

# \* 2039 SUMMONS \*

## IRS JUSTICE



### “You know where your books and records are yet??”

What is a 2039 Summons?

What is behind the summons hearing?

What are my remedies?

How can I procedurally protect my rights?

What should I say, do, or not do at the summons hearing?

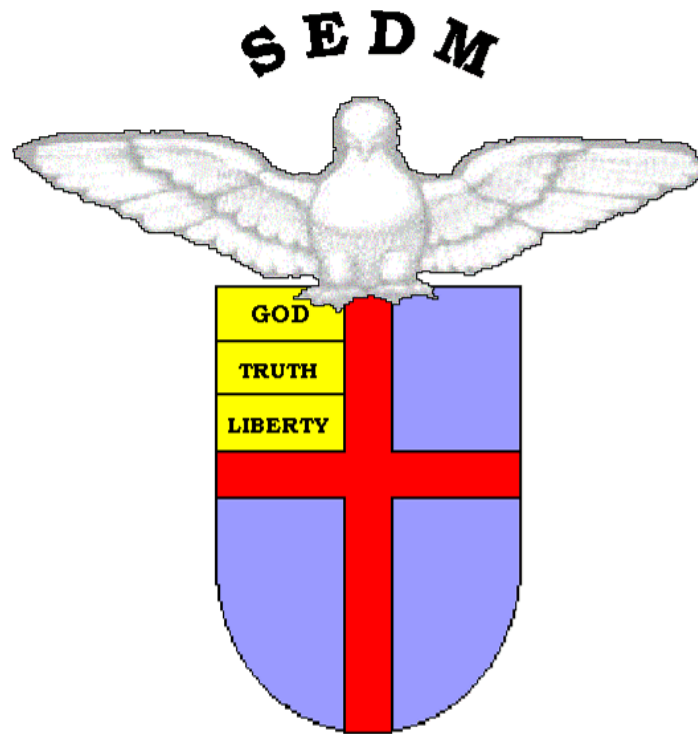
What do I need to do after the summons hearing?

Volume 13, January/February 2003

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## *Introduction to the 2039 Summons*

Everybody wants to get into our pockets and the IRS is no different except they want in your pocket first and to keep their hands in your pocket. If you try to get their hand out of your pocket, or if you slap their hand because they are trying to take too much, they usually get very upset.

After the 1998 Senate Hearings, Congress decided that the IRS was using tactics that were very underhanded and outright abusive against the citizens as we heard from the IRS employees who testified (see number 39 on our list - the transcript of the 1998 Senate hearings). Congress then passed the 1998, Tax Reform Restructuring Act which slapped the hands of the IRS and made them cease many of its improper practices. With this new Act in place the IRS had to restructure and retrain its personnel. This took place in 1999, 2000, and the first half of 2001. During this time many individuals ran around the country selling untax programs trust programs and many other legal style programs. There were even those who bragged that they were responsible for shutting down the IRS plus many other unfounded claims. And there are actually people who believe those unsubstantial claims. That's one reason we started doing the "VIP Dispatch" in order to put out important information so you can make intelligent decisions and ask relevant questions.

Now you have the IRS again sending out their various letters, notices, and summons to all those people who jumped on all those various bandwagons that were selling hype. Many of those selling that hype are in jail, or the IRS is after them big time and they cannot handle their own problems much less help anybody else. We know because we have many of these people calling us for help.

So, now we have the IRS sending out “2039 Summons” to all those good people and a host of others. Most of those people have no training in how to prepare for these summonses or what they can do procedurally to help protect themselves.

Having been involved with several hundred “2039 Summons” problems we can only teach you what we found to be the best approach over all that is workable for most people. We look at doing the “2039 Summons” response as a very good tool to use for your benefit to help you build your evidence package with IRS.

1. You get a “2039 Summons” from the IRS to show up and produce books and records. What do you do?
  - a. Refer to our August 2002 VIP Dispatch.
2. Call us if you feel you need help.
3. Make up your mind as to how you want to take it on. Only you can make that decision.
4. Be aware of all your options and beware of those who tell you to refuse it and send it back or accept it for value or other such silly nonsense that is going around.
5. Do you have your IMF or BMF decoded? What other FOIA’s have you done?
6. We have a basic starter package of Exhibits that we help you with to use at the hearing.
7. You should be able to contact a court reporter to go in with you so you will have an official and accurate record of the hearing.
8. Can you have at least one or two witness to go in with you?
9. Read the enclosed transcript several times in this “Dispatch” and in the August “Dispatch”.
10. Don’t wait until the last minute, practice your presentation several times. If you have friends who will help you practice then go through your evidence package with them. Roll play the different parts.

11. When you go to the hearing be polite but firm.
12. If they run you out of the hearing have another location ready to go to and invite them to come.
13. Make sure you put in the record agents names that are asking you to leave your meeting. For the record inform them that they cannot terminate your meeting and that you are recessing the meeting to another location and that they are invited to attend.
14. Make sure you get all of your documents marked as exhibits by the court recorder. Be sure you tell the court reporter to bring plenty of exhibit stickers.
15. Do not get in a hurry. If you have a problem take a break as needed.
16. Make sure you identify each document as to where it came from and what it concerns on the record.
17. As soon as you get your transcript back from the court reporter you will want to do a "Letter of Determination" and make several copies of the entire package. Send one back to the agent with whom you had the hearing. Send another copy to the Area Manager, one to the commissioner of IRS and one to the Commissioner of BATF to let them know that you have complied with the "2039 Summons".
18. Now you have a very good evidence package that, if needed, can be used over and over.

How can you turn over any books and records to someone who does not have a security clearance to keep those records in a secured location?

Why would you want to waste your time and money to keep books and records if you are in a "Regulated Industry" or you are not one who has a duty to report under United States Code Title 31 section 1321.

Is anyone paying you to keep any books or records or do you just do it because "Everybody knows".



## **6637 And 6638 Summons**

- A. We wanted to show you examples of the 6637 (Exhibit A) and the 6638 (Exhibit B) Summons so you can see that they exist.
- B. If you notice Cherry Alexander issued and served both of these but we never did confirm if Cherry Alexander actually existed or not.
- C. Look at what Cherry Alexander is asking for.
- D. What is the definition of a Revenue officer (Exhibit C) according to 120-01?
- E. Is this an ATF related examination?

# Summons

Collection Information Statement



Department of the Treasury  
Internal Revenue Service

Form 6637  
(Rev. March 1994)

In the matter of  
Internal Revenue District of North Texas  
The Commissioner of Internal Revenue

U.S. Individual Income Tax  
Periods Return for periods ending  
December 31, 1985, December 31, 1986  
December 31, 1987, December 31, 1988  
December 31, 1996 & December 31, 1997

To  
At

You are hereby summoned and required to appear before CERRY ALEXANDER, an Internal Revenue Service (IRS) officer, to give testimony and to bring for examination the following information related to the tax liability of the person identified above for the periods shown:

All documents and records you possess or control regarding assets, liabilities, or accounts held in the taxpayer's name or for the taxpayer's benefit which the taxpayer wholly or partially owns, or in which the taxpayer has a security interest. These records and documents include but are not limited to: All bank statements, checkbooks, canceled checks, savings account passbooks, records or certificates of deposit for the period:

from 4/49 to Present

Also include all current vehicle registration certificates, deeds or contracts regarding real property, stock and bonds, accounts, notes and judgments receivable, and all current life or health insurance policies.

IRS will use this information to prepare a Collection Information Statement. We have attached a blank statement to guide you in producing the necessary documents and records.

Business address and telephone number of Internal Revenue Service officer named above:

4050 ALPHA RD MC5107NWSAT, DALLAS, TX 75244 (972) 308-7854

Place and time for appearance:

at 4050 ALPHA RD MC5107NWSAT, DALLAS, TX 75244

on the 14 day of Sept, 1999 at 9 o'clock A.M.

Issued under authority of the Internal Revenue Code this 18 day of Aug, 1999

Exhibit A 1 of 2



6638  
October

# Summons

Income Tax Return



Department of the Treasury  
Internal Revenue Service

In the matter of  
Internal Revenue District of North Texas  
The Commissioner of Internal Revenue  
To  
At

U.S. Individual Income  
Periods Tax Return for the period  
ending December 31, 1998

You are hereby summoned and required to appear before CHERRY ALEXANDER, an Internal Revenue Service (IRS) officer, to give testimony and to bring for examination the following information related to the tax liability of the person identified above for the periods shown:

All documents and records you possess or control about income you received for the years:

1998

These records and documents include, but are not limited to: Forms W-2 (Wage and Tax Statement),

Forms 1099 for interest or dividend income, employee earnings statements, and records of deposit with banks or other financial institutions.

Also include all other books, records, documents and receipts for income from, but not limited to, the following sources: wages, salaries, tips, fees, commissions, interest, rents, royalties, alimony, state or local tax refunds, annuities, life insurance policies, endowment contracts, pensions, estates, trusts, discharge of indebtedness, distributive shares of partnership income, business income, gains from dealings in property, and any other compensation for services (including receipt of property other than money). Include all documents and records about any income you assigned to any other person or entity.

IRS will use this information to prepare a federal income tax return for the following year(s) when you didn't file a return:

We have attached a blank return to guide you in producing the necessary documents and records.

Business address and telephone number of Internal Revenue Service officer named above:

4050 ALPHA RD MC5107NWSAT, DALLAS, TX 75244 (972) 308-7854

Place and time for appearance: 14th day of Sept 1999 at 9:00 am  
at 4050 ALPHA RD MC5107NWSAT, DALLAS TX 75244

Exhibit B 1 of 2

Issued under authority of the Internal Revenue Code this 18 day of Aug, 1975

[Handwritten Signature]  
Signature of Issuing Officer

Revenue Officer Title

\_\_\_\_\_  
Signature of Approving Officer (if applicable)

\_\_\_\_\_  
Title

Form 6638(CG) (Rev. 10-93)

"I hereby certify that I have examined and compared this copy of the summons with the original and that it is a true and correct copy of the original."

[Handwritten Signature]  
Signature of IRS Official Serving the Summons

REVENUE OFFICER-7506077

Title

**Exhibit B 2 of 2**

# BY ORDER OF THE SECRETARY OF THE TREASURY

TREASURY ORDER: 120-01

DATE: June 6, 1972

SUNSET REVIEW: TBD

SUBJECT: Establishment of the Bureau of Alcohol, Tobacco and Firearms

By virtue of the authority vested in me as Secretary of the Treasury, including the authority in Reorganization Plan No. 26 of 1950, it is ordered that:

1. The purpose of this Order is to transfer, as specified herein, the functions, powers and duties of the Internal Revenue Service arising under laws relating to alcohol, tobacco, firearms, and explosives (including the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service) to the Bureau of Alcohol, Tobacco and Firearms (hereinafter referred to as the Bureau) which is hereby established. The Bureau shall be headed by the Director, Alcohol, Tobacco and Firearms (hereinafter referred to as the Director). The Director shall perform his duties under the general direction of the Secretary of the Treasury (hereinafter referred to as the Secretary) and under the supervision of the Assistant Secretary (Enforcement, Tariff and Trade Affairs, and Operations) (hereinafter referred to as the Assistant Secretary).

2. The Director shall perform the functions, exercise the powers, and carry out the duties of the Secretary in the administration and enforcement of the following provisions of law:

- a. Chapters 51, 52, and 53 of the Internal Revenue Code of 1954 and sections 7652 and 7653 of such Code insofar as they relate to the commodities subject to tax under such chapters;
- b. Chapters 61 to 80, inclusive, of the Internal Revenue Code of 1954, insofar as they relate to activities administered and enforced with respect to chapters 51, 52, and 53;
- c. The Federal Alcohol Administration Act (27 U.S.C. Chapter 8);
- d. 18 U.S.C. Chapter 44 (relating to firearms);
- e. Title VII, Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. Appendix, sections 1201-1203);
- f. 18 U.S.C. 1262-1265; 1952; 3615 (relating to liquor traffic);
- g. Act of August 9, 1939 (49 U.S.C. Chapter 11); insofar as it involves matters relating to violations of the National Firearms Act;
- h. 18 U.S.C. Chapter 40 (relating to explosives); and
- i. Section 414 of the Mutual Security Act of 1954, as amended (22 U.S.C. 1934) relating to the control of the importation of arms, ammunition and implements of war.

