1964

The Use of the Administrative Summons in Federal Tax Investigations

James D. Burroughs

Follow this and additional works at: http://digitalcommons.law.villanova.edu/vlr

Part of the Administrative Law Commons, Criminal Procedure Commons, and the Tax Law Commons

Recommended Citation
Available at: http://digitalcommons.law.villanova.edu/vlr/vol9/iss3/1

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
THE USE OF THE ADMINISTRATIVE SUMMONS IN FEDERAL TAX INVESTIGATIONS*

JAMES D. BURROUGHS†

THE POWER to investigate and to compel the production of a taxpayer's records has long been recognized as a necessary aspect of our revenue laws. The statutes enacted by Congress for this purpose are inquisitorial in character and enable the Secretary or his delegate to properly determine, assess and collect taxes. These statutes are necessary and basic to a proper enforcement of our tax laws.

I.

GENERAL POWERS AND LIMITATIONS

The power to investigate the liability of any person for any internal revenue tax is conferred by section 7602 of the Internal Revenue Code of 1954. This section empowers the Secretary of the Treasury or his delegate, to conduct examinations for the purpose of (1) ascertaining the correctness of any return, (2) making a return where none has been made, (3) determining liability for tax, and (4) collecting any such liability. Specific authority is granted to examine any books, papers, records or other data which may be relevant or material to the inquiry, to summon the taxpayer and other persons to produce books and records and to take testimony under oath.

An examination is authorized for any of the four purposes enumerated in the statute. The statute permits the Secretary or his delegate, for the purposes stated, to summon any taxpayer or third person he deems proper, to produce such books, papers, records, or

* The views expressed herein are the author's and should not be considered as being the opinion of the Treasury Department, the Internal Revenue Service, or the Chief Counsel's Office.

† B.S., 1957, LL.B., 1960, University of North Carolina; Office of Chief Counsel, Southeast Region, Internal Revenue Service.
other data, and to give testimony, under oath, as may be relevant or material to such inquiry.\(^1\) This authorization is quite broad and covers both civil and criminal investigations with regard to the specified topics.\(^2\) The powers granted have often been analogized to the fact finding powers of federal grand juries.\(^3\)

While the powers granted cover a wide spectrum, they are not without confines. Section 7602 specifically provides that the records or information must be relevant or material to the inquiry. No taxpayer is to be subjected to unnecessary examinations or investigations, and only one inspection is to be made of the taxpayer's books of account for each taxable year unless the Secretary or his delegate, after investigation, notify the taxpayer in writing that an additional inspection is necessary.\(^4\) There are also limitations placed on the time and place of the examination.\(^5\)

The powers granted by section 7602 are not extinguished when the taxpayer files a petition with the Tax Court to review the asserted deficiencies.\(^6\) The rationale behind this ruling is based on the fact that the Government may apply to the Tax Court to increase the deficiency. This may necessitate preparing the "case in advance of a further examination, which is quite another matter from producing evidence in support of it."\(^7\) Section 7602 is not applicable where there is an indictment pending against the taxpayer prior to the issuance of the summons.\(^8\)

The summons must be utilized for the purpose for which it was granted. "The limitations implicit in every grant of power are that it will be used not colorably, but conscientiously for the realization of these specific ends contemplated by the donors of the power."\(^9\) The Government cannot circumvent the federal rule against pre-trial discovery by the use of the summons.\(^10\) However, where the summons has been issued prior to indictment for criminal charges, the right to enforce it does not cease upon indictment.\(^11\)

---

9. *Id.* at 251.
The fact that an organization may be exempt from taxation does not prohibit the Internal Revenue Service from conducting an examination of its books and records.\textsuperscript{12} If the investigatory right were denied on the claim that the taxpayer was exempt from taxation, "the court would in effect open the door to similar claims from every person or organization and would be taking from the Commissioner of Internal Revenue the duty of ascertaining whether a tax is due in his opinion."\textsuperscript{13}

The statute grants the right to examine books or records "wherever they are found."\textsuperscript{14} The right to examine also includes the right to copy or photostat.\textsuperscript{15} The statute gives the Secretary or his delegate discretion as to the means of investigation as well as the subjects of investigation.\textsuperscript{16} It also appears that the party summoned can be called upon to prepare certain statements from documents within his possession.\textsuperscript{17}

A. Authority Not Personal to the Secretary

The statutory authority vested in the Secretary is not personal to him, but also extends to his delegate. Another section of the code defines the phrase Secretary and his delegate,\textsuperscript{18} and the regulations\textsuperscript{19} prescribe the list of officers and employees who are authorized to issue a summons pursuant to this section. For the most part investigations in the field will be conducted by special agents, revenue agents and estate tax examiners, all of whom have the authority to issue the summons.\textsuperscript{20} All investigating agents carry a "Pocket Commission" to authenticate their status.\textsuperscript{21}

Investigations are usually initially conducted by revenue agents or estate tax examiners for the purpose of determining the taxpayer's correct civil tax liability. They ordinarily begin their investigation with an informal, oral request that the taxpayer or other individual voluntarily answer questions and make his records available. In the event the oral request is not honored, a summons may be issued requesting the person to appear at a certain time and place to give


\textsuperscript{14} Ibid.

\textsuperscript{15} Boren v. Tucker, 239 F.2d 767 (9th Cir. 1956).

\textsuperscript{16} Boren v. Tucker, 239 F.2d 767 (9th Cir. 1956).

\textsuperscript{17} See Donnelly v. United States, 201 F.2d 826 (9th Cir. 1953), where the court upheld a summons modified by the district court to produce only the names of the taxpayers and dates of the tax returns.


\textsuperscript{19} Treas. Reg. § 301.7602-1 (c).


\textsuperscript{21} Any taxpayer has a legitimate right to demand that this document be shown before providing any information. I.T. 2078, III-2 Cum. Bull. 351 (1924); News Release IR-144, Feb. 6, 1956.
testimony or to produce certain books and records. Such a summons is merely a formal demand issued pursuant to section 7602.

Sometimes during the course of their preliminary investigations, revenue agents uncover irregularities that indicate criminal fraud on the part of the taxpayer. In cases of this nature, a request is usually made for a special agent to be assigned for a joint investigation. The special agent conducts his investigation with the purpose of uncovering evidence that would sustain a charge of criminal fraud. As a general rule he is the only person that conducts such an investigation. The revenue agents and estate tax examiners are primarily concerned with the civil tax liability of the taxpayer.

B. Service of the Summons

Formal requirements for service of the summons are prescribed by section 7603. Service may be made, by the Secretary or his delegate, by delivering an attested copy in hand to the person to whom it is directed, or by leaving the same at his last and usual place of abode.

Unlike the judicial subpoena in a civil case, which normally is effective only within the judicial district where it originates, the summons may be served anywhere within the United States. The physical location of documents described in a duces tecum summons is unimportant, provided they are subject to the control of an individual who has been validly served. Control and not actual possession is the important factor. In the case of a corporation there is a presumption that it is in possession and control of its own books and records.

