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COMMENTS

THE FIFTH AMENDMENT PRIVILEGE AND OTHER PROTECTIONS AGAINST SELF-INCRIMINATION IN FEDERAL TAX INVESTIGATIONS

I. INTRODUCTION

The assertion of the right against self-incrimination by persons subjected to a federal tax investigation has presented a difficult factual context for the development of the fifth amendment.¹ This comment will examine the effect of our pervasive scheme of taxation and its attendant power to conduct civil investigations on the ability of the taxpayer to preserve his right against self-incrimination in a criminal tax case.

Criminal tax investigations center on proof of an intentional attempt to circumvent the income tax laws. The willful attempt to evade or defeat any tax imposed by the Internal Revenue Code is a felony.² In addition, a taxpayer who willfully fails to pay a tax or estimated tax, make a return, keep records, or supply records when he is required to do so by the Code may be guilty of a misdemeanor.³ Inherent in the criminal statutes is the requirement that the Internal Revenue Service demonstrate an actual tax liability on the part of the taxpayer, *i.e.*, prove that he owed a tax which he has not paid or that he has earned sufficient income to require the filing of a return which he has not filed. It is this necessity of proving a civil tax liability which forges the relationship between the criminal tax investigation and the civil audit.

To prove a violation of the tax laws in a criminal case, the Service will need to obtain a significant amount of information not contained on the usual tax return. Often it will want to discover information solely within the knowledge or possession of the taxpayer or those with a close relationship to him. Much of this information will be of the type normally considered to be private or confidential, *e.g.*, bank records, canceled checks, receipts, records of personal expenses, and similar items. A taxpayer who has been fully apprised of his potential criminal liability may

1. U.S. CONST. amend. V.

2. I.R.C. § 7201.

3. *Id.* § 7203. I.R.C. § 6012 defines those persons required to make income tax returns. Note that individuals required to file declarations of estimated income tax liability by I.R.C. § 6015 are exempted from § 7203 sanctions if they fail to file.

not be willing to surrender these documents voluntarily. To acquire such information, the Service may obtain a search warrant; once a criminal prosecution has been begun or recommended, this may be the only means available.⁴ However, because of the common element of tax liability, a criminal tax investigation is often contemporaneous with or preceded by a civil audit. The investigative procedures which are available in a civil audit but not in a criminal investigation⁵ may be valuable in obtaining the information necessary to obtain a criminal conviction.

In order to determine civil tax liability, the Secretary of the Treasury is empowered to issue a summons to the taxpayer or to any other person he deems proper to testify under oath or produce records relating to that liability.⁶ The United States district court for the district in which such person resides or is found has jurisdiction to compel compliance with the summons.⁷ If that person "contumaciously" refuses to obey the summons, the court may order his arrest and, after a hearing, punish him as for contempt.⁸

It is clear that information obtained by means of a civil summons may be used in a criminal case against the subject of the summons unless there is a ground for excluding such evidence.⁹ This comment will deal with the possibilities of preventing the Service from obtaining incriminating evidence by means of a civil summons and of excluding incriminating evidence obtained during a civil investigation. Specifically, three areas will be examined:¹⁰ (1) the necessity for a cautionary warning such as that required by *Miranda v. Arizona*¹¹ when a taxpayer is questioned by Service investigators; (2) the ability of a taxpayer to assert successfully the right against self-incrimination as a bar to a civil summons to produce documents or give testimony; and (3) the right of a taxpayer to assert common law privileges such as the attorney/client and husband/wife privileges in federal tax investigations.

II. THE NECESSITY OF A CAUTIONARY WARNING IN CRIMINAL TAX INVESTIGATIONS

A. *Constitutional Requirements*

In *Miranda v. Arizona*¹² the United States Supreme Court held that the prosecution could not introduce into evidence statements of the defend-

4. See *Donaldson v. United States*, 400 U.S. 517 (1971).

5. *Id.*

6. I.R.C. § 7602.

7. I.R.C. § 7604(a).

8. I.R.C. § 7604(b); *Reisman v. Caplin*, 375 U.S. 440, 448 (1964).

9. *United States v. Esser*, 520 F.2d 213 (7th Cir. 1975).

10. A discussion of the taxpayer's right not to file a return disclosing illegal sources of income is not within the scope of this comment. See *United States v. Oliver*, 505 F.2d 301, 307-08 (7th Cir. 1974).

11. 384 U.S. 436 (1966).

12. *Id.*

ant made during a custodial interrogation unless it demonstrated that procedural safeguards to protect the defendant's right against self-incrimination were followed.¹³ The prosecution was required to show that the defendant had been warned that he had the right to remain silent, that any statement he made could be used as evidence against him, and that he had the right to the presence of an attorney, either appointed or retained, during questioning.¹⁴ The Court held that the warning must be given when the defendant is first taken into "custody at the station or otherwise deprived of his freedom of action in any significant way."¹⁵

A problem arises in attempting to determine the point in a tax investigation at which the *Miranda* warning must be given. It is difficult to draw parallels between the traditional police investigation dealt with by the Court in *Miranda* and the typical criminal tax investigation in which the line between civil and criminal liability is blurred and in which the suspect is rarely taken into custody.¹⁶

The Seventh Circuit attempted to deal with this problem by devising a test based on the language in *Miranda* requiring a warning whenever the defendant is "deprived of his freedom of action in any significant way."¹⁷ In *United States v. Dickerson*¹⁸ and *United States v. Oliver*¹⁹ the court held that the dual civil/criminal nature of a tax investigation may create three key misapprehensions in the mind of the taxpayer: (1) a misapprehension as to the nature of the inquiry; (2) a misapprehension as to his obligation to respond; and (3) a misapprehension as to the consequences of his response.²⁰ The court stated that once the Service has commenced preparation of its criminal case by assigning the matter to its Intelligence Division, any questioning of the taxpayer without informing him of the potential for criminal liability will create these misapprehensions. The practical effect is to place the taxpayer under a psychological compulsion to testify similar to that experienced by a suspect during custodial interrogation; he is deprived of his freedom of action in a significant way and must be given the cautionary warning required by *Miranda*.²¹

13. *Id.* at 444.