All functions, powers and duties of the Secretary which relate to the administration and enforcement of

Exhibit C 1 of 3

the laws specified in paragraph 2 hereof are delegated to the Director. Regulations for the purposes of carrying out the functions, powers and duties delegated to the Director may be issued by him with the approval of the Secretary.

All regulations prescribed, all rules and instructions issued, and all forms adopted for the administration and enforcement of the laws specified in paragraph 2 hereof, which are in effect or in use on the effective date of this Order, shall continue in effect as regulations, rules, instructions and forms of the Bureau until superseded or revised.

All existing activities relating to the collection, processing, depositing, or accounting for taxes (including penalties and interest), fees, or other moneys under the laws specified in paragraph 2 hereof, shall continue to be performed by the Commissioner of Internal Revenue to the extent not now performed by the Alcohol, Tobacco and Firearms Division or the Assistant Regional Commissioners (Alcohol, Tobacco and Firearms), until the Director shall otherwise provide with the approval of the Secretary.

All existing activities relating to the laws specified in paragraph 2 hereof which are now performed by the Bureau of Customs, shall continue to be performed by such Bureau until the Director shall otherwise provide with the approval of the Secretary.

The terms "Director, Alcohol, Tobacco and Firearms Division" and "Commissioner of Internal Revenue" wherever used in regulations, rules, and instructions, and forms, issued or adopted for the administration and enforcement of the laws specified in paragraph 2 hereof, which are in effect or in use on the effective date of this Order, shall be held to mean the Director.

The terms "Assistant Regional Commissioner" wherever used in such regulations, rules, instructions, and forms, shall be held to mean Regional Director.

The terms "internal revenue officer" and "officer, employee or agent of the internal revenue" wherever used in such regulations, rules, instructions and forms, in any law specified in paragraph 2. above, and in 18 U.S.C. 1114, shall include all officers and employees of the United States engaged in the administration and enforcement of the laws administered by the Bureau, who are appointed or employed by, or pursuant to the authority of, or who are subject to the directions, instructions or orders of, the Secretary.

The above terms, when used in regulations, rules, instructions and forms of government agencies other than the Internal Revenue Service, which relate to the administration and enforcement of the laws specified in paragraph 2 hereof, shall be held to have the same meaning as if used in regulations, rules, instructions and forms of the Bureau.

There shall be transferred to the Bureau all positions, personnel, records, property, and unexpended balances of appropriations, allocations, and other funds of the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service, including those of the Assistant Regional Commissioners (Alcohol, Tobacco and Firearms), Internal Revenue Service.

In addition, there shall be transferred to the Bureau such other positions, personnel, records, property, and unexpended balances of appropriations, allocations, and other funds, as are determined by the Assistant Secretary for Administration, in consultation with the Assistant Secretary, the Director, and the Commissioner of Internal Revenue, to be necessary or appropriate to be transferred to carry out the purposes of this Order.

Exhibit C2 of 3

There shall be transferred to the Chief Counsel of the Bureau such functions, powers and duties, and positions, personnel, records, property, and unexpended balances of appropriations, allocations, and funds, of the Chief Counsel of the Internal Revenue Service as the General Counsel of the Department shall direct.

All delegations inconsistent with this Order are revoked.

This Order shall become effectively July 1, 1972.

Charles E. Walker

Acting Secretary of the Treasury

Exhibit C 3 of 3



## 2039 Summons

- A. In the August 2002, "VIP Dispatch" we gave you the first lesson concerning summons so we suggest a review of that issue.
- B. The first 2039 Summons Exhibit A is issued to an individual and Exhibit B to a corporation.
- C. Look at who we have serving the Summons.
  - 1. A Revenue Agent. And what do we know about a Revenue Agent?
  - 2. For any that missed that we are covering it again in this issue.
- D. The IRS is back at its old games and seems to be pushing these 2039 Summons out like a Santa Clause passing out candy canes.
- E. Number one: do not let anyone talk you into not showing up at a summons hearing as your problem will only get worse.
  - 1. Be aware that there are a lot of people on the Internet giving bad advice, which can get you into a whole lot of trouble.
- F. A lot of people who have contacted us concerning the 2039 Summons issue have been filing and often they don't even know why they are being summoned. They have not received anything in the mail from the IRS until some agent shows up on their doorstep with a Summons.
- G. If you or someone you know has been filing or not filing and receives a 2039 Summons contact us ASAP for a review of what you can do.
- H. We can customize a packet for you and provide you with complete response programs to help you deal with this problem.
  - 1. We have talked with hundreds of people in this situation and we know that no specific procedure works for everyone.
  - 2. As with any problem with a government agency certain rules apply in certain situations.
  - 3. Knowing what to use, when to use it and how to use it so it conforms to the Rules of Evidence is extremely important.



# Summons

In the matter of \_\_\_\_\_  
 Internal Revenue Service (Division): SMALL BUSINESS/SELF EMPLOYED  
 Industry/Area (name or number): AREA 5  
 Periods: JANUARY 1, 1997 THROUGH DECEMBER 21, 1999

The Commissioner of Internal Revenue

To: \_\_\_\_\_  
 At: 1448 SOUTH EAST 13TH STREET FORT LAUDERDALE, FLORIDA 33316

You are hereby summoned and required to appear before CYNTHIA EVANS  
 an officer of the Internal Revenue Service, to give testimony and to bring with you and to produce for examination the following books, records, papers,  
 and other data relating to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the  
 administration or enforcement of the internal revenue laws concerning the person identified above for the periods shown.

1. PHYSICAL PRESENCE OF MRS. \_\_\_\_\_ TO BE INTERVIEWED.
2. (A) ALL BANK (CHECKING AND SAVINGS) ACCOUNTS  
 (B) CANCELLED CHECKS  
 (C) DEPOSIT SLIPS  
 (D) MORTGAGE RECORDS AND APPLICATIONS

### Attestation

I hereby certify that I have examined and compared this copy of the summons with the original  
 and that it is a true and correct copy of the original.

Cynthia M. Evans                      Revenue Agent  
 Signature of IRS officer serving the summons                      Title

Business address and telephone number of IRS officer before whom you are to appear:

SOUTH WEST    COURT. STOP    PLANTATION, FLORIDA

Place and time for appearance at SOUTH WEST    COURT. STOP 4541, PLANTATION



Department of the Treasury  
 Internal Revenue Service

www.irs.gov

Form 2039 (Rev. 12-2001)  
 Catalog Number 21405J

on the \_\_\_\_\_ day of JULY \_\_\_\_\_ at 9:00 o'clock a m.  
 Issued under authority of the Internal Revenue Code this \_\_\_\_\_ day of JULY \_\_\_\_\_

Cynthia Evans                      Revenue Agent  
 Signature of issuing officer                      Title  
Maria W. Jones-Jones                      Thrup Messager  
 Signature of approving officer (if applicable)                      Title

Part A - to be given to person summoned

Exhibit #



# Summons

In the matter of \_\_\_\_\_

Internal Revenue Service (Division): SMALL BUSINESS/SELF EMPLOYED

Industry/Area (name or number): AREA 5

Periods: JANUARY 1, 1997 - DECEMBER 31, 1997 AND JANUARY 1, 1998 - DECEMBER 31, 1998

The Commissioner of Internal Revenue

To: \_\_\_\_\_

At: \_\_\_\_\_

WINTERDALE, FLORIDA

You are hereby summoned and required to appear before CYNTHIA M. EVANS an officer of the Internal Revenue Service, to give testimony and to bring with you and to produce for examination the following books, records, papers, and other data relating to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the administration or enforcement of the Internal revenue laws concerning the person identified above for the periods shown.

1. APPEARANCE OF THE PRESIDENT OF THIS CORPORATION FOR AN INTERVIEW.
2. COPY OF FORM W-4 SUBMITTED BY \_\_\_\_\_ SS
3. LIST OF ALL PAYMENTS MADE TO \_\_\_\_\_ IN 1997 AND 1998. INCLUDE ON THE LIST THE DATE OF THE PAYMENT AND THE AMOUNT OF THE PAYMENT.
4. IF THE PAYMENT WAS IN THE FORM OF A CHECK, PLEASE SUBMITT A COPY OF THE FRONT AND BACK OF THE CHECK.
5. LIST OF SERVICES PROVIDED BY \_\_\_\_\_ IN 1997 AND 1998.
6. WHAT WAS THE PURPOSE OF ALL PAYMENTS? WHAT SERVICES WERE PROVIDED?

### Attestation

I hereby certify that I have examined and compared this copy of the summons with the original and that it is a true and correct copy of the original.

Cynthia Evans  
Signature of IRS officer serving the summons

Revenue Agent  
Title

Business address and telephone number of IRS officer before whom you are to appear:

WEST STOP 4541, PLANTATION, FLORIDA 33324

Place and time for appearance at 7450 SOUTH WEST 6TH COURT, STOP 4541, PLANTATION, FLORIDA 33324



Department of the Treasury  
Internal Revenue Service

www.irs.gov

Form 2008 (Rev. 12-2001)  
Catalog Number 27405J

on the \_\_\_\_\_ day of DECEMBER at 9:00 o'clock A M.

issued under authority of the Internal Revenue Code this 25TH <sup>(year)</sup> day of NOVEMBER 2002 <sup>(year)</sup>

Cynthia Evans  
Signature of issuing officer

REVENUE AGENT  
Title

Maria H. Jones  
Signature of approving officer if applicable

GROUP MANAGER  
Title

Part A - to be given to person summoned

Exhibit B

## *Who are you FOIA Request*

- A. Send for your IMF or BMF ASAP. See January and February VIP Dispatches for these FOIA's.
- B. Go to a local IRS office and ask for your IMFOLT, TAXMOD, and the Transcript of Account, or your BMFOLT, if the Summons is for a business.
- C. Do a "Who are you" FOIA for each one of the IRS employees who has signed the 2039 Summons.
  1. You can not ask for their SSN or Medical Records but everything else is fair game. Incidentally, their SSN and medical records are private and confidential!
  2. Remember working for the Federal Government is considered a privilege and not a right.
  3. We find many times that the agent is not even using their real name so watch out for their tricks.

## FREEDOM OF INFORMATION ACT REQUEST

To: Disclosure Officer  
Re: Cynthia M. Evans, Revenue Agent  
Department of the Treasury  
Internal Revenue Service  
400 W. Bay Street, Stop 4030  
Ft. Lauderdale, FL 32202

From: Name  
address  
address  
Account # (SSN or EIN)

1. This is a request under the Freedom of Information Act, 5 USC 552.
2. This is my firm promise to pay fees and costs for locating, duplicating and reviewing the documents and information listed below. As per Reg. 601.702(F)(3)(I)(E), I am making this request in the classification of "other requestor." If costs are expected to exceed \$20.00, please send an estimate of the cost.
3. If some of this request is exempt from release, please send me those portions reasonably segregable and are not releasing.
4. Requestor is in need of the following information to ascertain if claimed Agent Cynthia M. Evans is an employee of the United States of America or an employee of an agency of the United States of America and that he/she is acting within the bounds of his/her authority as such employee.
5. I understand the penalties provided in 5 USC 552(a)(i)(3) for requesting or obtaining access to records under false pretenses.
6. BACKGROUND: See Exhibit A – Form 2039, Summons, signed by Cynthia M. Evans
7. This request pertains to the years beginning with Agent Cynthia M. Evans first employment with the Department of Treasury/IRS to the present year 2001.
8. Please send me copies of the following documents as they pertain to Cynthia M. Evans personally, and or in his/her title role of Revenue Agent, all of which documents I understand have been designated by the Office of Personnel Management as public information about employees of the United States of America.
  - a. All document(s) that include, identify, and describe the present and past position Revenue Agents and occupational service of Agent Cynthia M. Evans.
  - b. All document(s) that include, identify, and describe the past and present grades of Agent Cynthia M. Evans.
  - c. All document(s) that include, identify, and describe the past and present annual salary, including Executive Ranks, and allowances and differentials of Agent Cynthia M. Evans.
  - d. All document(s) that include, identify, and describe present and past duty stations (including room numbers, shop designations, or other identifying information regarding buildings or places of employment of Agent Cynthia M. Evans.
  - e. All document(s) that include, identify, and describe Agent Cynthia M. Evans position description, identification of job elements, and those performance standards (but not actual performance appraisals).
  - f. All document(s) that include, identify, and describe Agent Cynthia M. Evans specific "G.S. number," the meaning of the abbreviation "G.S." and a description or explanation of the numbering system used for "G.S" classification.
  - g. The specific document(s) of appointment for Agent Cynthia M. Evans to assert the title of "Revenue Agent".