A summons addressed to an individual in his capacity as a corporate officer or agent is sufficient to require the production of corporate books and records. However, a summons can be served on a corporation without being directed to a specific corporate officer. In Wilson v. United States the Court stated:

Where the documents of a corporation are sought, the practice has been to subpoena the officer who has them in his custody. But there would seem to be no reason why the subpoena duces

23. First Nat'l City Bank v. IRS, 271 F.2d 616 (2d Cir. 1959), cert. denied, 361 U.S. 948, 80 S.Ct. 609 (1960). The bank was required to produce certain records of its foreign branch in Panama; In re Rivera, 79 F. Supp. 510 (S.D.N.Y. 1948) (a New York bank was required to produce records maintained by its branch in Puerto Rico).
24. Ibid.
27. 221 U.S. 361, 31 S.Ct. 538 (1911).
tecum should not be directed to the corporation itself. . . . Possessing the privileges of a legal entity, and having records, books and papers, it is under a duty to produce them when they may properly be required in the administration of justice. 28

A corporate officer can be held in contempt where he is responsible for the corporation's failure to produce in response to a valid summons, even though it was not specifically directed to him. 29

C. **Time and Place of Examination**

Section 7605(a) 30 provides that the date fixed for appearance shall be not less than ten days from the date of the summons. This ten day period is not specifically related to the date of service of the summons. The section refers only to the "date of the summons." There is no judicial authority interpreting this aspect of the section, but in all probability it will be interpreted as meaning date of service. The obvious intent of the provision is frustrated unless the date of service is controlling.

The statute does not specify where an examination of books and records shall be conducted. 31 Its only requirement is that the time and place fixed for the examination shall be "reasonable under the circumstances." This undoubtedly places some limitation upon the distance that a person may be required to travel. In one case, 32 a corporation president was required to bring corporate records to a revenue agent's office, a distance of twenty-five miles, and leave them there for an anticipated investigation of four months' duration. The examination had previously been attempted by the agent in the taxpayer's office, and after a great deal of interference by the corporate employees, the agent resorted to a summons to secure the desired information.

In cases where the taxpayer cooperates with the agent, the examination is most always conducted at the taxpayer's office or home. In the event he does not cooperate, the agent is forced to issue a summons and require the taxpayer to bring the records to him. The summons normally requires that the person appear at the nearest internal revenue office. 33 The agents usually work out satisfactory arrangements which permit inspection of the books with a minimum of interference. Under these circumstances it is doubtful that distance will ever present the

28. Id. at 374-75, 31 S.Ct. at 542.
33. In re Wolrich, 84 F. Supp. 481 (S.D.N.Y. 1949), the court held that the office of the agent was a fair and proper place under the circumstances to examine the records.
taxpayer with an adequate defense. Any limitations by the courts under these circumstances would severely handicap the agents in their investigations.

As to the length of time which the agent can utilize the records for investigation, the court in United States v. United Distillers Prods. Corp.\textsuperscript{34} indicated that the rule as to a reasonable time and place will be elastic enough to permit a thorough examination without undue hardship upon either the taxpayer or agent. The time allowed for investigation seemingly depends upon the nature and complexity of the investigation being conducted by the agent. Presumably the same rule applicable to taxpayers under investigation applies to third parties since section 7605(a) merely refers to examinations pursuant to section 7602, which does not distinguish between taxpayers and third parties. The statute does not in specific terms limit the time within which books and records must be examined.

D. Failure to Obey

The summons is limited to the extent that it gives the Secretary, or his authorized representative, the authority but not the power to compel compliance with it.\textsuperscript{35} A taxpayer may, in the first instance, thwart an investigation on the part of the Secretary or his delegate by his refusal to obey. The refusal itself may be the result of perverseness on the part of the taxpayer, or a bona fide belief that the Government representative is overstepping the “power boundaries” of his examination. In any event such refusal, however motivated, is not a contempt since the Secretary and his agents are representatives of an administrative agency, not a judicial tribunal.

Refusal to comply with a summons issued by an agent may result in the institution of a proceeding in the United States District Court for the district in which the subpoenaed person resides, for an order to enforce the summons. Section 7604(b)\textsuperscript{36} authorizes the Secretary or his delegate to apply to the district court for an attachment against the witness as for a contempt, but in many instances the usual procedure is for the Secretary or his delegate, which is usually the district director, to petition the district court for an order requiring the witness to comply with the summons, or show cause why he should not be held in contempt. An order by the district court commanding appearance before an internal revenue agent, and the production of documents and rendering of testimony is final and thus appeal-

\textsuperscript{34} 156 F.2d 872 (2d Cir. 1946).
\textsuperscript{35} See In re Wolrich, 84 F. Supp. 481 (S.D.N.Y. 1949).
\textsuperscript{36} INT. REV. CODE of 1954.
able. Failure to obey the court order lays the person open to a contempt proceeding. There are also possible criminal consequences for disobedience of a summons. Willful failure to supply information required by the code is punishable as a misdemeanor under section 7203, and "neglect" to obey a summons is punishable by fine or imprisonment under section 7210. The possibility of punishment for willful failure to supply information has been minimized by the decision in United States v. Murdock. In that case the Supreme Court held that the refusal must be prompted by bad faith or evil intent. It was not sufficient for the Government to establish that the refusal was intentional and without legal justification. One who refuses to comply with a summons, believing in good faith that the refusal is legally justified, does not risk conviction under this section in the event his position proves to be erroneous.

Complete disregard of the summons may subject the person concerned to criminal prosecution under section 7210, which prescribes punishment for "neglect" to appear or to produce records. Only one case has been noted in which this section has been utilized, and in that case the taxpayer was found guilty. The court construed "neglect" as meaning something more than mere inadvertence. It stated that the word implies that the taxpayer "must have willfully failed to comply with the summons with knowledge that a reasonable man should have had that he was failing to do what the summons required him to do." The taxpayer treated the summons in a casual manner and made no bona fide effort to produce the books and records or to ascertain if they were in existence. He contended the books had been destroyed by fire and so stated under oath. The books and records were later produced in compliance with a grand jury subpoena, indicating they had been in existence at the time the summons was served. The court stated that had the taxpayer made any sort of investigation he would have found that the records were in existence.

Prosecution under section 7210 should not be risked needlessly. An individual should not disregard a summons served upon him. If it

40. Ibid.
41. 290 U.S. 389, 54 S.Ct. 223 (1933).
is decided to contest the summons, the party summoned should appear with legal counsel and assert his objections before the examining agent. If the challenges to the summons are rejected by the examining agent, the party can still refuse to testify or produce, and the Secretary or his delegate will then have to proceed to enforce the summons in the district court since he has no power to enforce compliance. The enforcement action is an adversary proceeding and affords a judicial determination of the challenges to the summons and gives complete protection to the party summoned.44

E. Unnecessary Examinations or Investigations

Section 7605(b) of the 1954 Code imposes two distinct prohibitions on the Government in the course of conducting its investigations. It provides that no taxpayer shall be subject to unnecessary examinations or investigations, and that only one inspection of a taxpayer’s books may be made for such taxable year unless he is notified in writing by the Secretary or his delegate, after investigation, that an additional inspection is necessary. This section affords the taxpayer some protection against harassment by time-consuming, repeated examinations. "The legislative history, though sparse, tends to confirm the impression that Congress was primarily concerned with protecting taxpayers from examinations which were 'unnecessary' in the sense that they followed prior investigations of the same matter which has established that there was no basis for liability."45

"Unnecessary" has been interpreted to mean needless, useless or not required under the circumstances.46 "It is a general standard, not unlike the reasonable man in the negligence area, and therefore will be flexible and adaptable to changing conditions."47 The question of whether an investigation is unnecessary is one of fact.48

The right to be protected against unnecessary examinations or investigations is personal to the taxpayer under investigation. The Government is not prevented from seeking information from other sources.49 Investigation of third parties is not expressly prohibited.50

44. See Reisman v. Caplin, 375 U.S. 440, 84 S.Ct. 508 (1964). This is the first case in which the United States Supreme Court has passed upon the rights of a party summoned to appear before a hearing officer under § 7602.
47. Id. at 301.
50. DeMasters v. Arend, 313 F.2d 79 (9th Cir. 1963), petition for cert. dismissed, 375 U.S. 936; Application of Magnus, 299 F.2d 335 (2d Cir. 1962), cert. denied, 370 U.S. 918, 82 S.Ct. 1556 (1962); Foster v. United States, 265 F.2d 183, 188 n.3 (2d Cir. 1959).
Indeed, the section anticipates that such inquiries will be made since it intends that the taxpayer be notified only “after investigation” from which it is concluded an additional inspection is necessary.51

The taxpayer has no standing under this section to question the propriety of an examination of third parties or their records, even though such examination relates to his own tax liability.52 Similarly, a taxpayer whose records have been examined with respect to his own liability cannot refuse to give information from his records which is later sought with respect to another taxpayer.53 An opposite result here would virtually prevent inquiry into a taxpayer’s records once they had been examined with respect to his own tax liability.