14. *Id.* at 467-75.

15. *Id.* at 477.

16. *United States v. Leahey*, 434 F.2d 7, 8 (1st Cir. 1970). It should be stated at this point that only criminal tax investigations are discussed in this section. No contention is made that a *Miranda* warning is required in a civil audit situation which does not result in a prosecution for violation of the tax law.

17. 384 U.S. at 477.

18. 413 F.2d 1111 (7th Cir. 1969).

19. 505 F.2d 301 (7th Cir. 1974).

20. *Id.* at 305.

21. *Id.*

The Supreme Court rejected the psychological compulsion test in *Beckwith v. United States*²² and held that no *Miranda* warning was required if the interrogation was not custodial. The Court interpreted the phrase in *Miranda* "otherwise deprived of his freedom of action in any significant way"²³ as requiring compulsion based on a restraint of physical freedom of movement. This reading ascribes no meaning to the "deprivation" language in *Miranda* beyond that already encompassed in the notion of "custody," and thus renders the term of little import.

In *Beckwith* the defendant was interrogated in a private home, and in his own office. The Court held that he was not in custody and that a warning was not necessary. The difficulty with this approach lies in the nature of a criminal tax investigation. It differs in a number of ways from the regular criminal investigations conducted by police. First, unlike the police suspect, the taxpayer under scrutiny by the Service is rarely taken into custody. Second, the police know what crime has been committed and in their investigation are searching for a culprit. In contrast, the Service knows the identity of the wrongdoer; the investigation is to discover which crime he committed. In this way a criminal tax investigation focuses on a suspect much earlier than an investigation conducted by the police. Third, the dual civil/criminal purpose of tax investigations affords an opportunity for improper coordination between the Service's civil audit and intelligence (criminal) divisions which does not exist in police work. By the time an agent of the Intelligence Division places a taxpayer in physical custody, the case against that taxpayer may be virtually complete; it has often been built with the taxpayer's own incriminating disclosures. In addition, it is not clear that the taxpayer must be informed of the possibility of criminal charges when he answers questions or supplies documents in the course of a civil audit.²⁴

The Court acknowledged in *Beckwith* that the purpose of the warnings required by *Miranda* is to counteract the compulsion inherent in custodial surroundings.²⁵ *Miranda* was based on the need for special safeguards in the case of "incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights."²⁶ However, the Court failed to recognize that there may be situations involving a significant restraint on the taxpayer's physical freedom of movement short of custody which fall within the ambit of the *Miranda* rationale. In *Oliver* the taxpayer was questioned in a federal building and was prevented from receiving communications from his attorney. The Seventh Circuit

22. 425 U.S. 341 (1976). In dissent, Justice Brennan indicated that he would have applied the psychological compulsion test developed by the Seventh Circuit.

23. 384 U.S. at 477.

24. *United States v. Presley*, 478 F.2d 163 (5th Cir. 1973).

25. 425 U.S. at 345-46.

26. 384 U.S. at 445.

indicated that although the taxpayer was not in custody, there was evidence of a significant deprivation of his freedom of action.²⁷

In *United States v. Lackey*²⁸ the taxpayers were instructed to report to a post office for questioning. They were not informed that they could refuse to attend or that they were entitled to have an attorney present. The questioning took place in a small, starkly furnished room in the basement of the building. The only windows were near the ceiling and, with one minor exception, the door to the room remained closed throughout the three hour interrogation. The taxpayers were placed under oath and the interview was recorded on tape. The court held that this was a significant deprivation of the taxpayer's freedom of action and that the cautionary warning required by *Miranda* should have been given.

These situations would seem to present the elements of an incommunicado interrogation conducted in an official-dominated, if not police-dominated, atmosphere discussed in *Miranda*. Not to require a cautionary warning in such cases violates the purpose of *Miranda*. However, the Court in *Beckwith* conditioned the necessity of a warning on a single factor—custody. Non-custody cases, the Court stated, are to be analyzed only in terms of the voluntariness of the statement. The fact that warnings are or are not given would only be evidence concerning coerciveness. In this regard the Court took a simplistic and unwarranted view of *Miranda*. *Beckwith* rejected the "psychological compulsion" test developed in *Dickerson*²⁹ and adopted instead a standard of compulsion based on physical custody. The Court in *Beckwith* apparently failed to recognize that custodial compulsion is also largely psychological in nature.³⁰ The central question should be what circumstances produce the requisite degree of psychological compulsion. In view of the Court's holding in *Beckwith*, it may be impossible to require a *Miranda*-type warning in any criminal tax investigation.³¹

27. In *United States v. Dreske*, 536 F.2d 188 (7th Cir. 1976), the Seventh Circuit acknowledged that *Beckwith* "undermines" *Dickerson* and *Oliver* but indicated that those cases have not been overruled. The court in *Dreske* did not base its decision to affirm the denial of a motion to strike evidence obtained in a taxpayer interview on *Beckwith*, despite the fact that the case appears to be directly applicable. Instead, the court explained that *Dickerson* and *Oliver* apply only when an investigation has been transferred to the Service's Intelligence Division (the branch responsible for criminal investigation) and not whenever investigation focuses on a subject. However, the court did cite *Beckwith* as an additional ground for affirmance.

28. 413 F.2d 655 (7th Cir. 1969).

29. 413 F.2d at 1116.

30. The Supreme Court in *Miranda* states, "Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented." *Miranda v. Arizona*, 384 U.S. 436, 448 (1966).