- h. The specific “delegation of authority” documents issued and applicable to Agent Cynthia M. Evans at his/her present position, at his/her present office, that cover all aspects of his/her job description.
- i. Any document that verifies the true identity of Agent Cynthia M. Evans as Revenue Agent.
- j. Copies of any documents that exempt Agent Cynthia M. Evans, or his/her division, from coming within the purview of the Freedom of Information Act, and Administrative Procedures Act.
- k. Provide me with the authorization of whether Cynthia M. Evans is the legal name or a pseudonym of the agent.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Name, Requestor

Dated: \_\_\_\_\_

\_\_\_\_\_  
Notary Public



# Summons

In the matter of \_\_\_\_\_

Internal Revenue Service (Division): SMALL BUSINESS/SELF EMPLOYED

Industry/Area (name or number): AREA 5

Periods: JANUARY 1, 1997 THROUGH DECEMBER 31, 1999

The Commissioner of Internal Revenue

To: \_\_\_\_\_

At: 1448 SOUTH EAST 13TH STREET FORT LAUDERDALE, FLORIDA 33316

You are hereby summoned and required to appear before CYNTHIA EVANS  
an officer of the Internal Revenue Service, to give testimony and to bring with you and to produce for examination the following books, records, papers,  
and other data relating to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the  
administration or enforcement of the internal revenue laws concerning the person identified above for the periods shown.

1. PHYSICAL PRESENCE OF MRS. \_\_\_\_\_ TO BE INTERVIEWED.
2. (A) ALL BANK (CHECKING AND SAVINGS) ACCOUNTS  
(B) CANCELLED CHECKS  
(C) DEPOSIT SLIPS  
(D) MORTGAGE RECORDS AND APPLICATIONS

### Attestation

I hereby certify that I have examined and compared this copy of the summons with the original and that it is a true and correct copy of the original.

Cynthia M. Evans                      Revenue Agent  
Signature of IRS officer serving the summons                      Title

Business address and telephone number of IRS officer before whom you are to appear:

SOUTH WEST      COURT, STOP      PLANTATION, FLORIDA

Place and time for appearance at SOUTH WEST      COURT, STOP 4541, PLANTATION.



Department of the Treasury  
Internal Revenue Service

www.irs.gov

Form 2039 (Rev. 12-2001)  
Catalog Number 21405J

on the \_\_\_\_\_ day of JULY \_\_\_\_\_ at 9:00 o'clock a m.  
Issued under authority of the Internal Revenue Code this \_\_\_\_\_ day of JULY \_\_\_\_\_

Cynthia Evans                      Revenue Agent  
Signature of issuing officer                      Title

Maria M. Jones-Jones                      Group Manager  
Signature of approving officer (if applicable)                      Title

Part A - to be given to person summoned

Exhibit A

# FREEDOM OF INFORMATION ACT REQUEST

To: Disclosure Officer

Re: Maria W. Homan - Jones, Group Manager  
Department of the Treasury  
Internal Revenue Service  
400 W. Bay Street, Stop 4030  
Ft. Lauderdale, FL 32202

From: Name

address  
address

Account # (SSN or EIN)

1. This is a request under the Freedom of Information Act, 5 USC 552.
2. This is my firm promise to pay fees and costs for locating, duplicating and reviewing the documents and information listed below. As per Reg. 601.702(F)(3)(I)(E), I am making this request in the classification of "other requestor." If costs are expected to exceed \$20.00, please send an estimate of the cost.
3. If some of this request is exempt from release, please send me those portions reasonably segregable and are not releasing.
4. Requestor is in need of the following information to ascertain if claimed Agent Maria W. Homan - Jones is an employee of the United States of America or an employee of an agency of the United States of America and that he/she is acting within the bounds of his/her authority as such employee.
5. I understand the penalties provided in 5 USC 552(a)(i)(3) for requesting or obtaining access to records under false pretenses.
6. BACKGROUND: See Exhibit A – Form 2039, Summons, signed by Maria W. Homan - Jones
7. This request pertains to the years beginning with Agent Maria W. Homan - Jones first employment with the Department of Treasury/IRS to the present year 2001.
8. Please send me copies of the following documents as they pertain to Maria W. Homan - Jones personally, and or in his/her title role of Group Manager, all of which documents I understand have been designated by the Office of Personnel Management as public information about employees of the United States of America.
  - a. All document(s) that include, identify, and describe the present and past position Group Managers and occupational service of Agent Maria W. Homan - Jones.
  - b. All document(s) that include, identify, and describe the past and present grades of Agent Maria W. Homan - Jones.
  - c. All document(s) that include, identify, and describe the past and present annual salary, including Executive Ranks, and allowances and differentials of Agent Maria W. Homan - Jones.
  - d. All document(s) that include, identify, and describe present and past duty stations (including room numbers, shop designations, or other identifying information regarding buildings or places of employment of Agent Maria W. Homan - Jones.
  - e. All document(s) that include, identify, and describe Agent Maria W. Homan - Jones position description, identification of job elements, and those performance standards (but not actual performance appraisals).
  - f. All document(s) that include, identify, and describe Agent Maria W. Homan - Jones specific "G.S. number," the meaning of the abbreviation "G.S." and a description or explanation of the numbering system used for "G.S" classification.
  - g. The specific document(s) of appointment for Agent Maria W. Homan - Jones to assert the title of "Group Manager".



- h. The specific "delegation of authority" documents issued and applicable to Agent Maria W. Homan - Jones at his/her present position, at his/her present office, that cover all aspects of his/her job description.
- i. Any document that verifies the true identity of Agent Maria W. Homan - Jones as Group Manager.
- j. Copies of any documents that exempt Agent Maria W. Homan - Jones, or his/her division, from coming within the purview of the Freedom of Information Act, and Administrative Procedures Act.
- k. Provide me with the authorization of whether Maria W. Homan - Jones is the legal name or a pseudonym of the agent.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Name, Requestor

Dated: \_\_\_\_\_

\_\_\_\_\_  
Notary Public



# Summons

In the matter of \_\_\_\_\_  
 Internal Revenue Service (Division): SMALL BUSINESS/SELF EMPLOYED  
 Industry/Area (name or number): AREA 5  
 Periods: JANUARY 1, 1997 THROUGH DECEMBER 21, 1999

The Commissioner of Internal Revenue

To: \_\_\_\_\_  
 At: 1448 SOUTH EAST 13TH STREET FORT LAUDERDALE, FLORIDA 33316

You are hereby summoned and required to appear before CYNTHIA EVANS  
 an officer of the Internal Revenue Service, to give testimony and to bring with you and to produce for examination the following books, records, papers,  
 and other data relating to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the  
 administration or enforcement of the internal revenue laws concerning the person identified above for the periods shown.

1. PHYSICAL PRESENCE OF MRS. \_\_\_\_\_ TO BE INTERVIEWED.
2. (A) ALL BANK (CHECKING AND SAVINGS) ACCOUNTS  
 (B) CANCELLED CHECKS  
 (C) DEPOSIT SLIPS  
 (D) MORTGAGE RECORDS AND APPLICATIONS

### Attestation

I hereby certify that I have examined and compared this copy of the summons with the original  
 and that it is a true and correct copy of the original.

Cynthia M. Evans \_\_\_\_\_ Revenue Agent  
 Signature of IRS officer serving the summons Title

Business address and telephone number of IRS officer before whom you are to appear:

SOUTH WEST COURT, STOP LANTATION, FLORIDA  
 Place and time for appearance at SOUTH WEST COURT, STOP 4541, PLANTATION.



Department of the Treasury  
 Internal Revenue Service

www.irs.gov

Form 2039 (Rev. 12-2001)  
 Catalog Number 21405J

on the \_\_\_\_\_ day of JULY at 9:00 o'clock a m.  
 issued under authority of the Internal Revenue Code this \_\_\_\_\_ day of JULY

Cynthia Evans \_\_\_\_\_ Revenue Agent  
 Signature of issuing officer Title  
Marshall Jones-Jones \_\_\_\_\_ Thrup Manager  
 Signature of approving officer (if applicable) Title

Part A - to be given to person summoned

Exhibit A

## *FOIA for a copy of a 2039 Summons*

- A. The 2039 Summons is a multi-part form.
- B. You receive only one part of that multi-part 2039 Summons form.
- C. Why not ask for a crisp clean complete 2039 Summons form?
- D. They are not about to give you one of these complete 2039 Summons forms.
- E. But now you have asked for it through FOIA. If the need arises you can ask for it in discovery if they should ever want to take you into court.
- F. The top of the one we have says, “Administrative Summons Obtaining Evidence from Abroad Administratively.”

FREEDOM OF INFORMATION ACT REQUEST

TO:

Internal Revenue Service  
Attn: Disclosure Officer  
(local IRS disclosure address)  
(local IRS disclosure address)

FROM: Name

addr1  
addr2

Account # (SS or EIN)

Dear Disclosure Officer:

1. This is a request under the Freedom of Information Act, 5 USC 552, or regulations thereunder. This is my firm promise to pay fees and costs for locating and duplicating the records requested below, ultimately determined in accordance with 26 CFR 601.702 (f).
3. If some of this request is exempt from release, please furnish me with those portions reasonably segregable. I am waiving personal inspection of the requested records.
3. BACKGROUND: See Exhibit A, page 1 of 2: "IRS Published Product Catalog," Document 7130 (Rev. 11-1999) Catalog Number 63740X.  
See Exhibit A, page 2 of 2: 3<sup>rd</sup> column, 2<sup>nd</sup> item down – 2039 21405J
4. Please send me a complete copy of Form 2039, 21405J with all parts attached.
5. Please certify all documents with the Form 2866, certificate of official record. If there are no specific documents pertaining to this request, certify your response with Form 3050, certificate of lack of records.