Where the Government undertakes to make a second inspection of the taxpayer’s books without giving written notice as required by section 7605(b), it has been held that any asserted deficiency can be set aside.54 In instances where the taxpayer is aware of such examination and fails to object or voluntarily consents to a re-examination, he will be deemed to have waived his rights under the statute.55

F. Scope of Inquiry

As a general rule objections raised under this topic fall within two categories that overlap and are, to a considerable extent, interrelated. The first is based on the breadth of inquiry allowed and objections are raised as to the necessity, reasonableness and materiality of the investigation. These objections are usually premised on the restrictions set forth in section 7605(b) or the search and seizure aspects of the Fourth Amendment or both. The second is based on the lack of specificity of the documents sought and is related to the breadth of inquiry.

The scope of inquiry limitation requires the examining agent to specify with reasonable particularity the documents or records sought, and to show that these documents or records are relevant or material to the tax returns of a reasonably specific taxpayer or group of taxpayers. The examination must bear upon matters required to be included in the return under investigation.56 The courts will not countenance a mere exploratory search for information,57 nor will they allow their judgment to be supplanted by that of revenue agents. "The agents are

53. Hubner v. Tucker, 245 F.2d 35 (9th Cir. 1957).
54. Reineman v. United States, 301 F.2d 267 (7th Cir. 1962).
55. United States v. O’Connor, 237 F.2d 466 (2d Cir. 1956); Glassell v. Commissioner, 42 F.2d 653 (5th Cir. 1930).
56. First Nat’l Bank v. United States, 160 F.2d 532 (5th Cir. 1947); Martin v. Chandis Sec. Co., 33 F. Supp. 478 (S.D. Cal. 1940), aff’d, 128 F.2d 731 (9th Cir. 1942).
not the sole judges as to the scope of the examination. . . . They must satisfy the Court that what they seek may be actually needed." In Martin v. Chandis Sec. Co., the circuit court stated that the rights of an internal revenue agent to require production of papers and records for examination "are statutory, and to obtain the relief granted by the statute he must bring himself within the terms thereof."

Section 7603 states that the documents must be described with reasonable certainty. It has been held that the summons need only be sufficiently definite to afford the person summoned to produce it an opportunity to reasonably identify the material sought. This requirement was considered in First Nat'l Bank v. United States where Judge Waller, speaking for the Fifth Circuit held:

We do not mean that the revenue agent must be able to describe in minute detail every document and paper that he wishes to inspect, but he must be able to describe them with such reasonable particularity that the officers of the bank will have sufficient information to enable them to produce such records for the inspection of the revenue agent.

If the agent identifies the document with sufficient particularity to inform the person summoned as to what is desired and shows that it is relevant to his examination, then his examination will not be condemned under the traditional cry that it is a "fishing expedition."

"Some exploration or fishing necessarily is inherent and entitled to exist in all documentary productions. . . ." It is merely the arbitrary that is prohibited.

As to materiality and relevancy the test is whether or not the testimony, books or records might throw light upon the correctness of the taxpayer's returns. The limited purpose of a summons issued by an agent has been recognized where it was issued in an effort to require the production of books and records, without proper identification, specification and some showing that the documents demanded bear upon matters required to be included in the return of the party under investigation. In First Nat'l Bank v. United States, the court stated:

This court does not intend to hold that the Bank could not be required to produce records, that have been reasonably desig-
nated and identified, of transactions between other persons or firms and the taxpayers whose returns are under investigation. But the Bank cannot be required to produce B's accounts in an investigation of A's tax returns unless it is alleged that B's account checks, etc., bear upon the correctness of A's return or upon matters that should have been included in A's return. 66

The agent cannot conduct an examination of a taxpayer or his records in the nature of a fishing expedition, in order to obtain the names of unknown and unidentified parties who may have failed to report income. 67 A summons directed to a bank which requested that it check all of its records for possible transactions with a taxpayer was held invalid where it was shown that the taxpayer only had one known transaction with the bank. 68 The agent merely suspected that the taxpayer might have had previous transactions with the bank. The information could be obtained only by a laborious process which imposed an undue hardship on the bank. A corporation which sought to withhold its records to prevent disclosure of the names of stockholders in an exchange of stock between corporations was required to produce its records. 69 The class of persons was clearly identified, and the information sought imposed no undue hardship upon the corporation. Thus, it seems that the agent must indicate that he is investigating a reasonably definite individual or group and is not just performing the examination to see what he can uncover.

There are no uniform criteria applied by the various lower federal courts in determining the requirements as to necessity, reasonableness, relevancy and materiality to satisfy section 7605(b) and the Fourth Amendment. There appears to be a tendency to allow more latitude in the material sought where a summons is directed to a taxpayer. The Ninth Circuit greatly restricts the material that can be summoned from third parties. 70 The indications are that the Fifth Circuit would also apply a stricter standard where a third party is involved. 71 The Second Circuit rejects the contention that third parties should be subject to

66. Id. at 535.
67. McDonough v. Lambert, 94 F.2d 838 (1st Cir. 1938). The agent sought to determine who received payment of a $10,000 check drawn by a party under examination. The disallowance of the payment did not affect the tax liability of the party under investigation. The party also agreed to waive the item.
69. Miles v. United Founders Corp., 5 F. Supp. 413 (D.N.J. 1933); see also In re International Corp., 5 F. Supp. 608 (S.D.N.Y. 1934), where the company was required to produce the names and addresses of all persons for whom foreign corporations were organized over a period of two years.
70. Hubner v. Tucker, 245 F.2d 35 (9th Cir. 1957); Local 174 v. United States, 240 F.2d 387 (9th Cir. 1956).
71. First Nat'l Bank v. United States, 160 F.2d 532 (5th Cir. 1947).
different treatment than taxpayers. The interpretation of these various requirements by the courts appears to vary under the circumstances.