31. On occasion the mechanical test of custody which the Supreme Court appears to be developing for tax cases may work in favor of the taxpayer. In

B. *Administratively Required Warning*

Even when the *Miranda* warning is not required, the taxpayer still may be afforded some protection by administratively required warnings and by fifth amendment standards of voluntariness. The Service has required agents employed by the Intelligence Division, which has responsibility for criminal matters, to give a cautionary warning whenever they conduct an interview, even if the person interviewed is not in custody. If an agent fails to follow these guidelines, at least one court has held that the evidence so obtained must be excluded.³² The rationale is that ex-

Mathis v. United States, 391 U.S. 1 (1968), the taxpayer was an inmate of the state penitentiary confined as a result of a conviction in a non-tax case. An agent of the civil audit department visited the taxpayer in prison and questioned him about his tax liability. This interview led to a criminal investigation and prosecution for tax fraud. The Court reversed the conviction because the agent had not given the taxpayer a *Miranda* warning before questioning him. The Service claimed that the warning was not required because the taxpayer was not in the custody of the agent conducting the interview. The Court rejected both contentions and held that whenever the taxpayer is in custody, the warning must be given. If *Miranda* is based on the compulsion to respond generated by custodial surroundings, it is questionable who is under greater pressure to answer questions in an attempt to exculpate himself, the prisoner in *Mathis* interrogated "at home" in the penitentiary, or the businessman questioned in the office of an agent for the Internal Revenue Service. The Supreme Court has recognized in non-tax cases that custody may occur outside a police station. *See, e.g., Orozco v. Texas*, 394 U.S. 324 (1969) (murder suspect interrogated in a bedroom).

In *United States v. Jaskiewicz*, 433 F.2d 415, 419 (3rd Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971), the court held that custody is a prerequisite to the *Miranda* warning, and that custody was not present when the taxpayer was interrogated. However, the court recognized in dictum that a taxpayer may be subjected to an in-custody interrogation outside a police station. *But see United States v. Venditti*, 533 F.2d 217 (5th Cir. 1976) (noncustodial, noncoercive interview with a tax technician); *United States v. Pholman*, 510 F.2d 414 (8th Cir. 1975) (attorney interviewed in her office); *United States v. Bettenhausen*, 499 F.2d 1223 (10th Cir. 1974) (taxpayer taken upstairs and down hallways to an inside room of government building); *White v. United States*, 395 F.2d 170 (8th Cir. 1968) (interview conducted on business premises of taxpayer). In these cases the *Miranda* warning was not required.

32. *United States v. Leahey*, 434 F.2d 7 (1st Cir. 1970). *Leahey* was based on the assumption by the First Circuit that a failure to give the warning would in some way deny the accused his right to due process, apparently either by removing a procedural safeguard or by misleading the accused as to its existence. However, because these warnings are not required by the self-incrimination clause of the fifth amendment but only by an administrative rule, it is not clear how a failure to supply the warning rises to a constitutional question.

United States v. Jacobs, 531 F.2d 87 (2d Cir.), *vacated and remanded*, 429 U.S. 909 (1976), suggests another possible basis for exclusion. The Second Circuit affirmed the district court's exclusion of testimony given by defendant before a grand jury and dismissal of a perjury count based on that testimony. The defendant had been summoned to testify before a grand jury by the Organized Crime Strike Force without being informed that she was the target of an investigation. The Second Circuit found that it was the universal practice among other pros-

clusion of the evidence will insure compliance with the guidelines by the agents, and that because of the publicity given to the guidelines, not to require compliance would mislead the public.

The administratively required warning is similar but not identical to the warning required by *Miranda*.³³ Unlike the *Miranda* requirements, however, under which the prosecution must demonstrate the use of procedural safeguards to protect the defendant's right against self-incrimination,³⁴ the burden is on the taxpayer to prove a violation of administrative procedures and to show that the violation was prejudicial to him. In addition, the focus in the administrative context is on whether there was a substantial omission.³⁵ Therefore, the protection provided by the administratively required warnings is less than that provided by the *Miranda* warning required for an in-custody interrogation. This is a rational distinction so long as the taxpayer has not been subjected to any compulsion to incriminate himself. Absent compulsion, it should be sufficient protection to inform the taxpayer of his potential criminal liability and of his rights to remain silent and to obtain the assistance of counsel.

C. Voluntariness

Another potential source for protection of taxpayers subjected to criminal tax investigations is the fifth amendment voluntariness requirement. Voluntariness is a requirement for admission of statements made by the defendant in a criminal case. When the prophylactic procedural safeguards mandated by *Miranda* are not applicable, the prosecution must show by the totality of the circumstances surrounding the statement it seeks to admit that the will of the defendant was not overborne and hence the statement was given voluntarily.³⁶ Two cases from the

ecutors in the circuit to inform a witness called before a grand jury if he or she was a subject of investigation in accordance with § 3.6(d) of the ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE CRIMINAL JUSTICE FUNCTION (Approved Draft 1971). The court held that such disparity was outside the "penumbra of fair play," and affirmed the dismissal pursuant to its supervisory function over the district courts in the interest of uniformity of criminal procedure within the circuit.

The Supreme Court vacated the opinion and remanded the case for further consideration in light of *United States v. Mandujano*, 425 U.S. 564 (1976), a case dealing with the constitutional right to a *Miranda* warning when testifying before a grand jury. The Court did this despite the fact that the Second Circuit expressly stated that its decision was based on its discretionary supervisory power and not on a constitutional basis. See 425 U.S. at 910 (Marshall, J., dissenting).

33. IRS Release (November 26, 1968); IRS Release (October 3, 1967).

34. 384 U.S. at 444.