**DATED:**

Respectfully,

Name, Requester

# IRS Published Product Catalog

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IRS

Department of the Treasury

Internal Revenue Service

Publish [no.list.gov](http://no.list.gov)

Document 7130 (Rev. 11-1999)

Catalog Number 63740X

Exhibit # 1 of 2

## Forms

- 1930** 17882M Each  
07/1985 Destroy Prev Issues Upon Rec  
Custody Receipt for Government  
Property  
This form is used as a custody receipt for Government Property. *M:RE:FP* Internal Use
- 1933** 17885T Each  
10/1997 Destroy Prev Issues Upon Rec  
Report of Survey  
Form used for reporting equipment in conjunction with Personal Property Management Handbook, Chapter 200, and the Automated Inventory System. *M:S:RE:FP* Internal Use
- 1937** 21315E Each  
05/1980 Use/Issue Prev Issue First  
Correspondence Approval and  
Clearance  
This form is prescribed as the official record copy of correspondence. Form is available to CI through their PC Program "Agent's Suite". *M:RE* Internal Use
- 1937 A** 21320X Each  
06/1980 Use/Issue Prev Issue First  
Correspondence Approval and  
Clearance  
This form is used as a file copy for letters and memos. *M:RE:FS* Internal Use
- 1937 B** 13928L Each  
09/1996 No Previous Issue  
Correspondence Approval and  
Clearance  
Used as an official record copy for correspondence. This form is a 20# weight version of Form 1937.  
Form 1937 printed on CW manifold (tissue weight) paper does not feed through most printers used with personal computers. This product converted to the national numbering system and supersedes RC-C Gen 1256 and SC-C 972. *D* Internal Use
- 1944 (C)** 26285Z Each  
01/1981 No Previous Issue  
Transmittal Register  
Used in Preparation of Various Computer Generated Taxpayer Notices. *T:C:O:A:C* Tax Form or Instruction
- 1957** 17912P Each  
02/1970 Destroy Prev Issues Upon Rec  
Schedule of Designated Certifying  
Officers or Employees  
This form is used to designate employees who are certified to pay IRS funds. *F:F:O* Internal Use
- 1958** 17913A Each  
12/1968 Destroy Prev Issues Upon Rec  
Schedule of Revoked Authorizations of  
Officers or Employees  
Form 1958 is used to list those personnel whose authorization to certify vouchers for payment has been revoked effective per the date shown. *F:F:O* Internal Use
- 1963** 17917S Each  
07/1992 Destroy Prev Issues Upon Rec  
Collection Register (Deposit Funds,  
Refund Repayments, General Funds  
Receipts)  
Form 1963 is used by Cash Clerks to record both non-revenue receipts of photocopy fees and deposits of general fund remittances. The data on the form is reconciled by Accounting Technicians in the service center Accounting and Receipt and Control Branches. *T*: Internal Use
- 1976** 21350L Pad  
02/1985 Use/Issue Prev Issue First  
Assignment Slip  
Form 1976 is used to assign and control TDA's, TDI's, miscellaneous investigations, offers-in-compromise, FTD alerts, and RCP (Returns Compliance Program) leads. *CP:CO:C:FP* Internal Use
- 1983** 17943O Each  
01/1987 Destroy Prev Issues Upon Rec  
Deposit Fund Record - Property Sales  
and Deposits  
Form 1983 is a control form prepared by tax examiners or accounting technicians to record property sales and deposits. When the account is closed out, the form is retired to the Federal Records Center. *T:S:R:R* Internal Use
- 2007** 61491R Each  
03/1986 Destroy Prev Issues Upon Rec  
Schedule of Small Credits Cleared  
Form 2007 is a journalizing document for listing small amounts of revenue monies under the Master File tolerance. *R:R:A* Internal Use
- 2019** 21365K Pad  
07/1988 Destroy Prev Issues Upon Rec  
Authorization for Disposition of Salary  
Checks and/or Savings Bonds  
Form 2019 is used as an authorization for delivery of salary checks and/or savings bonds and also as a mailing insert for salary checks. *M:S:P:S* Internal Use
- 2028** 61493N Each  
10/1993 Destroy Prev Issues Upon Rec  
Report of Investigation  
Form 2028 is used for all reports of investigation made by inspection. *I:IS:P* Internal Use
- 2028 P** 61431P Each  
05/1985 Use/Issue Prev Issue First  
Summary Report of Investigation  
Form 2028-P is used by Internal Security, exclusively, as an integral part of reporting character and other background investigations. *I:IS* Internal Use
- 2032** 49954D Each  
07/1998 Destroy Prev Issues Upon Rec  
Contract Coverage Under Title II Of The  
Social Security Act  
For use by a domestic corporation to extend social security coverage to United States citizens employed by its foreign subsidiaries. *T:FP:F:M* Tax Form or Instruction
- 2038** 21400G Each  
01/1994 Destroy Prev Issues Upon Rec  
Information Guide - Exemptions for  
Dependents  
ICR Form. Notice 609 must be enclosed with this form when mailed to taxpayer. Form 2038 requests information needed to support the exemption for dependents claimed on tax return. *CP:EX:CS:MI* Tax Related Public Use
- 2039** 21405J Each  
09/1999 Destroy Prev Issues Upon Rec  
Summons  
Form 2039 is used to summon a taxpayer to appear before an officer of the IRS to give testimony relating to the tax liability (or collection of it) of the person identified on the form. The person summoned is requested to bring along for examination all books, records, papers, and other data relative to the inquiry. *OP:CI:O:T* Tax Related Public Use
- 2040** 71120B Each  
02/1999 Destroy Prev Issues Upon Rec  
Distribution List  
Form 2040 will be used by the printing specialists and distribution analysts when shipping quantities to the distribution centers and service centers. This form will be printed on the On Demand Program from the Area Distribution Centers. This item is distributed on the IMDDS Program using File Number 96, Cat. No. 01495H. For more information, see Chapter 5 instructions in Document 7130. *OP:FS:T:M:L* Internal Use
- 2045** 61497F Each  
03/1980 Use/Issue Prev Issue First  
Transferee Agreement  
This form is used to secure a figure and an agreement from the transferee concerning his tax liability to the extent provided in Sec. 6901 of the IR code. *CP:EX:CS:MI* Tax Related Public Use
- 2061** 61498Q Each  
12/1998 Destroy Prev Issues Upon Rec  
Document Clearance Record  
Form 2061 is used to provide guidelines for originators and receivers in the clearance process of Internal Management Documents. It also serves as record of reviewers and their comments. *M:SP* Internal Use
- 2063** 21420Y Each  
02/1998 Destroy Prev Issues Upon Rec  
U.S. Departing Alien Income Tax  
Statement  
The prescribing instructions are Rev. Rul SS-468, C. B. 1955-2, 5a; Pub. 433; Rev. Proc. 60-33. Statement by a departing resident alien whose taxable period has not been terminated, or by a departing nonresident alien having no taxable income from U.S. Sources and certifies that all U.S. income tax obligations have been satisfied. To be used in lieu of 1040 C *T:FP:F:I* Tax Form or Instruction

FREEDOM OF INFORMATION ACT REQUEST

TO:

Internal Revenue Service  
Freedom of Information Reading Room  
1111 Constitution Ave., NW - Room 1621  
Washington, D.C. 20224

FROM: Name

addr1

addr2

Account # (SS or EIN)

Dear Disclosure Officer:

1. This is a request under the Freedom of Information Act, 5 USC 552, or regulations thereunder. This is my firm promise to pay fees and costs for locating and duplicating the records requested below, ultimately determined in accordance with 26 CFR 601.702 (f).
2. If some of this request is exempt from release, please furnish me with those portions reasonably segregable. I am waiving personal inspection of the requested records.
3. BACKGROUND: See Exhibit A, page 1 of 2: "IRS Published Product Catalog," Document 7130 (Rev. 11-1999) Catalog Number 63740X.  
See Exhibit A, page 2 of 2: 3<sup>rd</sup> column, 2<sup>nd</sup> item down – 2039 21405J
4. Please send me a complete copy of Form 2039, 21405J with all parts attached.
5. Please certify all documents with the Form 2866, certificate of official record. If there are no specific documents pertaining to this request, certify your response with Form 3050, certificate of lack of records.

**DATED:**

Respectfully,

Name, Requester

# IRS Published Product Catalog

---

IRS

Department of the Treasury

Internal Revenue Service

Publish .no.list.gov

Document 7130 (Rev. 11-1999)

Catalog Number 63740X

Exhibit *A* 1 of 2



## Forms

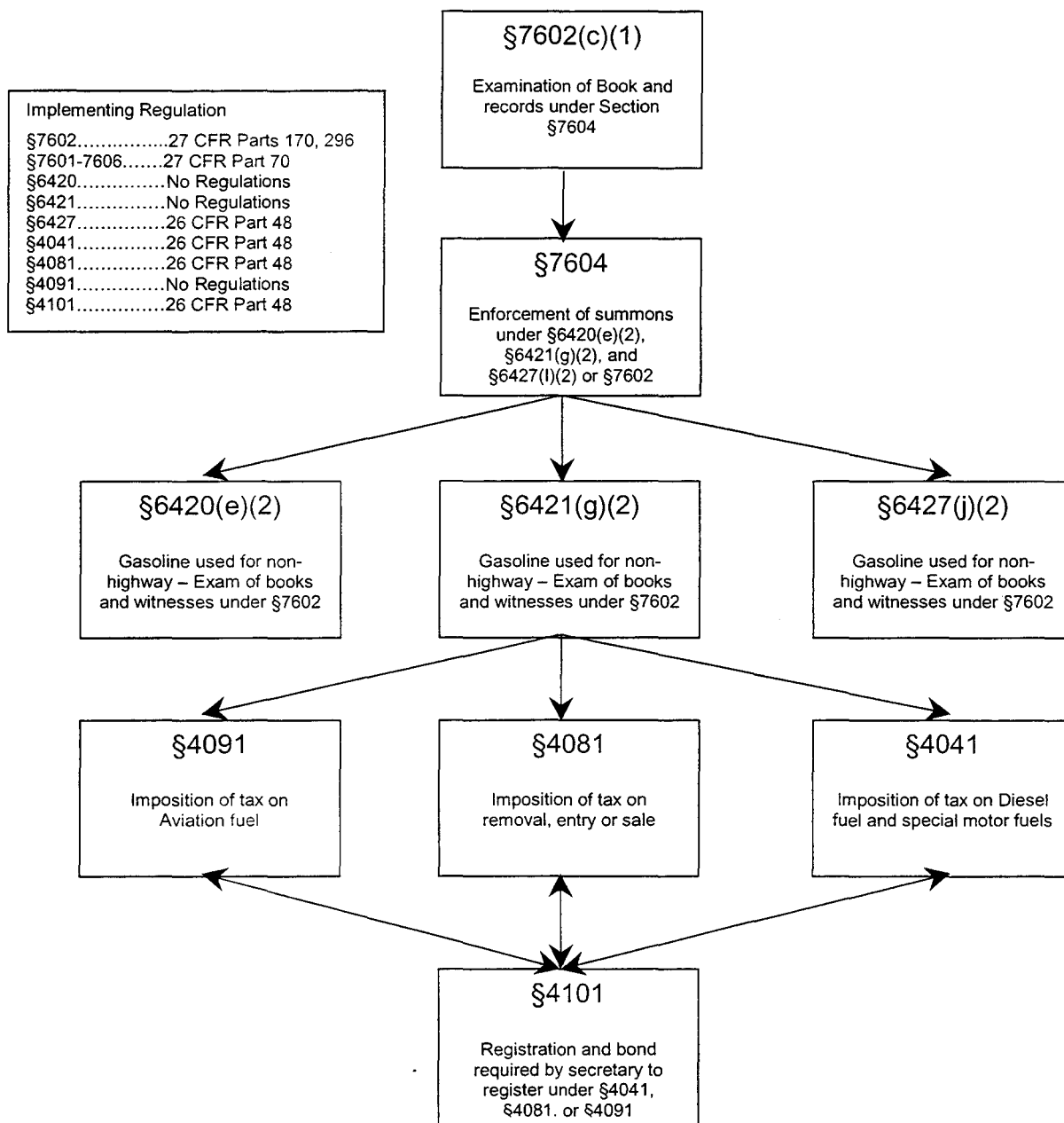
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Form used for reporting equipment in conjunction with Personal Property Management Handbook, Chapter 200, and the Automated Inventory System. *M:S:RE:FP* Internal Use
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**Transmittal Register**  
Used in Preparation of Various Computer Generated Taxpayer Notices. *T:C:O:A:C* Tax Form or Instruction
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**Authorization for Disposition of Salary Checks and/or Savings Bonds**  
Form 2019 is used as an authorization for delivery of salary checks and/or savings bonds and also as a mailing insert for salary checks. *M:S:P:S* Internal Use
- 2028** 61493N Each  
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**Report of Investigation**  
Form 2028 is used for all reports of investigation made by Inspection. *I:IS:P* Internal Use
- 2028 P** 61431P Each  
05/1985 Use/Issue Prev Issue First  
**Summary Report of Investigation**  
Form 2028-P is used by Internal Security, exclusively, as an integral part of reporting character and other background investigations. *I:IS* Internal Use
- 2032** 49954D Each  
07/1998 Destroy Prev Issues Upon Rec  
**Contract Coverage Under Title II Of The Social Security Act**  
For use by a domestic corporation to extend social security coverage to United States citizens employed by its foreign subsidiaries. *T:FP:F:M* Tax Form or Instruction
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This form is used to secure a figure and an agreement from the transferee concerning his tax liability to the extent provided in Sec. 6901 of the IR code. *CP:EX:CS:MI* Tax Related Public Use
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**U.S. Departing Alien Income Tax Statement**  
The prescribing instructions are Rev. Rul SS-468, C. B. 1955-2, 5a; Pub. 433; Rev. Proc. 60-33. Statement by a departing resident alien whose taxable period has not been terminated, or by a departing nonresident alien having no taxable income from U.S. Sources and certifies that all U.S. income tax obligations have been satisfied. To be used in lieu of 1040 C. *T:FP:F:I* Tax Form or Instruction

## **2039 Summons Under Title 26, 7602 (c) (1)**

- A. Go to Exhibit A in this section and study the breakdown of 7602(c)(1).
- B. Now go to Exhibit B, 1 of 4, for the breakdown of the 2039 Summons
- C. Go next to the IRS Handbook 109.1 Summons Handbook to study the 2039 Summons, Exhibit C.