As a minimal means of preventing unreasonable requests, the Government must show some link of relevance between the class of documents demanded and the taxpayer under investigation. In situations where the taxpayer himself holds the documents, this requirement is automatically satisfied in practically all cases since any transactions in which the taxpayer has participated are likely to be relevant to his tax status. "The taxpayer has standing to object only if the use of the summons is an impermissible ruse to obtain the taxpayer's books and records or other material in violation of . . . [his] . . . constitutional rights."73

G. Examinations Barred by the Statute of Limitations

Judicial decisions have established the proposition that no examination may be made of years barred of assessment by the statute of limitations unless the Government is able to allege or show facts warranting suspicion of fraud.74 This restriction is not set forth in the Internal Revenue Code, but is recognized by most courts as implicit in the Government's investigative power. The showing is required to satisfy the courts that the investigation is reasonable and necessary.75

There is considerable conflict among the federal courts of appeal as to whether the Government has only to allege fraud or suspicion thereof to show the investigation is necessary, or whether it is required to show "probable cause," that is, a reasonable basis for suspecting fraud.76 Two grounds have generally been relied upon for requiring evidence showing the basis for suspecting fraud: (1) it is a violation of the privilege against unlawful search and seizure granted by the Fourth Amendment,77 and (2) it is essential to establish that the

74. The general rule is that the amount of tax imposed may be assessed within 3 years from the date of filing the return except that a return filed early is considered as being filed on the due date. The tax may be assessed anytime in the case of fraud, or where no return has been filed. Int. Rev. Code of 1954, § 6501.
examination is necessary as required by section 7605(b). The question is the same under either of the theories: is it reasonable to allow investigation of barred years without requiring some evidence to show the basis for suspecting that the years are not time-barred?

In O'Connor v. O'Connell, the First Circuit stated that it thought "the Secretary or his delegate, when a court order is needed to enforce compliance with a summons to testify as to a 'closed' year, should be required to establish to the court's satisfaction that there is probable cause for an investigation into such a year." The court pointed out that this prerequisite did not mean proof of fraud was required.

It means only that before the tax authorities are entitled to a district court order enforcing a summons directing a taxpayer to testify as to a closed year they must establish to the district court's satisfaction that a reasonable basis exists for a suspicion of fraud, or put another way, that there is probable cause to believe that the taxpayer was guilty of fraud in a statute barred year.

The Ninth Circuit has required a showing of probable cause prior to investigation of a barred year, but seems to have reversed itself in a recent opinion.

The Sixth Circuit appears to reject the probable cause theory, stating in Peoples Deposit Bank & Trust Co. v. United States, "nor was the District Court obliged to require proof of facts showing reasonable grounds to believe that the tax returns . . . were false or fraudulent." In Globe Constr. Co. v. Humphrey, the Fifth Circuit held that the allegations of the revenue agent in the form of an affidavit were sufficient to require the production of records for years barred by the statute of limitations. This decision appears to also reject the probable cause requirement. The Fourth Circuit noted the difference in view among the circuit courts and found it unnecessary to resolve the question. The court took it to be admitted that "a bona fide suspicion of fraud justifies the investigation of the appropriate records."
The Second Circuit, in *Foster v. United States*, 88 rejected the probable cause theory, stating that "an examination, whether of a taxpayer or a third party, is not unnecessary or unreasonable (within the meaning of the Fourth Amendment) merely because three years, or five years or any longer specified period of time has elapsed since the tax return under investigation was filed."89 It reiterated the rationale expressed in *United States v. United Distillers Prods. Corp.*90 that the Commissioner "should not be required to prove grounds for belief that the liability was not time-barred ‘prior to examination of the only records which provide the ultimate proof’."91 The court further indicated that section 7605(b) was not applicable because third parties were summoned.92 In *Application of United States (Carroll)*,93 the Second Circuit held that an investigation is not "unnecessary" under section 7605(b) even though facts are not alleged which indicate probable cause for investigation. It held that such an allegation or showing was not essential.

Where the taxpayer is suspected of omitting more than twenty-five per cent of gross income,94 the test as to whether an examination can be made after the normal three-year statute of limitations appears similar to that used in cases of suspected fraud. In the *United Distillers Prods.* case, the court allowed the examination after the three year statute, stating: "Obviously, this provision [extending assessment time in the case of an omission of more than twenty-five per cent of gross income] would be of no practical effect if the Bureau were barred from making the investigation necessary to ascertain such a misstatement."95

II.

**Constitutional Limitations on the Government's Right To Obtain Information**

Basic elements of our free society are the constitutional provisions which protect an individual against compulsory self-incrimination96

---

89. *Id.* at 187.
90. 156 F.2d 872 (2d Cir. 1946).
91. 265 F.2d 183, 187 (2d Cir. 1959).
92. The courts are in conflict as to whether § 7605(b) is applicable to third parties. The Ninth Circuit has ruled both ways on the question. Compare *Hubner v. Tucker*, 245 F.2d 35 (9th Cir. 1957), with *Martin v. Chandis Sec. Co.* 128 F.2d 731 (9th Cir. 1942).
94. The statute of limitations is extended to six years from the date of the filing of the return where more than 25% of gross income is omitted from the taxpayer's return. *Int. Rev. Code* of 1954, § 6501(e)(1).
95. *Id.* at 874.
96. "... nor shall [any person] be compelled in any criminal case to be a witness against himself, ..." *U.S. Const.* amend. V.
and unreasonable search and seizure.\textsuperscript{97} Notwithstanding the various sections of the Internal Revenue Code requiring the taxpayer to produce books and records, or to testify, Congress does not have the power to abridge or abrogate in any manner the Constitution of the United States. It should be remembered that the taxpayer may invoke the Fourth and Fifth Amendments in protection of his rights. These constitutional limitations impose one of the principal limitations on the investigative authority of the Commissioner.

A. \textit{Privilege Against Self-Incrimination}

Any tax investigation carries with it at least a theoretical possibility of disclosing facts which might lead to criminal proceedings. Where there is a possibility of tax fraud the taxpayer is faced with either a fifty per cent penalty or a criminal prosecution or both.\textsuperscript{98} The privilege against self-incrimination embodied in the Fifth Amendment affords the taxpayer his most powerful weapon. Lawyers differ over the wisdom of invoking the privilege,\textsuperscript{99} but there is little doubt that the taxpayer who fears criminal prosecution is able to withhold a considerable amount of information from the Government.

Information can be withheld if there is a reasonable probability that it might furnish a link in a chain of evidence which could subject the taxpayer to criminal prosecution.\textsuperscript{100} There is no requirement that the information be of such import as to raise the likelihood of conviction. Under this rule the courts have held that the taxpayer may refuse to reveal either his assets\textsuperscript{101} or the source of his income.\textsuperscript{102} He can withhold any document describing any transaction which might raise the possibility of a prosecution for fraud. There are even certain circumstances under which he may refuse to disclose his business relations with another taxpayer who is under criminal investigation.\textsuperscript{103}

\begin{itemize}
\item \textsuperscript{97} "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. ..." U.S. Const. amend. IV.
\item \textsuperscript{98} Int. Rev. Code of 1954, §§ 6653(b), 7201. Section 6653(b) states that "if any part of any underpayment ... of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment." Section 7201 provides that any person who willfully attempts to evade or defeat his tax shall be guilty of a felony.
\item \textsuperscript{100} Blau v. United States, 340 U.S. 159, 71 S.Ct. 223 (1950); 8 Wigmore, \textit{Evidence} § 2260 (McNaughton ed. 1961).
\item \textsuperscript{102} Steinberg v. United States, 14 F.2d 564 (2d Cir. 1926).
\item \textsuperscript{103} United States v. Gildea, 48 Am. Fed. Tax R. 1445 (D. Mass. 1953). The defendant was upheld in his refusal to answer questions about another taxpayer under investigation where the possibility existed that defendant might have offered illegal bribe to taxpayer.
\end{itemize}
The taxpayer may refuse to answer any question put to him at any hearing that he may be compelled to attend. He may also refuse to produce books and records, if to do so would have the tendency to incriminate him. As to what information will tend to incriminate, the taxpayer is not the ultimate judge. In the event he refuses to comply with a summons, the Government may seek a court order to compel compliance. It then becomes the duty of the court to examine each question put to the taxpayer in light of all of the surrounding circumstances, and to reach a conclusion that there is, or is not, a real and appreciable probability that compelling an answer would create, or tend to create, a situation whereby the witness would be forced to incriminate himself.¹⁰⁴

In *Hoffman v. United States*,¹⁰⁵ the Court said that the privilege extends not only to answers that would in themselves support a conviction under a federal criminal statute, but also embraces answers which furnish a link in the chain of evidence needed to support a prosecution for such crime. The protection thus afforded must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer — his mere say-so will not suffice. He is not exonerated from answering merely because he declares that in so doing he would incriminate himself.