35. See generally Note, *Extending Miranda to Administrative Investigations*, 56 VA. L. REV. 690 (1970).

36. See *Beckwith v. United States*, 425 U.S. 341, 347-48 (1976). See also *Iverson v. North Dakota*, 480 F.2d 414 (8th Cir. 1973). This was a murder case in

Third Circuit³⁷ have indicated that this voluntariness test is to be applied in all criminal tax cases.³⁸

Traditional forms of coercion, *e.g.*, threats of physical violence or harm to friends or relatives, may be rare in tax investigations. However, it is possible that a statement could be rendered involuntary by deception on the part of the investigators. In *United States v. Robson*,³⁹ a case decided on fourth amendment search and seizure grounds,⁴⁰ the court stated that if an agent affirmatively misleads a taxpayer into believing that an investigation is exclusively civil when it is not, this deception may vitiate the taxpayer's consent to a search of his records and render the search unreasonable. However, merely failing to inform the taxpayer that the investigation may have potential criminal consequences will not make the search unreasonable. By analogy, a deception which rises to the level of affirmative trickery concerning the very nature of the investigation should be sufficient to justify a finding that the will of the accused was overborne. Any statement made while laboring under such a misapprehension should be considered involuntary.

III. THE RIGHT AGAINST SELF-INCRIMINATION AS A BAR TO A CIVIL SUMMONS

Information obtained by the Service pursuant to a legitimate civil audit may be used in a subsequent criminal tax prosecution.⁴¹ Therefore, the taxpayer who suspects potential criminal liability⁴² may wish to

which the defendant was interrogated in a police station for twenty minutes without being taken into custody. The defendant was told by the state's attorney that he could not refuse to answer questions. The court held that in the normal case this would not be enough to overbear the will but remanded for a determination whether the the disputed competency of the defendant may have resulted in his will being overborne by this tactic.

37. *United States v. Nemetz*, 450 F.2d 924 (3d Cir. 1971); *United States v. Jaskiewicz*, 433 F.2d 415 (3d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971).

38. This position, which is stated more clearly in *Nemetz*, is of doubtful validity in light of *Mathis v. United States*, 391 U.S. 1 (1968). Apparently, the *Nemetz* court meant only that the *Miranda* warnings are not required when custody is absent, as it is in the majority of tax cases. In *Jaskiewicz* the court recognized that noncustodial compulsion may rise to a level which renders a statement involuntary. 433 F.2d at 420.

39. 477 F.2d 13 (9th Cir. 1973).

40. U.S. CONST. amend. IV.

41. *United States v. Esser*, 520 F.2d 213 (7th Cir. 1975). The Service's ability to investigate under I.R.C. § 7602 is not limited to situations in which there is probable cause to believe that the tax laws have been violated. "The purpose of the statutes is not to accuse, but to inquire." *United States v. Bisceglia*, 420 U.S. 141, 146 (1975).

42. If the taxpayer already faces criminal prosecution, a motion to suppress evidence obtained by the use of a summons presents another possible context in which the fifth amendment privilege might be raised.

refuse to comply with a summons issued by the Service.⁴³ Refusals to provide information or attempts to suppress evidence have focused on two different but interrelated issues: a pure fifth amendment approach, and an attempt to show that the summons does not meet the statutory requirements. Both issues deal with protection of the right against self-incrimination, and the courts have not always made a clear delineation between them.

A. Constitutional Objections

In the pure fifth amendment context, the test centers on possession and the testimonial nature of the documents or other information sought by the summons.⁴⁴ In *Fisher v. United States*⁴⁵ the Service sought

43. Taxpayers have generally been unsuccessful in attempts to avoid liability for failing to file a tax return by claiming that to do so would violate their fifth amendment right against self-incrimination by disclosing illegally obtained income. *Oliver v. United States*, 505 F.2d 301, 307-08 (7th Cir. 1974) rejected an application of *Marchetti v. United States*, 390 U.S. 39 (1968) to federal tax returns. Unlike the statute involved in *Marchetti*, the income tax law is directed to the public at large. Its demand for information is neutral in that it requires both legal and illegal income to be reported, and it is supported by legitimate policy considerations, *i.e.*, collecting tax revenues, which are unrelated to the compulsion to disclose incriminating evidence. *But see* Comment, *Reporting Illegal Gains As Taxable Income: A Compromise Solution To A Prosecutorial Windfall*, 69 Nw. U.L. Rev. 111 (1974).

44. In those situations in which a fifth amendment right does exist, it is a *personal* right. It cannot be claimed by a partner to prevent enforcement of a summons seeking partnership records, even if those records will incriminate the partner who has possession of them and to whom the summons is directed. *Bellis v. United States*, 417 U.S. 85 (1974). Nor may the officer of a corporation, even a Subchapter S corporation, assert a fifth amendment right as a basis for refusing to deliver corporate records which incriminate him. *United States v. Midwest Business Forms, Inc.*, 474 F.2d 722 (8th Cir. 1973); *United States v. Richardson*, 469 F.2d 349 (10th Cir. 1972).

This limitation on the right applies only to the production of documents. It does not apply to a summons directing a taxpayer partner to appear and testify. In *United States v. Mahady & Mahady*, 512 F.2d 521 (3d Cir. 1975), the client of a law firm was under investigation by the Service. The client waived the attorney/client privilege, but the attorney partners still refused to testify or to deliver documents pursuant to the summons, claiming that to do so might incriminate them. The court held that they had to produce the documents but could not be compelled to testify. As to testimony, the right against self-incrimination extends even where the respondent to the summons is not the subject of criminal investigation. The attorneys' answers might have formed a link in a chain leading to a criminal conviction and they could not be compelled to forge that link. *Id.* at 524.

Rather than making a simple dichotomy between documents and "testimony," it might prove fruitful to argue for or against the enforcement of a summons based on the testimonial nature of whatever evidence is sought. *See* text accompanying notes 48-51 *infra*.