# 2039 Summons Under Title 26 §7602(c)(1)

Form 2039 – Administrative Summons Obtaining Evidence from Abroad Administratively



## Authority to Summons:

26 U.S.C. Section 7602(a) discusses the authority to summons. It states that:

- (a) Authority to summon, etc.  
For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized -
  - (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
  - (2) **To summon the person liable for tax** or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
  - (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Therefore, the IRS must FIRST establish a liability BEFORE it can summons you.

Furthermore, there are only three sections of the entire Internal Revenue Code that mention the term "liability", and they are:

- 26 U.S.C. Section 1441: **Withholding of tax on nonresident aliens**
- 26 U.S.C. Section 1442: **Withholding of tax on foreign corporations**
- 26 U.S.C. Section 1443: **Foreign Tax Exempt Organizations**

There are no implementing regulations under Title 26 that authorize the IRS to summons anyone.

*"...we think it important to note that the Act's civil and criminal penalties attach only upon violation of regulations promulgated by the Secretary: if the Secretary were to do nothing, the Act itself would impose no penalties on anyone." California Bankers Assn. v. Shultz, 416 U.S. 21 (1974)*

All of the implementing regulations for 26 U.S.C. Section 7602 are associated with

Title 27, which is the Bureau of Alcohol, Tobacco, and Firearms. Here is a list of the related parallel authorities for this section, ALL of which are related to Alcohol, Tobacco, and Firearms and NONE of which relate in any way with the individual income tax found in 26 U.S.C. Subtitle A:

- [27 CFR part 70](#)
- [27 CFR part 170](#)
- [27 CFR part 296](#)

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### **Enforcement of Summons:**

26 U.S.C. Section 7604(b) states that there are only FOUR reasons why a person can be compelled to appear at a summons:

- *(b) Enforcement*  
*Whenever any person summoned under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.*

You will note that the three valid reasons for the summons are information related to (the titles of the respective sections are shown):

- **Section 6420: Gasoline used on farms**
- **Section 6421. Gasoline used for certain nonhighway purposes, used by local transit systems, or sold for certain exempt purposes**
- **Section 6427. Fuels not used for taxable purposes**

[Click here for a summary of the relationship of laws that regulate summons.](#)

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### **United States v. Powell, 379 U.S. 57 (1964)**

"We do not equate necessity as contemplated by this provision with probable cause or

any like notion. **If a taxpayer has filed fraudulent returns, a tax liability exists without regard to any period of limitations. Section 7602 authorizes the Commissioner to investigate any such liability. 12 If, in order to determine the existence or nonexistence of fraud in the taxpayer's returns, information in the taxpayer's records is needed which is not already in the Commissioner's possession, we think the examination is not "unnecessary" within the meaning of 7605 (b).** Although a more stringent interpretation is possible, one which would require some showing of cause for suspecting fraud, we reject such an interpretation [379 U.S. 48, 54] because it might seriously hamper the Commissioner in carrying out investigations he thinks warranted, forcing him to litigate and prosecute appeals on the very subject which he desires to investigate, and because the legislative history of 7605 (b) indicates that no severe restriction was intended....."

**"We are asked to read 7605 (b) together with the limitations sections in such a way as to impose a probable cause standard upon the Commissioner from the expiration date of the ordinary limitations period forward. Without some solid indication in the legislative history that such a gloss was intended, we find it unacceptable. 15 Our reading of the statute is said to render the first clause of 7605 (b) surplusage to a large extent, for, as interpreted, the clause adds little beyond the relevance and materiality requirements of 7602. That clause does appear to require that the information sought is not already within the Commissioner's possession, but we think its primary purpose was no more than to emphasize the responsibility of agents to exercise prudent judgment in wielding the extensive powers granted to them by the Internal Revenue Code. 16 [379 U.S. 48, 57] "**

"This view of the statute is reinforced by the general rejection of probable cause requirements in like circumstances involving other agencies. In *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 216, in reference to the Administrator's subpoena power under the Fair Labor Standards Act, the Court said "his investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury's, or the court's in issuing other pretrial orders for the discovery of evidence, and is governed by the same limitations," and accordingly applied the view that inquiry must not be "limited . . . by forecasts of the probable result of the investigation." In *United States v. Morton Salt Co.*, 338 U.S. 632, 642-643, the Court said of the Federal Trade Commission, "It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." While the power of the Commissioner of Internal Revenue derives from a different body of statutes, we do not think the analogies to other agency situations are without force when the scope of the Commissioner's power is called in question. 17 "

**"Reading the statutes as we do, the Commissioner need not meet any standard of probable cause to obtain enforcement of his summons, either before or after the three-year statute of limitations on ordinary tax liabilities has expired. He must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the [379 U.S. 48, 58] information sought is not already within the Commissioner's possession, and**

**that the administrative steps required by the Code have been followed - in particular, that the "Secretary or his delegate," after investigation, has determined the further examination to be necessary and has notified the taxpayer in writing to that effect.** This does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered. <sup>18</sup> At the hearing he "may challenge the summons on any appropriate ground," *Reisman v. Caplin*, 375 U.S. 440, at 449. <sup>19</sup> Nor does our reading of the statutes mean that under no circumstances may the court inquire into the underlying reasons for the examination. It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. <sup>20</sup> Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. The burden of showing an abuse of the court's process is on the taxpayer, and it is not met by a mere showing, as was made in this case, that the statute of limitations for ordinary deficiencies has run or that the records in question have already been once examined. [379 U.S. 48, 59] "

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# Handbook 109.1

## Summons Handbook

### Chapter 1

### Introduction

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#### Contents

- [\[109.1\] 1.1 Overview](#)
- [\[109.1\] 1.2 Provisions of Law](#)
- [\[109.1\] 1.3 Authority](#)
  - [\[109.1\] 1.3.1 Authority to Issue "John Doe" Summonses](#)
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#### [\[109.1\] 1.1 \(04-30-1999\)](#)

##### Overview

1. The Summons Handbook provides guidelines for use by the Collection Division, Criminal Investigation, Examination, and Employee Plans & Exempt Organization. Specific function directed guidelines are covered where appropriate.
2. This chapter contains the following sections:
  - Provisions of law
  - Authority
  - Factors to consider
  - Description of summons (Form 2039)

#### [\[109.1\] 1.2 \(04-30-1999\)](#)

##### Provisions of Law

1. The provisions of the law relating to the use and enforcement of a summons are contained in the following sections of the Internal Revenue Code:
  - A. IRC 7602 Examination of Books and Witnesses



- B. IRC 7603 Service of Summons
- C. IRC 7604 Enforcement of Summons
- D. IRC 7605 Time and Place of Examination
- E. IRC 7609 Special Procedures for Third-Party Summonses
- F. IRC 7610 Fees and Costs for Witnesses
- G. IRC 7612 Special Procedures for Summonses for Computer Software
- H. IRC 7622 Authority to Administer Oaths and Certify
- I. IRC 7402 Jurisdiction of District Courts
- J. IRC 7210 Failure to Obey Summons
- K. IRC 6420(e)(2), 6421(g)(2) and 7427(j)(2)
- L. IRC 6503(j) Designated and Related Summonses

### **[109.1] 1.3 (04-30-1999)**

#### **Authority**

1. Authority has been granted to the Commissioner of Internal Revenue by 26 CFR 301.7602-1(b), 301.7603-1, 301.7604-1 and 301.7605-1(a) and the authorities contained in Section 7609 of the Internal Revenue Code of 1986 and vested in the Commissioner of Internal Revenue Service by Treasury Order No. 150-10 and delegated to the officers and employees of the Internal Revenue Service specified in paragraphs 1 through 6 of Delegation Order No. 4 (as revised) to:
  - A. issue, serve and enforce summonses;
  - B. set the time and place for appearance;
  - C. take testimony under oath of the person summoned;
  - D. to receive and examine data produced in compliance with the summons; and
  - E. to perform other related duties described in Internal Revenue Code Sections 7609 (f), (g) and (i) (2).

### **[109.1] 1.3.1 (04-30-1999)**

#### **Authority to Issue "John Doe" Summonses**

1. Delegation Order No. 4, Authority 1 provides the authority to issue a summons and to perform the other functions listed in Section 1.3, to the District Directors, and the following, when the proper name(s) of the taxpayer(s) is not identified because unknown or unidentifiable (hereinafter called a "John Doe" summons):
  - A. Director (International District Operations),
  - B. Director (International Programs),
  - C. Chiefs of Divisions (District Criminal Investigation, Collection, Examination, and Employee Plans and Exempt Organizations).

### **[109.1] 1.3.2 (04-30-1999)**

#### **Authority to Issue Summonses Except "John Doe" Summonses**

1. Delegation Order No. 4, Authority 2 provides the authority to issue summonses except "John Doe" summonses, and to perform other related functions as stated in Delegation Order No. 4, Authority 1 and delegates this authority to:
  - A. Director, Office of Investigations and Technology,
  - B. Special Agents,
  - C. Group Managers (including large case managers) in District Collection, Examination, and Employee Plans and Exempt Organizations

### **[109.1] 1.3.3 (04-30-1999)**

#### **Authority to Issue Summons Requiring Approval (Except "John Doe" Summonses)**

1. Delegation Order No. 4, Authority 3 provides the authority to issue summonses, (except "John Doe" summonses) and to perform other related functions as stated in Delegation Order No. 4, Authority 1. The following officers/employees are authorized to issue a summons to a third party witness, where the

issuing officer's manager, or any supervisory official above that level, has authorized the issuance of the summons in advance (evidenced by the supervisor's signature on the summons, or by a statement on the summons, signed by the issuing officer, that he or she had prior authorization to issue the summons and stating the name and title of the authorizing official and date of authorization).

- A. Internal Revenue Agents,
- B. Estate Tax Attorneys,
- C. Estate Tax Examiners,
- D. Revenue Service and Assistant Revenue Service Representatives,
- E. Tax Auditors,
- F. Revenue Officers, GS-9 and above,
- G. Tax Law Specialists,
- H. Compliance Officers.

