602 summons. No doubt, *Theodore* constitutes a severe setback to the enforcement tactics utilized by the IRS under the Tax Preparers Project, but hopefully it will also lead to a widespread recognition of the constitutional privileges to which all third parties are entitled.

160. 479 F.2d 749 (4th Cir. 1973).