45. 425 U.S. 391 (1976).

items used by the taxpayer's accountant in preparing the taxpayer's returns and directed the summons at the taxpayer's attorney who was in possession of the documents. The taxpayer intervened in the proceeding brought by the Service to enforce the summons after the attorney refused to deliver the papers.⁴⁶ The taxpayer asserted her fifth amendment right against self-incrimination and the attorney/client privilege as a bar to enforcement. The Supreme Court held that this could not be a direct violation of the taxpayer's right against self-incrimination because she was not being compelled to testify or furnish any information. The documents were being taken from the possession of a third person, her attorney.⁴⁷

In discussing the availability of the attorney/client privilege as a bar to enforcement of the summons,⁴⁸ the Court stated that the taxpayer could not have asserted the fifth amendment right even if she had been in possession of the documents. The fifth amendment protects only against the compulsion of testimonial disclosures. The work papers of her accountant could not be the testimony of the taxpayer because she did not prepare them. The Court recognized that being compelled to surrender evidence in response to a subpoena has certain communicative aspects, in that the taxpayer would have to admit the existence of the documents sought and possession or control by the taxpayer. However, whatever communicative value such compelled admissions may have, the Court stated that they do not rise to the level of testimony and are not protected by the fifth amendment. The Court reasoned that the government does not rely on the surrender of the documents to prove their existence, because that existence is a foregone conclusion. In addition, the Court pointed out that it is not illegal to have such documents prepared or to possess them. Thus it cannot be incriminating to admit their existence or possession.⁴⁹ The taxpayer was not compelled to authenticate workpapers of her accountant. Production of the papers would express only that she believed that the papers produced were those described in the summons; it would not mean that the taxpayer was vouching for the authenticity of the documents or the truthfulness of their contents.⁵⁰

Arguably, the taxpayer's personal papers, *e.g.*, his checks, receipts and other documents prepared by him, are testimonial in nature and hence protected under the fifth amendment. He was involved in their creation and necessarily would authenticate them by producing them in response to a summons.⁵¹

46. *Id.* at 394-95.

47. *Id.* at 398.

48. See text accompanying notes 71-81 *infra*.

49. 425 U.S. at 409-12.

50. *Id.* at 409, 413.

51. *But see* opinion of Brennan, J., concurring in result, 425 U.S. at 414.

In *Couch v. United States*⁵² the Court also centered on possession as the test for fifth amendment protection and affirmed an order enforcing the summons. However, the Court did state that there are situations in which *constructive* possession is so clear or relinquishment of personal possession is so temporary and insignificant that the fifth amendment would be violated by compelling a third person to deliver the documents sought by the summons.⁵³ For example, documents placed in a safe deposit box should meet the constructive possession test. Unlike materials turned over to an attorney or accountant, the taxpayer does not surrender control over the documents to the bank, but merely limits his own access to the documents to certain hours. Personal papers turned over to an employee also might meet the constructive possession test.⁵⁴

B. *Nonconstitutional Requirements for a Summons*

In addition to the ability of the taxpayer to challenge a summons based on the pure fifth amendment approach, the Supreme Court has held that the Service must meet certain requirements to satisfy the statute.⁵⁵ In order to get enforcement of a summons, the Service must show: (1) that the investigation will be conducted pursuant to a legitimate purpose; (2) that the inquiry may be relevant to that purpose; (3) that the information is not already in the possession of the Service; and (4) that the administrative steps required by the Internal Revenue Code, if any, have been followed.⁵⁶

In *Donaldson v. United States*⁵⁷ the Court amplified the meaning of the requirement "that the investigation will be conducted pursuant to a legitimate purpose." Legitimate purpose means civil purpose. Where the sole objective of the summons is to obtain evidence for use in a criminal prosecution, the purpose of the summons is improper and the district court should deny enforcement.⁵⁸ However, the Court recognized that a summons may be enforced even when the information may lead to a criminal conviction so long as there is a valid civil purpose. The Court gave two criteria which must be met to demonstrate a valid civil purpose: the summons must have been issued in good faith, and it must have

52. 409 U.S. 322 (1973). For a discussion of the accountant/client privilege, see text accompanying notes 91-93 *infra*.

53. 409 U.S. at 335.

54. In his dissent Justice Douglas pointed out that the effect of *Couch* will be to extend protection to the wealthy taxpayer who can afford to hire a full-time accountant and thus meet the constructive possession test but to deny that protection to the average taxpayer who must employ an accountant on a part-time, independent contractor basis. *Id.* at 342 n.4.

55. I.R.C. § 7602.

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

57. 400 U.S. 517 (1971).

58. *Id.* at 533.

been issued prior to the time the recommendation was made to the Justice Department that a criminal prosecution be instituted.⁵⁹

In interpreting the legitimate purpose test of *Donaldson*, the courts of appeals have held that a summons may be successfully challenged on that basis only if a criminal prosecution has been instituted and is pending at the time the summons is issued or if a criminal prosecution has been recommended;⁶⁰ that the Service is not required to elect between a civil or criminal case; and that it may pursue both and utilize the information obtained for the first to advance the second so long as the recommendation for prosecution is properly timed.⁶¹ However, the summons cannot be enforced once any criminal proceeding is actually *pending* in which the information obtained might be used, even if that prosecution is not tax related.⁶² The validity of a summons is determined as of the time it is issued,⁶³ and the burden is on the taxpayer seeking to prevent enforcement to show that the sole purpose of the summons is to obtain information for a criminal prosecution.⁶⁴

59. *Id.* at 536.

60. *United States v. Troupe*, 438 F.2d 117 (8th Cir. 1971). *But see United States v. Lafko*, 520 F.2d 622, 625 (3d Cir. 1975). The Third Circuit stated that a prior recommendation to the Justice Department to prosecute is not the only permissible basis for a finding that the summons was issued for an improper purpose. The district court also must refuse to enforce the summons if it finds that it was issued in bad faith. *See also United States v. Wall Corp.*, 475 F.2d 893, 895 (D.C. Cir. 1972) (if the investigating agent had formed a firm purpose to recommend criminal prosecution, issuance of the summons would presumably be in bad faith).

61. *United States v. Robson*, 477 F.2d 13, 15 (9th Cir. 1973).