### **[109.1] 1.3.4 (04-30-1999)**

#### **Authority to Serve Summons**

1. The authority to serve summonses whether issued personally or by another official is provided per Delegation Order No. 4, Authority 4 and delegated to:
  - A. Each of the officer/employees listed in Authorities 1,2 and 3 of Delegation Order No. 4,
  - B. Revenue Officers and Tax Examiners, GS-5 and above (whose duties include contacting taxpayers in person),
  - C. Revenue Officer Aides, GS-5 and above,
  - D. Tax Fraud Investigative Aides, GS-5 and above,

### **[109.1] 1.3.5 (04-30-1999)**

#### **Authority to Designate**

1. Delegation No. 4, Authority 5 provides for the authority to designate any of the following officer/employees as the individual before whom a summoned person shall appear, and for the designated individual to take testimony under oath of the person summoned, to set the time and place of examination and to receive and examine data produced in compliance with the summons:
  - A. Assistant Chief of Division and/or Branch Chief (District Criminal Investigation, Collection, Examination, and Employee Plans and Exempt Organizations),
  - B. Deputy Assistant Commissioner (International),
  - C. Special Agents,
  - D. Case Managers,
  - E. Group Managers,
  - F. Internal Revenue Agents,
  - G. Estate Tax Attorneys,
  - H. Estate Tax Law Clerks,
  - I. Estate Tax Examiners,
  - J. Revenue Service and Assistant Revenue Service Representatives,
  - K. Tax Auditors,
  - L. Revenue Officers,
  - M. Compliance Officers,
  - N. Tax Examiners whose duties include contacting taxpayers in person,
  - O. Tax Law Specialists,
  - P. Service Center Tax Examiners in the correspondence examination function.
2. This authority is delegated to each of the officers/employees listed in Authorities 1,2 and 3 of Delegation Order No. 4.
3. District Directors, Service Center Directors, and the Director, Office of Investigations and Technology may redelegate this authority to
  - A. Student Trainees (Revenue Officer), (Internal Revenue Agent), and (Special Agent), and
  - B. Examination Aides, Tax Fraud Investigative Aides and Revenue Officer Aides. Provided each student trainee or aide receives appropriate supervision from a Revenue Officer, Tax Auditor, Internal Revenue Agent, Special Agent as applicable.

### **[109.1] 1.3.6 (04-30-1999)**

#### **Authority to Administer Oaths and Certifications**

1. Delegation Order No. 4, Authority 6 provides for the authority to administer oaths and affirmations and to certify to those papers when necessary except that the authority to certify shall not apply to papers or documents whose certification is authorized by separate order or directive. This authority is delegated to each of the officers/employees listed in Authorities 1, 2, 3 and 5 of Delegation Order No. 4, except for Tax Examiners and Tax Fraud Investigative Aides.
2. Tax Examiners and Tax Fraud Investigative Aides are not designated to administer oaths or to perform the other functions mentioned in these paragraphs. They may, however, certify the method and manner of giving notice after serving summonses.

### **[109.1] 1.4 (04-30-1999)**

#### **Factors to Consider Before Issuing a Summons**

1. Attempt to obtain information voluntarily from taxpayers and witnesses prior to issuing a summons. Consent may be obtained voluntarily by acquainting the taxpayer or witness with the provisions of the Internal Revenue Code. See the reverse side of Form 2039-A.
2. Consider all surrounding circumstances before issuing a summons. Analyze each situation in the light of its particular facts and circumstances. Weigh the importance of the desired information against the:
  - A. tax liability involved,
  - B. time and expense of obtaining the records,
  - C. probability of having to institute court action,
  - D. adverse effect on voluntary compliance by others if the enforcement efforts are not successful,
  - E. whether a criminal case is pending.
3. Additionally, consider serving a summons in the following situations:
  - A. No records are made available to permit an adequate examination within a reasonable period of time.
  - B. Submitted records are known or suspected to be incomplete. Additional records are presumed to be in the possession of the taxpayer or a third party that may disclose material matters not reflected in the submitted records (i.e. broker statements, contracts, and bills for legal expenses).
  - C. Taxpayers or taxpayers' representatives will not seriously attempt to provide documentation for substantiation to the examiner because they intend to offer records and explanations at another level or after a notice of deficiency has been issued.
  - D. The existence and location of records are in doubt. A summons may be issued to require testimony, under oath, as to what records exist and the location of such records. A subsequent summons may be issued describing the records. If the records are in the possession or custody or subject to the control of the person who has testified, it may be served at the time of the testimony or thereafter.

### **[109.1] 1.4.1 (04-30-1999)**

#### **Documents from Financial Institutions in the Tenth Circuit**

1. As indicated in subsection 1.4(1), Service employees should attempt to obtain information informally from third party sources. If the third party voluntarily provides the information, the Service need not follow formal summons procedures. This approach also applies when seeking financial records from financial institutions, except in cases governed by the Tenth Circuit's interpretation of the Right to Financial Privacy Act (RFPA). In general, the RFPA requires that account owners be given notice of (and an opportunity to challenge) a government agency's intent to obtain records of their finances from a financial institution. However, the RFPA also provides an exception to these requirements as they apply to the Service. Specifically, section 3413(c) states: "Nothing in [the RFPA] prohibits the disclosure of financial records in accordance with procedures authorized by the [IRC]." In all circuits other than the Tenth, the Service takes the position that an informal request for records is a procedure authorized under IRC 7602. The Tenth Circuit reached the opposite conclusion in Neece v. Internal Revenue Service, 922 F.2d 572 (10th Cir. 1990) and ruled that a bank's voluntary disclosure of a customer's financial

records to the Service, without prior notice to the customer, violated the RFPA. The Tenth Circuit reasoned that IRC 7609, not section 7602, contained the procedures for obtaining records concerning a taxpayer from a financial institution. See subsection 1.4.1(6) below for a discussion of IRC 7609(j), enacted in RRA 1998, as it affects this reasoning.

2. The Tenth Circuit states are Kansas, Oklahoma, Wyoming, Utah, Colorado, and New Mexico.
3. When issuing a summons, follow the procedures of IRC 7609 (if applicable), and refrain from seeking financial information from financial institutions by using only credentials, letters of circularization (for example: Letters 1040(DO), 1029(DO), and LP62(ACS)) or any other nonsummons method if the following conditions exist:
  - A. the financial institution is located in the Tenth Circuit;
  - B. the information sought concerns taxpayers residing in the Tenth Circuit, regardless of the location of the financial institution;
  - C. the Internal Revenue Service office is located in the Tenth Circuit, regardless of the location of the financial institution or the residence of the taxpayer.
4. Seek the advice of District Counsel if there is any doubt as to whether Neece applies.
5. Do not attempt to obtain financial information voluntarily from financial institutions if the above conditions exist. To do otherwise could result in actual and punitive damages awarded in suits against the Service, and the expenditure of valuable resources in defending such damage suits.
6. In RRA 1998, Congress enacted IRC 7609(j), which provides that nothing in IRC 7609 shall be construed to limit the Service's ability to obtain information, other than by summons, through formal or informal procedures authorized by IRC 7601 and 7602. This section indicates that the Service's ability to informally seek the voluntary exchange of records, i.e., without a summons, constitutes a procedure authorized by the Code. Nevertheless, the Service will follow the Neece ruling in cases described in 1.4.1(3).

#### **[109.1] 1.4.2 (04-30-1999)**

### **Documents from Financial Institutions Located in Circuits Other than the Tenth Circuit**

1. The Service does not follow the Neece rationale in other circuits; therefore, information may continue to be obtained voluntarily from financial institutions in other circuits using credentials or voluntary methods.

#### **[109.1] 1.4.3 (04-30-1999)**

### **Considerations and Limitations on Issuance of a Summons**

1. Use credentials or circular letters (Letters 1040(DO), 1029(DO) and LP62(ACS)) to get information when possible.

#### **NOTE:**

Special Agents, Criminal Investigation, should ensure that the requirements stated in IRM Handbook 9.3 Chapter 1 Sub-Section 1.3.3 are met when using circular letters.

2. Collection/Exam/EP/EO should get clearance from CI and/or District Counsel before issuing a summons in connection with a pending criminal case to:
  - A. Obtain more information from the taxpayer or a witness.
  - B. Uncover assets to apply against assessed liabilities.

#### **NOTE:**

Collection personnel can issue a summons if firm indications of fraud have not been developed.

3. As required by IRC 7602(d), do not issue a summons to investigate a taxable year (or period) where the Service has referred the same taxpayer's case and the same taxable year (or period) to the Department of

Justice for criminal prosecution.

4. Do not issue a summons to request proof of filing, copies of returns, or proof of payment if the desired documents are available from Service records.
5. Employment and excise tax returns can be processed under IRC 6020(b).
6. IRC 6331(g) forbids the levy or seizure of property of the taxpayer on the day that the taxpayer (or officer or employee of the taxpayer) appears in response to a summons issued for the purpose of collecting any under-payment of tax.

**NOTE:**

Exception: In a jeopardy situation, a levy or seizure of property may be appropriate even though the taxpayer is appearing in response to a summons.

**[109.1] 1.5 (04-30-1999)**

**Description of Summons (Form 2039)**

1. The Form 2039 summons (Exhibit 109.1.1-1) and assembly consists of five parts, as follows:
  - A. Original (Form 2039) Summons, with the Service of Summons, Notice, and Recordkeeper Certificates on the reverse side;
  - B. Part A (Form 2039-A) Summons (attested copy), with a reprint of pertinent IRC provisions on the reverse side;
  - C. Part B (Form 2039-B) Notice to Third-Party Recipient of IRS Summons; with a reprint of IRC 7609 on the reverse side;
  - D. Part C (Form 2039-C) Summons (copy), with a reprint of pertinent IRC provisions on the reverse side; and
  - E. Part D (Form 2039-D) notice explaining the right to contest the administrative summons, with a reprint of IRC 7609 on the reverse side.

**NOTE:**

General Instructions for preparation of a summons, Exhibit 109.1.1-2.

**Exhibit [109.1] 1-1 (04/30/99)**

**Form 2039, Summons**

**Exhibit [109.1] 1-2 (04/30/99)**

**General Instructions For Preparation of a Summons**

"In the matter of" : Insert in the space provided the name of the taxpayer whose tax liability is being investigated, collected, or examined. Include in the same space any other information a summoned third-party, e.g., a bank, would need to accurately identify the taxpayer. This information might include the taxpayer's address (complete with street number, city, state, and zip code). "Internal Revenue District of" : Insert the name of the Internal Revenue district:

- A. in which the returns were filed, or should have been filed, or
- B. where the assessment for collection is outstanding.

**NOTE:**

If returns under investigation were filed in various districts, include the name of each district.

Periods : Insert all of the calendar years, fiscal years, quarterly or monthly periods involved in the examination or investigation. The periods should be specifically stated, e.g., "quarterly periods ended March 31, 1999 and June 30, 1999." Do not use abbreviations such as "9906" or "6/30/99." "To" : Insert the correct name of the person summoned and the name or names by which he or she is customarily known. Add the title or official status of the person, if the purpose of the summons is to obtain testimony or records from a person in his or her capacity as trustee, receiver, custodian, corporate, or public official. If the name of a corporate custodian of records is unknown and his or her testimony is not needed (i.e., the summons seeks only the production of documents and not testimony), the summons may be directed to the corporation. "At" : Insert the correct address of the person

summoned.

- A. the street and number of the place of business,
- B. the place of residence, or
- C. the location of the place where the person is found.

"To Appear Before" :

- A. name and title of the Service employee who is to take the testimony or examine the books and records,  
or
- B. name and title of the Service employee the person summoned is to appear before.

**NOTE:**

In some instances, the name will be the same as that of the Service employee authorized to issue the summons. However, the Service employee authorized to issue a summons may desire the person summoned to appear before another Service employee.

When the summons requires the production of books and records, papers, or other data, it is important that they be properly designated and described, including the inclusive dates covered by the documents. If the witness is not required to produce books and records, papers or other data, eliminate from the summons the phrase "and to bring with you and produce for examination the following books, records and papers, and other data" .

**NOTE:**

The summons should not require the witness to do anything other than to appear on a given date to give testimony and to bring existing books, papers and records. A summons cannot require a witness to prepare or create documents, including tax returns, that are not currently in existence.