In order to sustain the privilege the Court stated, “it need only be evident 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 could result.”¹⁰⁶ This approach seems sound for if the witness, after invoking the privilege, is required to prove the danger in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee.

It has been repeatedly held that to warrant a denial of the privilege it must appear in the setting in which the question is asked that the answer can not possibly have a tendency to incriminate.¹⁰⁷ This claim of possible incrimination must be determined on a question by question basis.¹⁰⁸ In so doing, the courts accord liberal construction in favor of the right it was intended to secure.¹⁰⁹ The court in *In re Turner*¹¹⁰ denied the privilege where it was not evident that production of all

¹⁰⁶. *Id.* at 486-87, 71 S.Ct. at 818.
¹¹⁰. 309 F.2d 69 (2d Cir. 1962).
records called for in the summons, or an explanation why the records could not be produced, might result in an injurious disclosure.

B. Restriction on the Use of the Fifth Amendment

The privilege against self-incrimination is available only to those who may be incriminated by the disclosure. The taxpayer is the only person who can refuse to give incriminating information about himself. Third parties, such as banks or people with whom the taxpayer does business, cannot base a refusal to answer on the fact that the testimony might incriminate the taxpayer. Accountants or stockbrokers may be compelled to yield records in their possession. If such records tend also to incriminate the third party the privilege can be asserted. Even then the documents sought to be withheld must be the property of the third party or the claim of privilege will fail on the ground that a person cannot withhold that which is not his. In none of these situations can the taxpayer who is the object of the investigation prevent the third party from turning over the records.

This constitutional privilege is restricted to “natural individuals acting in their own private capacity. . . .” A direct corollary of the personal nature of the privilege is the rule that corporations may not invoke it. Access to corporate records may not be refused on this basis. One who holds corporate records in a representative capacity may not successfully claim the privilege when required to produce them. The same rule applies to an unincorporated association. There is a diversity of opinion among the courts as to whether the privilege can be invoked by a partner holding partnership records to which a summons is directed. A consistent approach does not emerge from the cases.


112. Falsone v. United States, 205 F.2d 734 (5th Cir. 1953), cert. denied, 346 U.S. 864, 74 S.Ct. 103 (1953).

113. McMann v. SEC, 87 F.2d 377 (2d Cir. 1937), cert. denied sub nom., McMann v. Engle, 301 U.S. 684, 57 S.Ct. 785 (1937). This is the accepted view. Zimmerman v. Wilson, 81 F.2d 487 (3d Cir. 1936) is contra, but this decision was later overruled to conform to the McMann case. See Zimmerman v. Wilson, 105 F.2d 583 (3d Cir. 1939).


115. Id. at 700, 64 S.Ct. at 1252.


An individual who is a corporate officer does not lose his constitutional protection as an individual merely by becoming a corporate officer.\textsuperscript{120} He may refuse to divulge his personal records and may also refuse to give oral testimony which tends to incriminate him as an individual.\textsuperscript{121} In a case where criminal informations had been filed against a corporate officer, and the Government sought to question him further about his activities as an officer, it was held that he could invoke his privilege as a defendant and refuse to answer any questions, whether or not they were of an incriminating nature.\textsuperscript{122} Courts from time to time have indicated that there are limitations on the general rule that corporate officers must produce all corporate records,\textsuperscript{123} but no clear idea of these limitations emerges from the cases.

C. Waiver of the Privilege

Since the privilege must be specifically claimed,\textsuperscript{124} it may also be waived.\textsuperscript{125} It "is deemed waived unless invoked."\textsuperscript{126} Occasionally a situation will arise where the taxpayer refuses to give information concerning a particular transaction, only to be told that he has waived his privilege.\textsuperscript{127} This results from the established rule that a witness who reveals an incriminating fact must give all information relating directly to the incriminating testimony.\textsuperscript{128} Theoretically, testimony compelled under such circumstances will not further incriminate the witness, since he has incriminated himself by his earlier testimony.\textsuperscript{129} The question of waiver rarely arises during the preliminary stages of tax investigation.

\textsuperscript{120} Cf., United States v. White, 322 U.S. 694, 64 S.Ct. 1248 (1944); McAlister v. Henkel, 201 U.S. 90, 26 S.Ct. 385 (1906); Fuller v. United States, 31 F.2d 747 (2d Cir. 1929).

\textsuperscript{121} Ibid. In re Verser-Clay Co., 98 F.2d 859 (10th Cir. 1938), cert. denied, 306 U.S. 639, 59 S.Ct. 487 (1939).


\textsuperscript{123} Healey v. United States, 186 F.2d 164 (9th Cir. 1950); United States v. Daisart Sportswear, 169 F.2d 856 (2d Cir. 1948), rev'd sub nom., Smith v. United States, 337 U.S. 137, 69 S.Ct. 1000 (1949); In re Verser-Clay Co., 98 F.2d 859 (10th Cir. 1938), cert. denied, 306 U.S. 639, 59 S.Ct. 487 (1939).


\textsuperscript{126} United States v. Murdock, 284 U.S. 141, 148, 52 S.Ct. 63, 64 (1931).


D. Search and Seizure

The Fourth Amendment is supplementary to the rights of the taxpayer under the Fifth. When the thing forbidden in the Fifth Amendment, namely compelling a man to be a witness against himself, is the object of a search and seizure of a taxpayer’s records and papers, it is an unreasonable search and seizure within the Fourth. It affords protection against abuse by way of too much indefiniteness or breadth in the things required to be particularly described. If the inquiry is within the specific powers granted, and the records specified are relevant, one cannot successfully rely on the Fourth Amendment as a defense. Judge Learned Hand, in *McMann v. SEC*, made the following comment on the applicability of the Fourth Amendment:

No doubt a subpoena may be so onerous as to constitute an unreasonable search. . . . Even then, the sanction is unobjectionable, unlike a descent upon one’s dwelling or the seizure of one’s papers; the search is “unreasonable” only because it is out of proportion to the end sought, as when the person served is required to fetch all his books at once to an exploratory investigation whose purposes and limits can be determined only as it proceeds.

Claims of privilege under the Fourth Amendment in tax cases usually depend upon assertions that Government agents have gained access to documents through the use of subterfuge or upon protests that the Government is demanding the production of documents under a summons lacking in reasonable specificity. In the former situation, the person affected can enforce his rights by invoking the exclusionary rule which has been established by the federal courts as an implementation of the Fourth Amendment. In the area of vague requests, the recipient of the summons may resist governmental attempts to secure judicial enforcement of the summons as an unreasonable search.