62. *United States v. Henry*, 491 F.2d 702 (6th Cir. 1974) (drug prosecution). The Organized Crime Strike Force of the Attorney General's office has a policy of working closely with the Service in such cases.

63. *United States v. Rosinsky*, 547 F.2d 249 (4th Cir. 1977). The Service issued a summons and brought an enforcement action in a federal district court. The district court ordered enforcement and the taxpayer appealed. At that point the Service recommended criminal prosecution. The Fourth Circuit affirmed the enforcement order and directed the taxpayer to supply the requested information. The fact that criminal charges had been recommended after the summons had been issued was no bar to its enforcement.

64. *United States v. Zack*, 521 F.2d 1366 (9th Cir. 1975). The evidence must be very strong to support such a finding. In *Zack* the same Intelligence Division agent who sought enforcement of the summons had obtained a search warrant directed to the same documents one week earlier; the summons even referred to the warrant. The agent testified that he would have sought another warrant as part of a criminal investigation then in progress had not the records sought been transferred to the possession of the taxpayer's attorney. The agent stated that he believed the records were thus outside the reach of a warrant. The district court found that there was no legitimate civil purpose and denied enforcement. The Ninth Circuit stated that no one of the above factors standing alone would support a finding that the sole object of the summons was to obtain information for a criminal investigation, but that all of the factors taken together might be suffi-

The practical effect of these interpretations is to severely limit the protection available to taxpayers from these requirements. In effect, they pose no real restraints on the ability of the Service to use civil means to advance a criminal investigation so long as it can supply at least the pretext of a valid civil investigation. In most situations, the statute will be useful to a taxpayer seeking to prevent enforcement of an allegedly civil summons only when the Service makes a tactical mistake and prematurely recommends to the Justice Department that prosecution be initiated.

Stronger statutory safeguards might be enacted by Congress, forbidding use of the civil summons once a case has been turned over to the Intelligence Division for investigation of possible criminal activity. The courts should interpret such a law as preventing collusion between the Service's civil and criminal investigation divisions to circumvent the law's purpose. If this were done, the government would not be unduly hampered in its efforts to collect revenue, but the Service would be prevented from using a tool which the Congress made available for use in civil audits to advance a criminal investigation.

IV. ASSERTION OF COMMON LAW PRIVILEGES

There are two dimensions to assertion of the common law evidentiary privileges, such as the attorney/client and husband/wife privileges, as a bar to the enforcement of a summons. First, these privileges may have a foundation in the right to counsel and the right against self-incrimination guaranteed by the sixth⁶⁵ and fifth⁶⁶ amendments respectively. Second, the Federal Rules of Evidence provide that the privileges of persons in federal courts shall be governed by principles of common law as interpreted by the federal courts in the light of reason and expe-

cient. It then remanded to insure that the district court applied the proper standard.

To meet his burden, the taxpayer is entitled to investigate the purpose of the Service in seeking enforcement of the summons. The Fifth Circuit has held that the taxpayer is entitled to take the agent's deposition before the hearing on the motion to enforce the summons. *United States v. Wright Motor Co.*, 536 F.2d 1090 (5th Cir. 1976). The court affirmed a dismissal with prejudice granted by the district court after the agent refused to answer questions put to him in a deposition concerning the purpose of the summons.

The Ninth Circuit, however, has held that the taxpayer is not entitled to pre-enforcement discovery, but that the taxpayer must have some opportunity to substantiate his allegation that the summons has no legitimate purpose. *United States v. Church of Scientology*, 520 F.2d 818 (9th Cir. 1975). The court left the scope of that opportunity to the district courts but indicated that a cross-examination of the agent seeking enforcement at the hearing would be a permissible method.

65. U.S. CONST. amend. VI.

66. U.S. CONST. amend. V.

rience.⁶⁷ Before the adoption of the new rules, the circuits were split as to whether federal or state law controlled the availability of a particular privilege in federal court.⁶⁸ However, the language of rule 501 and the comments of the House and Senate committees indicate that privileges in federal courts are to be based on a common law developed by the federal courts under a uniform standard and in light of modern reason and experience.⁶⁹

In asserting these privileges as a bar to an Internal Revenue Service summons, it is important to keep the two dimensions separate. Although they impact on each other, there are problems concerning standing to assert constitutional privileges, particularly the fifth amendment privilege against self-incrimination, which must be kept analytically distinct from the assertion of the common law privileges.⁷⁰

A. Attorney/Client Privilege

The Supreme Court has stated that a summons may be challenged on the basis of the attorney/client privilege.⁷¹ However, *Fisher v. United*

67. FED. R. EVID. 501 provides: "[T]he privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. . . ."

68. *United States v. Tratner*, 511 F.2d 248 (7th Cir. 1975).

69. H.R. REP. NO. 650, 93rd Cong., 2d Sess. 8, 9 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7082-83; S. REP. NO. 1277, 93rd Cong., 2d Sess. 11-13 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7058-59. *See also* *Gannet v. First Nat'l State Bank*, 546 F.2d 1072 (3rd Cir. 1976), *cert. denied*, 431 U.S. 954 (1977).

70. *See Fisher v. United States*, 425 U.S. 391, 396-401 (1976); text accompanying notes 73-76 *infra*.

71. *Reisman v. Caplin*, 375 U.S. 440 (1964). Wigmore describes the attorney/client privilege:

Where legal advice is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose made in confidence by the client, are at his instance permanently protected from disclosure by himself or the legal adviser unless the protection is waived.

8 J. WIGMORE, EVIDENCE § 2292 (McNaughten rev. 1961) (emphasis and heading numbers omitted).

It is the *substantive* matters communicated between attorney and client which are protected by the privilege, *e.g.*, the attorney normally cannot refuse to divulge the identity of his client. However, there may be circumstances in which so much about the client is already known that to reveal his identity would be to reveal a confidence. *Id.*

In *United States v. Long*, 328 F. Supp. 233 (E.D. Mo. 1971), the court held that the attorney must indicate the general nature of the work performed ("litigation," "domestic relations," "tax advice," etc.) but that specific factual inquiry into the communications between attorney and client beyond this was privileged. The appendix to the case sets out the questions which were propounded to the attorney and indicates those which are permissible in light of the privilege.