"Business address and telephone number of Internal Revenue Service officer named above" : Insert the business address and telephone number of the IRS employee named in the body of the summons."Place and time for appearance at" : Insert the complete address, including the room number where the person is required to appear.Insert the date and time the witness is to appear. IRC 7605 provides that the date and time set for appearance be reasonable under the circumstances and not less than 10 calendar days from the date of the summons. In computing the 10-day period, exclude the date of service and the date of appearance which should not be prior to the day after the 10th day following service of the summons. In short, for practical purposes, use 11 calendar days. Strict compliance with this provision is necessary in the preparation and issuance of a summons in order to enable the enforcement of obedience to its requirements when the person refuses or fails to comply. The date for appearance should be on a workday. Do not set the date for appearance of the person summoned on a weekend or legal holiday. When summoning a third-party, set the date for appearance at least 24 to 26 days after the date notice of the summons is given to all persons entitled to notice. IRC 7609(a)(1) provides that noticees must be given notice "within 3 days of the day on which service is made (on the third-party summoned), but no later than the 23rd day before the day fixed in the summons" as the appearance date. The date of appearance cannot be counted in the 23 day period. Therefore, if the noticee receives notice on the same date the summons is served, the appearance date must be at least 24 days later. If the noticee receives notice on the third day after the summons was served, the date of appearance must be at least 26 days later."Issued under authority of the Internal Revenue Code this" : Insert the date on which the summons is signed by the issuing officer. This date is not to be considered as the "date of the summons" in setting the date for appearance pursuant to IRC 7605 (see item 10 above).The authorized issuing officer will manually sign the summons in the space labeled "Signature of Issuing Officer" and insert his or her official title in the space labeled "Title" .Insert the signature and title of the approving officer, if appropriate. (Group or Case Manager)Insert in the space provided the date and the time of day the summons was served.Show the manner in which the summons was served by checking one of the squares provided.Insert the address of the place or the location where the attested copy of the summons was delivered to the person summoned.If the summons was served by leaving an attested copy with a person at the last and usual place of abode of the party summoned, enter the name and address of the person to whom it was handed. If the summons was merely left at the individual's last and usual place of abode, state only the address, and eliminate the phrase "with the following person" from the printed sentence above the space for entering the name of the person.

**NOTE:**

It is desirable that the summons be left with a responsible person, over 16 years of age, who is capable of understanding the importance of giving the summons to the summoned party.

The officer serving the summons should sign the certificate of service in the space provided for "Signature" and enter his or her official title in the space designated "Title" .When a summons is served on a third-party, complete the certificate of notice, showing date, time of notice, and name and address of noticee. Check the appropriate square if notice is not required. The copy of the summons given to the summoned party, Form 2039 (Part A), must bear the server's original signature on the front page. If using a revision of Form 2039 bearing the notation (4-97), insert the pen and ink changes specified in this Handbook at subsection 6.3.2(2) Note and at 6.6.4(3) Note.

**NOTE:**

If the person summoned is a third-party entitled to payment for search, reproduction and transportation costs, give that person the third part of the summons form which explains payment procedures. Otherwise, this part may be discarded.

The Service employee giving the notice should sign the certificate of notice in the space provided for "Signature" and enter his or her official title in the space designated "Title" .The Service employee should sign in the space for "Signature" and enter his or her official title in the space for "Title" certifying that :

- A. the period prescribed for beginning a proceeding to quash the summons has expired,
- B. that no such proceeding was instituted, or
- C. that the noticee consented to the examination.

If a person (named in the body of the summons) is entitled to notice of the summons, provide Part C of Form 2039 to the noticee along with the notice, Part D, explaining the rights to stay compliance and intervene.If the summons is served on a third-party and notice is not required, discard Parts C and D of Form 2039 (Rev.4-97).All copies served on the person to whom the summons is directed should contain the following statement: "I hereby certify that I have examined and compared this copy of the summons with the original and that it is a true and correct copy of the original."

## Compulsory Production Of Documents In Criminal And Civil Matters

The provisions of the United States Code regarding summons enforcement proceedings, 26 U.S.C., §§ 7601 through 7610, have over the last three decades been the subject of much litigation and consequently have been construed by the federal courts of appeals as well as the United States Supreme Court.

In *Reisman v. Caplin*, 375 U.S. 440, 84 S.Ct. 508 (1964), the Supreme Court held that a witness or taxpayer could challenge an I.R.S. summons on any appropriate grounds and may assert as a defense to the proceedings the fact that the materials sought by the I.R.S. relate solely for use as evidence in a criminal prosecution.

In *United States v. Powell*, 379 U.S. 48, 85 S.Ct. 248 (1964), the Court outlined four requirements which must be shown before any summons can be enforced.

In *Donaldson v. United States*, 400 U.S. 517, 91 S.Ct. 534 (1971), the Court held that an I.R.S. summons could lawfully be used for a criminal investigation provided the summons also had a civil purpose.

In *Couch v. United States*, 409 U.S. 322, 93 S.Ct. 611 (1973), the Court held that the Fifth Amendment to the U.S. Constitution did not protect tax records in the possession of a taxpayer's accountant.

In *United States v. Bisceglia*, 420 U.S. 141, 95 S.Ct. 915 (1975), the Court allowed the issuance of a John Doe summons for the purpose of investigating a \$40,000 deposit of \$100 bills.

In *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569 (1976), the Court held that the Fifth Amendment did not protect tax records in the possession of the taxpayer's attorney. See also *United States v. Rylander*, 460 U.S. 752, 103 S.Ct. 1548 (1983). This line of cases clearly shows that the Internal Revenue Service has very broad summons authority and may secure virtually any record or document in the possession of a third party.

I.R.S. summonses are issued to two separate and distinct classes of persons, with one class representing third parties who have possession and custody of books and records of the taxpayers under investigation, and the other class comprising taxpayers under investigation. A summons enforcement action is utilized when compliance with the summons has not been obtained due to the taxpayer notifying the third party not to comply, by the institution of a suit to enjoin enforcement, or by the refusal on the part of the taxpayer to comply when summons is directed to him. When the Service proceeds to enforce a summons issued to either a third party recordholder or the taxpayer himself, its burden of proof is very minimal and amounts to nothing more than proof of compliance with the requirements of *Powell*, supra; see *United States v. Will*, 671 F.2d 963 (6th Cir. 1982).

Whereas the burden of proof upon the Service is relatively light in summons enforcement actions, a taxpayer opposing enforcement of the summons has a far heavier burden to carry. Basically, a taxpayer seeking denial of enforcement of the summons has available three defenses:

- (a) bad faith;
- (b) institutional posture, and
- (c) the Fifth Amendment.

The "bad faith" defense is based upon *Reisman v. Caplin*, supra, and *Donaldson v. United States*, supra, and involves those situations wherein the summons has been issued for the improper purpose of gathering evidence needed for a criminal prosecution after referral to the Department of Justice. The "institutional posture" defense is based upon *United States v. LaSalle National Bank*, 437 U.S. 298, 98 S.Ct. 2357 (1978), and relates to those situations when the Service has made an institutional commitment to criminally prosecute the taxpayer under investigation but desires to withhold referral to the Justice Department to allow for the gathering of additional evidence needed for a successful criminal prosecution.<sup>[1]</sup>

These two defenses are most often utilized by a taxpayer when intervening in a third party summons enforcement action or commencing an action to enjoin enforcement of the summons. Although a taxpayer opposing enforcement of a summons issued to him may assert the defenses of "bad faith" and "institutional posture," he will most likely rely upon the third defense available to him, that of the Fifth Amendment.

The history and development of the Fifth Amendment right against self-incrimination has been one of slow but sure expansion of the benefits of its protection. James Madison, the prime author of this provision in the Bill of Rights to the U.S. Constitution, sought this provision to prevent the development in our country of proceedings similar to or identical with Spanish Inquisitions or Star Chamber proceedings. A cursory examination of the *William Penn Case*, 6 How. St. Tr. 951 (1670), reveals that resort to "Spanish Inquisitions" has on many occasions been desired in order to bring about the efficient operation of governmental machinery; this is what Madison desired to avoid by inserting the Fifth Amendment into our Constitution. The original intent or purpose for the Fifth Amendment was to compel the government to procure independent evidence of the facts and proof of a crime other than through the mouth of the accused. Without such a requirement and with the availability of procedures such as the Inquisition or Star Chamber, the government could constantly harass law abiding citizens and might on some occasion procure,



through duress and coercion, a confession. But as is well known, such confessions are highly suspect, hence we have the protection of the Fifth Amendment.

One of the most appropriate statements concerning the Fifth Amendment and its operation was made by U.S. Supreme Court Justice John Marshall in the case of *United States v. Aaron Burr*. Chief Justice Marshall, quoted in *Counselman v. Hitchcock*, 142 U.S. 547, 565, 12 S.Ct. 195 (1892), maintained that a witness could plead the Fifth Amendment not only in situations where his answer to a question would directly implicate him in a crime, but also in response to questions the answer to which would provide a link in the chain of evidence needed to convict the witness of a crime. Protection from compulsory testimony designed to implicate a witness in a crime has been secured through the Fifth Amendment and has been one of the most sacred principles known to American jurisprudence. This principle of the Fifth Amendment protection from compulsory testimony, absent a grant of immunity,<sup>[2]</sup> has seen no erosion in its application since first expounded and requires but few citations to support it; see *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370 (1906), *Blau v. United States*, 340 U.S. 159, 71 S.Ct. 223 (1950), and *Hoffman v. United States*, 341 U.S. 479, 71 S.Ct. 814 (1951).

The question of Fifth Amendment protection for the books, records and personal documents of a witness who may be implicated in a crime was first really considered in *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524 (1886), where the Supreme Court expanded Fifth Amendment protection against compulsory testimony to books and records of the witness. In granting such protection, the Court held:

*"And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom,"* 116 U.S., at 631-32.

*"And we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the fifth amendment to the Constitution, and is the equivalent of a search and seizure -- and an unreasonable search and seizure -- within the meaning of the fourth amendment,"* 116 U.S., at 634-35.

Since the decision in *Boyd*, the Supreme Court has on some occasions limited the full import of that historic ruling. In *Wilson v. United States*, 221 U.S. 361, 31 S.Ct. 538 (1911), the Court held that the *Boyd* principle did not apply to corporations; see also *United States v. Peter*, 479 F.2d 147 (6th Cir. 1973); and *In Re Grand Jury Empanelled March 8, 1983*, 722 F.2d 294 (6th Cir. 1983). Still later, application of *Boyd* to partnership records was prohibited in *Bellis v. United States*, 417 U.S. 85, 94 S.Ct. 2179 (1974). However until 1984, it still appeared that personal, non-corporate tax records of a person with potential criminal liability were still protected by *Boyd* principles. When the Supreme Court held that *Boyd* protection did not apply to partnership records in *Bellis*, supra, it expressly affirmed this proposition by stating:

*"The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life,"* 417 U.S., at 87-88.

Likewise, *Fisher*, supra, did not emasculate *Boyd* in any respect as the issue in that case was completely different; in fact, the Court in *Fisher* definitely appeared to have sided with *Boyd* in the last paragraph of its opinion:

*"Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his 'private papers,' see Boyd v. United States,"* 425 U.S., at 414.

Shortly after its decision in *Fisher*, the Court was confronted with a similar issue in *Andresen v. Maryland*, 427 U.S. 463, 473-74, 96 S.Ct. 2737 (1976). Here, a search warrant had been issued for the seizure of certain private books and records, and the criminal defendant was not required to produce those records or authenticate them because authentication was achieved by the use of third parties. The Supreme Court in *Andresen* did not emasculate *Boyd* in any way and in fact expressly affirmed *Boyd*:

*"Thus, although the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information ..., a seizure of the same materials by law enforcement officers differs in a crucial respect -- the individual against whom the search is directed is not required to aid in the discovery, production or authentication of incriminating evidence."*

The Fifth Amendment to the U.S. Constitution states that no person shall be compelled to be a "witness" against himself in a criminal prosecution. Similar provisions exist in the constitutions of the various states of our nation, with some such constitutional provisions following the Fifth Amendment via use of the word "witness" while other provisions offer more expansive protection by stating that no person shall be compelled to give "evidence" against himself in a criminal prosecution. There exist distinct and crucial differences in the type of protection offered under

these two different types of constitutional provisions. The protection against being compelled to give "evidence" against the accused is far broader than protection only afforded to "witnessing" and giving "evidence" arguably would include providing to the prosecution documents incriminating to the accused. The protection afforded by the Fifth Amendment is only that of proscribing testimonial compulsion and is not as all encompassing as the provisions prohibiting compulsory production of "evidence."