In developing the test of whether or not the search is reasonable, the courts have proceeded on a pragmatic basis, examining the relevance of the requested documents in relation to the scope and purpose of the investigation. “In general terms, the test to be applied

---

134. *Id.* at 379.
under it is whether the thing done or attempted to be done, in the sum of its form, scope, nature, incidents and effect, impresses as being fundamentally unfair or unreasonable in the specific situation, when the immediate end sought is considered against the private right affected.\textsuperscript{137}

The present attitude of the Supreme Court in regard to a test of reasonableness seems best expressed in a 1950 decision:\textsuperscript{138} "nothing more than official curiosity"\textsuperscript{139} may justify the inquiry. But the Court qualifies its position by saying: "Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matters under inquiry as to exceed the investigatory power. . . . But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."\textsuperscript{140}

The Government has been permitted, under the reasonableness standard, to examine not only hospital records in order to compile a list of the patients of a doctor suspected of understating his income,\textsuperscript{141} but also copies of all tax returns for two years prepared for clients by an accountant and all books and records relating thereto, where irregularities involving back-dating of returns had been discovered in returns signed by him.\textsuperscript{142} In \textit{Schwimmer v. United States},\textsuperscript{143} an attorney successfully relied on the Fourth Amendment in resisting a subpoena duces tecum which required the production before a grand jury of all his books, records, files, memoranda, correspondence and other documents for a period of ten years.

An agent cannot summon all records pertaining to similar transactions as those of the taxpayer under investigation, irrespective of whether such records relate to the taxpayer. Such a summons was held to be oppressive or out of all proportion to the end sought and constituted an unreasonable search under the Fourth Amendment.\textsuperscript{144} The rationale of these cases reflect that the Fourth Amendment, where applicable, primarily protects the aggrieved party against abuse caused by too much indefiniteness or breadth in the things required to be particularly described. The question is whether the description of the records to be produced is so broad as to amount to an unreasonable search and

\begin{itemize}
\item \textsuperscript{137} Schwimmer v. United States, 232 F.2d 855, 861 (8th Cir. 1956), \textit{cert. denied}, 352 U.S. 833, 77 S.Ct. 48 (1956).
\item \textsuperscript{138} United States v. Morton Salt Co., 338 U.S. 632, 70 S.Ct. 357 (1950).
\item \textsuperscript{139} \textit{Id.} at 652, 70 S.Ct. at 369.
\item \textsuperscript{140} \textit{Ibid.}
\item \textsuperscript{142} Donnelly v. United States, 201 F.2d 826 (9th Cir. 1953).
\item \textsuperscript{143} 232 F.2d 855 (8th Cir. 1956), \textit{cert. denied}, 352 U.S. 833, 77 S.Ct. 48 (1956).
\item \textsuperscript{144} First Nat'l Bank v. United States, 160 F.2d 532 (5th Cir. 1947).
\end{itemize}
seizure. In general, the comments made under the “scope of inquiry” section are also pertinent to the application of the Fourth Amendment.

In some circumstances, even the taxpayer has been permitted to object on Fourth Amendment grounds to a subpoena directed to a third party, although, generally, the privilege against unreasonable search and seizure can be asserted only by one who has a proprietary or possessory interest in the property to be produced. In the third party situation, there appears little that the taxpayer can do to prevent search, unless he can establish an agency relationship with the person in possession of the information. In the absence of such relationship, the taxpayer is bound by the rule that one person cannot object to the unreasonable search of someone else.

E. Waiver of the Right Under the Fourth Amendment

A waiver by the taxpayer can be by specific consent given voluntarily, or it can arise from a failure to make timely objection. There is no duty on the examining agent to inform him of his rights. Unless he has been misled by the statements or actions of the agents under circumstances amounting to fraud or subterfuge, he will be held to have waived his privilege against unreasonable search and seizure, if he voluntarily complies with the requests of the agents to produce his records for examination. The test is not knowledge of his rights, but the voluntariness of his waiver.

III.

APPLICATION OF POWERS AND LIMITATIONS

to Attorneys and Accountants

It often happens that the books and records of the taxpayer are out of his own possession, either temporarily or by reason of some previous arrangement. The agent usually discovers this fact and serves a summons on the third party, which in most cases is the taxpayer’s attorney or accountant. This raises the question as to what rights an attorney or accountant have to refuse to surrender incriminating records or evidence in their possession when they are served with a valid summons.

146. Lovette v. United States, 230 F.2d 263 (5th Cir. 1956).
149. Scanlon v. United States, 223 F.2d 382 (1st Cir. 1955); United States v. Burdick, 214 F.2d 768 (3d Cir. 1954).
A. Accountants

The accountant is one of the most vulnerable of the third parties. There is no privilege existing between an accountant and his client. The accountant like any other third person cannot refuse to turn over the taxpayer's books and records if he has them in his possession when he is served with a valid subpoena. State laws providing that communications between an accountant and his client shall be privileged are inapplicable when the parties are the taxpayer and the federal government. It is also well established that the accountant like any other third party is prohibited from claiming the privilege against self-incrimination for the taxpayer. The accountant can only assert the self-incrimination privilege if he claims it for himself. Even under these circumstances the privilege extends only to such papers and documents as belong to the accountant or are in his possession "in a purely personal capacity."

There is no privileged relationship between the accountant and his client which is similar to the attorney-client privilege. The fact that the accountant is hired by an attorney does not make the accountant's communications with the client or his records privileged. In Himmelfarb v. United States, a lawyer engaged an accountant in connection with a tax case against one of the lawyer's clients. The accountant participated in several conferences with the taxpayer present. At the trial of the case, the accountant was called as a witness by the Government. Objection was made to the admission of his testimony on the basis that the attorney-client privilege was applicable to him. The court held there was no privilege and analyzed the law as follows: (1) if the taxpayer disclosed the information to the accountant, there was no privilege; (2) if the disclosures were made by the taxpayer to the attorney in the presence of the accountant, the taxpayer impliedly authorized the attorney to make disclosures and thereby waived the privilege; (3) if the attorney made disclosures to the accountant

151. Sale v. United States, 228 F.2d 682 (8th Cir. 1956), cert. denied, 350 U.S. 1006, 76 S.Ct. 650 (1956); Falsone v. United States, 205 F.2d 734 (5th Cir. 1953), cert. denied, 346 U.S. 864, 74 S.Ct. 103 (1953).

152. Falsone v. United States, 205 F.2d 734 (5th Cir. 1953), cert. denied, 346 U.S. 864, 74 S.Ct. 103 (1953); In re Wolrich, 84 F. Supp. 481 (S.D.N.Y. 1949).

153. Falsone v. United States, 205 F.2d 734 (5th Cir. 1953), cert. denied, 346 U.S. 864, 74 S.Ct. 103 (1953).


156. Falsone v. United States, 205 F.2d 734 (5th Cir. 1953), cert. denied, 346 U.S. 864, 74 S.Ct. 103 (1953).

157. Gariepy v. United States, 189 F.2d 459 (6th Cir. 1951); Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949), cert. denied, 338 U.S. 860, 70 S.Ct. 103 (1949).

158. 175 F.2d 924 (9th Cir. 1949), cert. denied, 338 U.S. 860, 70 S.Ct. 103 (1949).
without the taxpayer's consent, the privilege would attach. The court applied the second principle and surmised that no privilege existed since the accountant's presence was not indispensable in order for the communication to be made to the attorney.

Where an individual is both an accountant and an attorney, the type of service performed for the client will determine the availability of the privilege. In the event the accountant's books and papers are actually transferred to an attorney such records are not privileged. The accountant cannot raise the objection that the examination or investigation is unnecessary since this objection is available to the taxpayer alone. Thus the accountant is practically defenseless when served with a valid summons.