*States*⁷² makes it clear that merely transferring sensitive documents to an attorney will not bring them under the protection of the privilege. In order to assert the privilege successfully as a bar to a summons ordering the taxpayer's attorney to produce documents in his possession, the taxpayer or his attorney must show that the client himself would have been entitled to refuse to produce the documents had they been in his possession.⁷³ This means that the attorney/client privilege cannot be used to prevent disclosure unless the taxpayer himself is entitled to assert some other privilege which would shield the documents from the Service. In *Fisher* the taxpayers incorrectly argued that it would violate their fifth amendment rights to compel their attorneys to turn over the documents. The Court held that a person's fifth amendment rights could not be violated by compelling evidence from a third party in such a situation.⁷⁴ Instead, it stated that the issue was whether the attorney/client privilege would be violated if an attorney were compelled to deliver documents which would have been protected by the fifth amendment prohibition against self-incrimination had the government sought to compel the client himself to deliver the documents from his own possession. The Court stated that the attorney/client privilege would be violated in such circumstances; the Service could not compel the attorney to turn over documents in such a situation, provided that the transfer was made for the purpose of obtaining legal advice.⁷⁵ However, in *Fisher* the Court held that the taxpayers could not have successfully asserted the fifth amendment as a bar to the summons had the documents remained in their possession⁷⁶ and ordered the attorneys to comply with the summons.⁷⁷

The Court indicated that this construction is in complete harmony with the underlying purpose of the privilege, which is to encourage clients to make full disclosure to their attorneys.⁷⁸ The theory is that the client will not be discouraged from transferring documents to his attorney so long as he knows that the attorney cannot be compelled to release documents the client himself could not have been required to produce.

The Court stressed in *Fisher* that the documents sought to be excluded from the scope of the summons must have been transferred to the attorney by the taxpayer or his agent for the purpose of obtaining legal advice.⁷⁹ This can be a fine distinction in the tax area; the role of the

The attorney must normally divulge fee arrangements with clients. *United States v. Hodgson*, 492 F.2d 1175 (10th Cir. 1974).

72. 425 U.S. 391 (1976).

73. *Id.* at 402-05. See also 8 J. WIGMORE, *supra* note 71, § 2307.

74. 425 U.S. at 396-401.

75. *Id.* at 405.

76. *Id.* at 414.

77. *Id.*

78. See note 71 *supra*.

79. 425 U.S. at 405.

attorney is often a mixed one of business and legal advisor. The burden is on the person asserting the privilege to prove that he is entitled to it.⁸⁰ An attorney may not safely rely on local court rules or statutes which make particular documents or records privileged if those rules or statutes do not coincide with the formulation of the privilege as developed by the federal courts.⁸¹

B. Husband/Wife Privilege

A taxpayer may be able to assert a husband/wife privilege in response to a summons directed to his spouse. Although the authority is sparse, there are some indications that such a privilege may be recognized at federal common law. The privilege relating to the marital relationship may be divided into two categories. First, the defendant in a criminal case may prevent his spouse from testifying.⁸² Secondly, a spouse may not give testimony concerning confidential communications made to him by his spouse. The latter privilege is available in civil cases.⁸³

Although *Stein v. Bowman*⁸⁴ was decided before the modern marital privileges were clearly developed, it recognized a husband/wife privilege

80. *United States v. Tratner*, 511 F.2d 248 (7th Cir. 1975).

81. *United States v. Cortese*, 540 F.2d 640 (3d Cir. 1976). The court refused to recognize a privilege based on a local state court rule requiring all contingent fee contracts to be filed with the prothonotary of the court and providing that those records were impounded and hence not subject to inspection. The court held that the federal interest in administering the tax law prevailed over the local interest in monitoring contingent fee contracts. In *Gannet v. First Nat'l Bank*, 546 F.2d 1072 (3d Cir. 1976), cert. denied, 431 U.S. 954 (1977), the court refused to recognize a privilege based on a New Jersey statute which provided that the bank records of an attorney's trust account will not be disclosed over a claim of attorney/client privilege. Instead the court applied federal common law and held that the attorney/client privilege is not available to shield bank records from an Internal Revenue Service summons merely because the records pertain to an attorney's trust account. The attorney's trust account is sometimes used by clients to conduct financial transactions anonymously, including the payment of delinquent taxes or taxes on illegal gains undiscovered by the Service. See also *United States v. Tratner*, 511 F.2d 248 (7th Cir. 1975). A summons ordering an attorney to produce records relating to his escrow account is not a per se violation of the privilege.

Neither an attorney nor a taxpayer may rely on a blanket claim of privilege; the privilege must be raised as to each record sought. *United States v. Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974). An *in camera* inspection by a district court judge of the documents sought to be shielded from the summons may be a prerequisite to the successful assertion of the privilege. See *United States v. Nelson*, 511 F.2d 1132 (4th Cir. 1975).

82. See C. McCORMICK, EVIDENCE § 66 (2d ed. 1972). In Missouri, it is unclear whether the privilege may be asserted by the defendant spouse or only by the witness spouse. See *State v. Frazier*, 550 S.W.2d 590 (Mo. App., D.K.C. 1977).

83. See C. McCORMICK, *supra* note 82, §§ 78-80.

84. 38 U.S. 126 (1839). This nontax diversity case did not involve a federal question. However, the case was decided at a time when the federal courts were applying federal common law to diversity cases.

based on preservation of the sanctity of the marriage relationship, which it termed the "best solace of human existence."⁸⁵ The Court discussed the common law incapacity of a spouse to testify either in favor of or against his spouse⁸⁶ and the need to protect the confidential relations of the parties, and held that a wife may not voluntarily or under compulsion testify against her husband.⁸⁷

The Sixth Circuit has more recently acknowledged the existence of a confidential communications privilege in *United States v. Brown*.⁸⁸ The court stated that the privilege would not prevent a wife from testifying as to the genuineness of her signature on a joint return or from providing handwriting exemplars because no confidential communication between spouses would be disclosed. In *United States v. Goldsmith*⁸⁹ a district court appeared to recognize the privilege in an action to enforce a summons seeking to discover assets of the husband to satisfy tax claims. The court stated that the privilege was not applicable because the questions asked of the wife did not reach anything confidential or inculpatory to her husband.

C. Statutory Privileges

Taxpayers have generally not been successful in asserting privileges based on state statutes as a bar to an Internal Revenue Service summons.⁹⁰ The Supreme Court in *Couch v. United States*⁹¹ noted that there is no accountant/client privilege at federal common law and that no state accountant/client privilege had yet been recognized in federal court. The Court held that there can be no accountant/client privilege where records relevant to a federal income tax return are involved in a criminal tax investigation. There can be little expectation of privacy, the Court said, when the taxpayer turns the records over to the accountant knowing that the accountant must disclose most of the information in the process of preparing an accurate return or risk personal liability.⁹² It is

85. *Id.* at 132.

86. See C. McCORMICK, *supra* note 82, §§ 66, 78.

87. It should be noted that this case was decided before the modern marital privileges were clearly formulated. The Federal Rules of Evidence require the federal courts to develop a modern federal common law of evidence. See text accompanying notes 67 & 69 *supra*. Therefore, the case is probably not conclusive authority on the status of the privilege in federal courts. It is, however, some indication of the existence of a husband/wife privilege in federal common law.

88. 536 F.2d 117, 120 n.4 (6th Cir. 1976) (dictum).

89. 272 F. Supp. 924 (E.D.N.Y. 1967).

90. Missouri recently enacted a statutory privilege for public accountants, V.A.M.S. § 326.151, Supp. 1978. The privilege applies to communications made by the client in person or through books or records, to the advice of the accountant, to his working papers, and to his employees.

91. 409 U.S. 322 (1973). This case was decided before the adoption of FED. R. EVID. 501.

92. 409 U.S. at 335.

possible to interpret the Court's holding narrowly to mean that documents and other materials turned over to an accountant for a purpose other than preparing a tax return may be protected by an accountant/client privilege if such a privilege is ever developed in the federal common law.⁹³ In *United States v. Schoenheinz*,⁹⁴ a Federal tax case, the court similarly refused to recognize an employer/stenographer privilege created by state statute.⁹⁵

V. CONCLUSION

The enforcement of the tax laws has presented a number of difficult problems involving the fifth amendment right against self-incrimination. Clearly, psychological pressure is not enough to trigger the necessity of a *Miranda* warning.⁹⁶ Yet to require the type of custody normally found in other criminal investigations is to render the procedural safeguards guaranteed in that case unavailable to most persons subject to a federal tax prosecution. By the time the taxpayer is taken into custody, the Service usually will have all the information it needs.⁹⁷ A redefinition of "custody" is needed which will give effect to the "freedom of action" language in *Miranda*. The cautionary warning described in that case should be required after the investigation has been transferred to the Intelligence Division in any situation in which the taxpayer will experience a significant compulsion to speak out in an attempt to extricate himself.

The question whether a summons can be barred on the basis of a fifth amendment right against self-incrimination will center on the elements of possession and testimonial quality of the information sought by the Service.⁹⁸ The impact of these factors must await definition by the courts. However, if the availability of the right against self-incrimination is to remain applicable to criminal tax cases, neither should be defined narrowly. Private papers of a taxpayer, and particularly those which he prepares himself for his own use, should be held to be testimonial of their contents and of their existence.

In the area of common law privileges, the focus will be on the impact of the new Federal Rule of Evidence 501 and the development of a federal common law of privilege. An attorney/client privilege will cer-

93. See opinion of Brennan, J., concurring, *id.* at 337. Note that an accountant also may be covered by the attorney/client privilege if the work is done for an attorney, under the attorney's direction, to enable the attorney to render legal advice. See *United States v. Cote*, 456 F.2d 142 (8th Cir. 1972).

94. 548 F.2d 1389 (9th Cir. 1977).

95. OR. REV. STAT. § 44.040(1)(f).

96. *Beckwith v. United States*, 425 U.S. 341 (1976).

97. See Andrews, *The Right to Counsel in Criminal Tax Investigations Under Escobedo and Miranda: The "Critical Stage"*, 53 IOWA L. REV. 1074, 1111-17 (1968).

98. *Fisher v. United States*, 425 U.S. 391 (1976).

tainly be available in some form. Even this privilege, however, may be narrowed by the requirement that the attorney/client privilege be available only when the client would have had another privilege had the documents remained in his possession. The taxpayer will usually assert that he would have had a fifth amendment protection against self-incrimination if his papers had remained with him. Therefore, if the testimonial requirements of that right are interpreted restrictively, it will narrow not only the fifth amendment protection but also the attorney/client privilege.

It seems unlikely that an accountant/client privilege will be recognized in tax cases. Such a privilege would drastically limit the government's access to information necessary to enforcement of the tax laws. Documents in the possession of an accountant may be protected by a fifth amendment right only if there is constructive possession by the taxpayer and if the documents have a sufficient testimonial quality.⁹⁹

Because of the special nature of tax investigations, they provide a convenient and perhaps unsuspected vehicle for narrowing fifth amendment protections against self-incrimination. Procedural safeguards are designed for the standard police investigation. When these rights are asserted in a tax case, they do not fit. The response of the courts has been not to widen the safeguards but to narrow the protection; this trend could eventually spread to other areas of the criminal law and encroach on constitutional rights in contexts beyond tax cases.

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99. *Id.*; *Couch v. United States*, 409 U.S. 322 (1973).