B. Attorneys

The attorney is in a much better position to withhold information than any other third party. This is so because traditionally there has been recognized a confidential relationship between an attorney and his client which extends to all communications between them. This privilege is a widely accepted, highly respected rule of evidence. On the basis of the attorney-client privilege, an attorney may refuse to reveal any information regarding his client's affairs. All communications with counsel, however, are not protected by the privilege. Only those confidential disclosures made while seeking legal advice from a lawyer in his capacity as such cannot be disclosed by the attorney without the consent of the client.

A professional relationship is established when the client seeks legal, as opposed to business or personal advice of an attorney, and continues so long as the attorney confines his services for the client to the area of professional legal assistance. Since the prevailing motive of clients in consulting attorneys is the need for legal advice, the mere fact of legal consultation is prima facie the establishment of a professional relationship.

---

159. Olender v. United States, 210 F.2d 795 (9th Cir. 1954); In re Fisher, 51 F.2d 424 (S.D.N.Y. 1931).
160. Falsone v. United States, 205 F.2d 734 (5th Cir. 1953), cert. denid, 346 U.S. 864, 74 S.Ct. 103 (1953); the Fifth Amendment may be applicable. See Application of House, 144 F. Supp. 95 (N.D. Cal. 1956). The court permitted an attorney to invoke the Fifth for his client and withhold information in work papers owned by the client, but prepared by the accountant and transferred to the attorney. Contra, In re Fahey, 192 F. Supp. 492 (W.D. Ky. 1961), aff'd, 300 F.2d 383 (6th Cir. 1962); United States v. Boccuto, 175 F. Supp. 886 (D.N.J. 1959), appeal dismissed, 274 F.2d 860 (3d Cir. 1959).
162. United States v. Kovel, 296 F.2d 918 (2d Cir. 1961); 8 WIGMORE, EVIDENCE § 2292 (McNaughton ed. 1961).
163. 8 WIGMORE, EVIDENCE § 2296 (McNaughton ed. 1961).

Published by Villanova University Charles Widger School of Law Digital Repository, 1964
The circumstances of the communication must indicate that it was intended to be confidential. This requirement of confidentiality "is predicated upon a reasonable intention and expectancy on the part of the attorney and the client to maintain secrecy."\(^{164}\) Ordinarily this requirement is satisfied if there are no circumstances which rebut confidentiality.\(^{165}\) The presence of a third person will usually destroy the privilege, unless the third person is an agent of the client or attorney and is reasonably necessary to the function of either.\(^{166}\) If at any time the matter which was communicated in confidence is profaned by transmission to a third party, the protection is lost. The moment confidence ceases, privilege ceases.

Where an attorney performs clerical and bookkeeping services in the handling of a commercial bank account for his client, no confidential privilege attaches.\(^{167}\) Nor does the privilege attach where the attorney simply deposits funds in a bank for his client,\(^{168}\) or acts as a mere scrivener on transactions involving the transfer of title to real estate.\(^{169}\)

Anything the taxpayer himself can assert as being privileged can be withheld by the attorney if the information or books and records are in the attorney's possession.\(^{170}\) The privilege does not attach to documents simply because they are transferred to an attorney's possession, whether the transfer is made by the taxpayer or some third party.\(^{171}\) Work papers of an accountant in the hands of the taxpayer's attorney are not privileged communications.\(^{172}\) It is also well settled that the client's papers are not confidential information.\(^{173}\) "In the case of a taxpayer who may be lawfully compelled to surrender records for examination, the transfer of these records by the taxpayer to his attorney does not give rise to the attorney-client privilege with respect to such records."\(^{174}\)

\(^{165}\) 8 Wigmore, Evidence § 2311 (McNaughton ed. 1961).
\(^{166}\) United States v. Kovel, 296 F.2d 918 (2d Cir. 1961); 8 Wigmore, Evidence § 2311 (McNaughton ed. 1961).
\(^{168}\) Pollock v. United States, 202 F.2d 281 (5th Cir. 1953), cert. denied, 345 U.S. 993, 73 S.Ct. 1133 (1953).
\(^{169}\) Pollock v. United States, 202 F.2d 281 (5th Cir. 1953), cert. denied, 345 U.S. 993, 73 S.Ct. 1133 (1953); United States v. DeVasto, 52 F.2d 26 (2d Cir. 1931), cert. denied, 284 U.S. 678, 52 S.Ct. 138 (1931).
\(^{170}\) 8 Wigmore, Evidence § 2307 (McNaughton ed. 1961).
\(^{171}\) Cf., Sale v. United States, 228 F.2d 682 (8th Cir. 1956), cert. denied, 350 U.S. 1006, 76 S.Ct. 650 (1956); Falsone v. United States, 205 F.2d 734 (5th Cir. 1953), cert. denied, 346 U.S. 864, 74 S.Ct. 103 (1953).
\(^{172}\) In re Fahey, 300 F.2d 383 (6th Cir. 1962).
other question apart from the attorney-client privilege. "The answer to that depends upon whether the client itself could be so required." 175

An attorney must answer questions which attempt to establish his relationship with a client-taxpayer. 176 "Indeed, it is a necessary preliminary fact, to be established before any privilege can be asserted." 177

The amount of fees paid by a client to his lawyer and the dates of payment are not confidential communications, and this information does not come within the attorney-client privilege. 178 Similarly an attorney cannot refuse to answer questions pertaining to the general nature of legal services rendered to taxpayers, including income tax returns with related work sheets. 179 The making and executing of financial transactions with, for, and on behalf of a client do not come within the privilege. 180 Federal law determines the applicability of the attorney-client privilege. 181

The breadth and relevancy limitations upon a duces tecum summons applies to an attorney's files the same as it does to any other third party. Schwimmer v. United States 182 is illustrative of the above point. In that case the attorney's files were sought in connection with a grand jury investigation of one of his clients for tax evasion. The attorney had stored his files and was out of the jurisdiction at the time two subpoenas duces tecum were served upon the storing warehouse. The first subpoena requested production of all the books, records and correspondence held by the warehouse for the attorney. The second was more limited, requesting all the books, records and correspondence pertaining to three named taxpayers. The court quashed the first subpoena as being so broad as to constitute an unreasonable search and seizure, but modified the second to require the disclosure of all requested information to which the attorney-client privilege did not apply.

While the qualifications necessary to be considered by an attorney for the purpose of exercising the privilege have long been settled, critical judicial investigation into the question of who can qualify as a client has only recently begun. The first reported judicial analysis of the right of the corporate client to claim the attorney-client privilege, Radiant Burners, Inc. v. American Gas Ass'n, 183 resulted in a denial
of the corporation claim. This decision caused quite a stir because of the assumption of many that both corporations and individuals enjoyed the same privilege. Chief Judge Campbell, who rendered the opinion, confessed that he was unable to find any authority "wherein the courts decided that the privilege should be extended to corporations." 184 He further concluded that in the past the corporation's right to claim the privilege had been assumed without a proper reliance on stare decisis or a clear legal analysis of the issues involved. 185

The Seventh Circuit in reversing noted that there are several limitations on the privilege and that "the limitation surrounding any information sought must be determined for each document separately considered on a case-by-case basis." 186 Even if corporate clients are permitted to avail themselves of the attorney-client privilege, this does not insulate all of their records or activities from disclosure. Agents of the corporation can always be called to testify as to facts within their own knowledge. 187 Furthermore, the privilege cannot be utilized by a corporation to make any desired part of its corporate records immune to a summons by depositing them with its attorneys. 188 Only those communications which constitute a bona fide submission of a matter to an attorney for legal advice will be privileged.

IV. RIGHTS OF WITNESSES IN RESPONSE TO A SUMMONS

A. Rights to Counsel

Witnesses summoned to appear before any agency of the Government have the right to the presence and advice of counsel. 189 There is a conflict in federal tax cases as to whether this section permits the witness to be accompanied and advised by counsel connected with, or

184. Id. at 772.
185. The Radiant Burners decision encouraged litigants in several other actions to seek discovery from corporations of what heretofore were considered privileged communications. See United States v. Becton Dickinson & Co., 212 F. Supp. 92 (D.N.J. 1962); American Cyanimid Co. v. Hercules Powder Co., 211 F. Supp. 85 (D. Del. 1962); Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962); 8 VILL. L. REV. 423 (1963). The courts have been reluctant to follow the lead of Radiant Burners. This is best expressed by Judge Kirkpatrick: "His [Judge Campbell's] opinion is supported by a good deal of history and sound logic, but the availability of the privilege has gone unchallenged so long and has been so generally accepted that I must recognize that it does exist." Philadelphia v. Westinghouse Elec. Corp., id. at 484. See generally, Gardner, A Re-Evaluation of the Attorney-Client Privilege, Part II, 8 VILL. L. REV. 447, 492-507 (1963).
186. 320 F.2d 314, 325 (7th Cir. 1963).
187. 8 WIGMORE, EVIDENCE § 2291 (McNaughton ed. 1961).
188. The privilege cannot be invoked merely by making an attorney custodian of documents for his clients; cf., Grant v. United States, 227 U.S. 74, 79, 33 S.Ct. 190, 192 (1913); 8 WIGMORE, EVIDENCE § 2307 (McNaughton ed. 1961).
189. Administrative Procedure Act, § 6(a), 60 Stat. 240 (1946), 5 U.S.C. § 1005 (1958). This § provides, in part: "Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied and advised by counsel...."
retained by, the taxpayer. In United States v. Smith, the witness was denied the right to be represented by the same counsel as employed by the taxpayer. The court stated: "While no harm seems likely from such a situation in this case, since the knowledge of these witnesses is necessarily also the knowledge of the taxpayer, any possibility of prejudice to the investigation should be obviated by requiring that counsel be not connected with, or retained by, the taxpayer."191

In Torras v. Stradley, the court held that the witness was not entitled to insist upon the presence and advice of counsel connected with or retained by the taxpayer. It stated that the constitutional rights of the witness were amply protected so long as he could select counsel from all other attorneys. The witness whose testimony was being sought was that of the bookkeeper and secretary of a dentist whose tax liability was under investigation. The taxpayer's brother was counsel for both the taxpayer and the witness. The court commented on the fact that counsel caused the agents much trouble, delay and expense in their investigation of the case.

The Fifth Circuit in Backer v. Commissioner construed the term "right to counsel" to mean counsel of one's choice and permitted the same counsel to represent both the taxpayer and the witness. It apparently distinguished the Torras case on the grounds that counsel was not obstructing the inquiry process by improper conduct or tactics. It found as a fact that the witness employed the counsel at his own expense, and that neither counsel nor the witness had attempted in any manner to impede the investigation. The opinion seemingly implies that the rationale of the decision is only applicable where the attorney and the witness come into court with clean hands and a cooperative attitude.

In cases where counsel and the witness are cooperative and make no attempt to impede the investigation, the decisions indicate that the witness will probably be permitted to employ the same counsel as the taxpayer. On the other hand, should the attitudes of the attorney and witness be perversive or obstructive, the witness will probably be denied the right to retain the same counsel as the taxpayer.

B. Right to Copy of the Transcript

In many cases where evidence of fraud exists, the agents obtain statements from the taxpayer and third parties by use of a question and answer interview under oath. On many occasions the individuals who have been summoned to give testimony have been accompanied

190. 87 F. Supp. 293 (D. Conn. 1949).
191. Id. at 294.
by a personal stenographer or court reporter. In the cases which have been reported, the persons to be interviewed have, on the advice of counsel, refused to testify unless the stenographer or court reporter was allowed to be present. The agents in turn insisted that the personal stenographer or court reporter be excluded. To obtain the necessary testimony the agents had to seek a court order enforcing the summons.

The court in *Torras v. Stradley*¹⁹⁴ upheld the exclusion of a personal stenographer, stating that "it seems obvious, by inference, that the Congress, in passing the Administrative Procedure Act, did not intend that a witness testifying in a non-public investigative proceeding should have a right to the presence of a personal stenographer."¹⁹⁵ The decision of the court was premised on the belief that the word transcript as used in the Administrative Procedure Act referred to the "official transcript." The court stated:

The provision of 5 U.S.C.A. § 1005(b), that a witness should have a right, under certain circumstances and conditions, to a copy of the transcript of his testimony refers to "the official transcript." If a witness had a right to have his own stenographer present, he could arrange to have his own transcript prepared, and there would be no need for a statute to aid him in obtaining a copy of the transcript from the agency.¹⁹⁶

In the case of *In re Neil*,¹⁹⁷ a court reporter was excluded from the interview. The court further stated that the person interviewed has the right to obtain a copy of the transcript without first signing the original. It said a copy of the transcript could only be denied the witness for good cause and that the refusal to sign the original did not constitute good cause within the meaning of the statute. The agent stated at the hearing that it was their policy to require the witness to sign the original transcript before receiving copy. The decision eliminated any need that the person interviewed might have for his personal stenographer or court reporter to be present.

In *Mott v. Mac Mahon*,¹⁹⁸ a court reporter was permitted to be present during the interview to take notes. After noting the exemplary cooperation of the witness, who was an attorney, the court said the Government can hardly be prejudiced by the making of an accurate record. The court limited its decision to the facts before it by prefacing its decision with the following remarks: "Under the circumstances of this particular case, the presence of a Certified Shorthand Reporter presents no obstacle to the achievement of all proper objectives of the

¹⁹⁵. *Id.* at 740.
Internal Revenue Service. Respondent has not tried to control or direct or interfere.”

The Court noted that in *Torras v. Stradley* and *In re Neil* the learned respective district courts held that the witness could be compelled to testify without the presence of a reporter brought by the witness. It made no attempt to distinguish these cases on the facts and simply stated that the facts of "those cases may vary from those in the instant proceeding." Under these circumstances the rationale expressed by the court in its decision cannot be said to effectively over-rule the policy of excluding personal stenographers or court reporters.

The future of excluding personal stenographers and court reporters from being present and taking notes during an interview is uncertain. The trend of the decisions indicates that such a policy will not be accepted favorably by the courts where the witness has a cooperative attitude and is not attempting to impede or thwart the investigation. On the other hand, where the witness is uncooperative and his general demeanor suggests the request is founded on bad faith, the personal stenographer or court reporter will probably be barred.

V.

CONCLUSION

Congress has conferred upon the Secretary and his delegates the power and the duty to administer the laws relating to the assessment and collecting of taxes. The laws so enacted are a reasonable and proper means to that end. In cases where the Government seeks information in the manner prescribed, the statutes should be liberally interpreted to entrust to the Secretary and his delegates the authority to exercise their informed judgment in the determination of questions as to the need for, as well as the time, place and extent to which the permitted means of detection should be employed.

The public interest, with which such authority is impressed, and the evils for which the legislation was designed to correct, emphasizes the importance of avoiding judicial imposition at the investigation stage unless the private interest asserted is direct and immediate or the Government has proceeded in an arbitrary manner. This is justifiable because all of the facts are in the taxpayer's hand. "The suppression of truth is a grievous necessity at best, more especially when as here the inquiry concerns the public interest; it can be justified at all only when the opposed private interest is supreme.""