Neither *Fisher* nor *Andresen* disturbed the holding in *Boyd* or *Bellis* and both are wholly consistent with these two other cases. What the Supreme Court did in these two cases was note the crucial difference between protecting "evidence" and being a compelled "witness"; private papers may no longer be specially protected and in a distinct and different class from other evidence, property or contraband. What the Supreme Court has directed is that an accused cannot be compelled to produce his own incriminating books and records because such would involve to a degree an amount of authentication of such books and records on the part of the accused; such is tantamount to compelled testimony specifically proscribed by the Fifth Amendment. What the Supreme Court has commanded is that if the government desires to obtain personal books and records and use the same against the accused, it must be done through witnesses other than the accused himself.

A survey of pre-1984 decisions reveals the continued vitality of the principles of *Boyd* and the crucial government-citizen relationship which it protects. In the First Circuit case of *In Re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051, 1056 (1st Cir. 1980), the court found that "personal, self-created business records in the possession of a sole proprietor or practitioner would enjoy a privilege against subpoena." In the Second Circuit, the case of *United States v. O'Henry's Film Works, Inc.*, 598 F.2d 313 (2nd Cir. 1979), held that a corporate official's Fifth Amendment plea to questions concerning the location of corporate records was valid; see also *United States v. Beattie*, 522 F.2d 267 (2nd Cir. 1975), *United States v. Patterson*, 219 F.2d 659 (2nd Cir. 1955), *In Re Grand Jury Subpoena Duces Tecum*, 657 F.2d 5 (2nd Cir. 1981), *In Re Grand Jury Witness (Gilboe)*, 699 F.2d 71 (2nd Cir. 1983), and *United States v. Bobart Travel Agency, Inc.*, 699 F.2d 618 (2nd Cir. 1983). The three cases of *In Re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327 (3rd Cir. 1982), *In Re Grand Jury Proceedings (Johanson)*, 632 F.2d 1033 (3rd Cir. 1980), and *In Re Grand Jury (Colucci)*, 597 F.2d 851 (3rd Cir. 1979), demonstrate that the Third Circuit has protected private books and records from compulsory production. In *United States v. Henry*, 491 F.2d 702 (6th Cir. 1974), the Sixth Circuit quashed an I.R.S. summons to a taxpayer already indicted on a narcotics offense. The Seventh Circuit, faced with a pro se litigant in *United States v. Awerkamp*, 497 F.2d 832 (7th Cir. 1974), who was prematurely raising Fifth Amendment objections to the enforcement of an I.R.S. summons, held that the taxpayer could make specific Fifth Amendment pleas to questions directed at him when he complied with the order of enforcement.

In two other Seventh Circuit cases, *Hill v. Philpott*, 445 F.2d 144 (7th Cir. 1971), and *United States v. Dickerson*, 413 F.2d 1111 (7th Cir. 1969), that court held that the records of an individual taxpayer were immune from a summons. The Eighth Circuit, in *Isaacs v. United States*, 256 F.2d 654 (8th Cir. 1958), held a Fifth Amendment plea of a corporate official to be valid when he responded to questions relating to \$99,000 in checks written by the corporation. Another Eighth Circuit opinion in *United States v. Plesons*, 560 F.2d 890 (8th Cir. 1977), would have granted protection to the records of a doctor if he had raised his Fifth Amendment plea to a grand jury subpoena before testifying about those records. In the Ninth Circuit cases of *United States v. Cohen*, 388 F.2d 464 (9th Cir. 1967), and *United States v. Helina*, 549 F.2d 713 (9th Cir. 1977), protection of a taxpayer's records from production was upheld. The above cases demonstrate that the great weight of authority in the various circuits has been that an individual taxpayer's records are protected from compulsory production because of the Fifth Amendment.

The Fifth and Eleventh Circuits have apparently treated this precise issue more often than the others and have conclusively held that tax records of an individual are immune from production on the basis of *Boyd*. In *Stuart v. United States*, 416 F.2d 459 (5th Cir. 1969), *In Re Grand Jury Proceedings (McCoy)*, 601 F.2d 162 (5th Cir. 1979), *In Re Oswald*, 607 F.2d 645 (5th Cir. 1979), *In Re Grand Jury Subpoena (Kent)*, 646 F.2d 963 (5th Cir. 1981), and *United States v. Meeks*, 642 F.2d 733 (5th Cir. 1981), this principle was upheld. More specifically in *United States v. Davis*, 636 F.2d 1028, 1043 (5th Cir. 1981), that court held:

*"Their cumulative teaching is that any incriminating papers in the actual or constructive possession of an individual, which he holds in his individual capacity, ... and which he himself wrote or which were written under his immediate supervision, are absolutely protected by the Boyd principle from production by subpoena or equivalent process, regardless of whether they are business-related or more inherently personal in content."*

The Sixth Circuit does not deviate in any respect from comparable decisions made in other circuits. In *Patty v. Bordenkircher*, 603 F.2d 587 (6th Cir. 1979), the court held that the government couldn't compel a criminal defendant to testify concerning his previous criminal convictions where they were relevant to a habitual offender statute. In *United States v. Hill*, 601 F.2d 253 (6th Cir. 1979), that court acknowledged that a taxpayer could raise Fifth Amendment objections by refusing to answer specific questions. In *United States v. Doss*, 563 F.2d 265, 275

(6th Cir. 1977), a case involving an indicted defendant called before a grand jury, that court concluded:  
*"However, upon the trial of the defendant in a criminal case, it would be a clear violation of a defendant's right against self-incrimination under the Fifth Amendment of the Constitution to compel him to take the stand, testify and produce his records, relating to the matter with which he is charged."*

The erosion of *Boyd* principles started in the early eighties. In *United States v. Schlansky*, 709 F.2d 1079, 1084 (6th Cir. 1983), a case where the taxpayer under investigation was compelled to surrender certain of his records which had previously been in his accountant's possession, the Sixth Circuit held that the three elements of compulsion, testimonial communication and incrimination by such communication were requisites to a valid assertion of the Fifth Amendment:

*"Under this focus the key question is whether the compelled production involves compelled testimonial communication. The answer to this question in turn depends on whether the very act of production supplies a necessary link in the evidentiary chain. Does it confirm that which was previously unknown to the government; e.g., the existence or location of the materials? Does it supply assurance of authenticity not available to the government from sources other than the person summonsed? Though the party seeking to avoid compliance does not have to show more than is required to demonstrate that the privilege is properly claimed, he must make some showing that the act of production alone would involve an incriminating testimonial communication."*

The Third Circuit case of *In Re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327 (3rd Cir. 1982), involved the issue of compulsory production of books and records and that court continued to uphold the principles of *Boyd*. Because of a desire to have the Supreme Court adopt the *Schlansky* rationale, the government sought and obtained a writ of certiorari with the United States Supreme Court to review the decision in this case. On February 28, 1984, the U.S. Supreme Court reversed the above decision in *United States v. Doe*, 465 U.S. 605, 104 S.Ct. 1237, 1242 (1984). In this pronouncement, the Court reversed its former holding in *Boyd* and held that books and records were no longer protected by the Fifth Amendment. It reasoned that the Fifth Amendment protected only compelled testimony and not books and records, and it relied heavily upon its rationale in *Fisher*, supra. But while the Court decided to withdraw Fifth Amendment protection to books and records, it held that production of such books and records was entitled to such protection. The Court reasoned that compulsory production of books and records via subpoena or summons is communicative in nature and similar to giving testimony, therefore such production is entitled to Fifth Amendment protection:

*"Compliance with the subpoena tacitly concedes the existence of the papers by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena."*

The U.S. Supreme Court in *Boyd v. United States*, supra, clearly held that compulsory production via subpoena or summons of books, records and other documents in the possession of a witness was not permitted by the Fifth Amendment. This decision prevailed for some 98 years and effectively prevented the government from obtaining such written documentation from one having potential criminal liability. In *United States v. Doe*, supra, the Court changed its construction of the Fifth Amendment and held that the Amendment did not protect such records; and by making this change, a problem not addressed by *Boyd* arose. If the records are not protected from compulsory production by the amendment, what protection by the Fifth Amendment is left to a witness under process to produce documents? In *Doe*, the Court analyzed this situation and found that the mere act of producing such documents via compulsion non-verbally provides the following:

- (a) Such production concedes that the requested documentation exists;
- (b) Such production proves that the same are in the witness' possession;
- (c) Such production proves that the witness believes that the documents so produced are those which are sought;
- (d) The act of production authenticates the documents.

Because of these non-verbal but communicative aspects present within any act of production, the Court held that the Fifth Amendment applied to the act of production. Thus, even though there is no longer any protection afforded by the Fifth Amendment for books and records, the Fifth Amendment's protection for the act of production accomplishes virtually the same result as under the *Boyd* doctrine.

This has proven to be the case as shown by various cases decided subsequent to *Doe*. In *In re Kave*, 760 F.2d 343, 355-56 (1st Cir. 1985), an attorney was permitted to plead the protection of the Fifth Amendment because the request to produce certain documentary evidence would have in effect, under the "act of production" rule, forced her to testify against herself, the court explaining:

*"The compelled production of such documents is prohibited only if there are testimonial aspects to the act of production itself. ... This rule extends to the business records of a sole proprietor ... In this context, the rule has three elements: The Fifth Amendment protects against compulsory surrender of (1) personal business records, (2) in the possession of a sole proprietor or practitioner, (3) only with respect to the testimonial act implicit in the surrender itself."*

For a few years after *Doe*, its rule was applied to corporate records. The *Doe* "act of production" rule was followed in *In Re Grand Jury Proceedings*, 747 F.2d 1098 (6th Cir. 1984), and *In Re Grand Jury Matter*, 768 F.2d 525 (3rd Cir. 1985), to prevent the compulsory production of corporate and partnership records. However, in *Braswell v. United States*, 487 U.S. 99, 108 S.Ct. 2284 (1988), the Court held that *Doe* did not apply to corporate records; see also *Doe v. United States*, 487 U.S. 201, 108 S.Ct. 2341 (1988).

But the application of *Doe* has continued as to personal and private records. In *United States v. (Under Seal)*, 745 F.2d 834 (4th Cir. 1984), a case decided some seven (7) months after *Doe*, the Fourth Circuit specifically held that personal and individual records can't be forcibly produced by any process, over a Fifth Amendment objection; see also *United States v. Cates*, 686 F.Supp. 1185 (D.Md. 1988); and *United States v. Argomaniz*, 925 F.2d 1349 (11th Cir. 1991). In *In Re Grand Jury Proceedings on Feb. 4, 1982*, 759 F.2d 1418 (9th Cir. 1985), it was determined that records of a party under investigation in the hands of his attorney were entitled to protection under the *Doe* "act of production" rule. Further, there is no "tax exception" to this rule; see *United States v. Troescher*, 99 F.3d 933 (9th Cir. 1996).

Thus, according to the rationale of these cases, the compulsory production of private personal records cannot be obtained in view of a valid Fifth Amendment objection. Therefore, it is clear that the decision in *Boyd* still produces a legal result, even if from its "grave."

## CONCLUSION

A summons or subpoena for individual books and records, either personal or business, can't be enforced over a Fifth Amendment objection because of the *Doe* "act of production" rule.

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## THE CIVIL PROCEEDING

The rule that a party or a witness can plead the right against self-incrimination in civil proceedings has been well established by an abundance of authority. In *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316 (1973), the U.S. Supreme Court stated this rule as follows:

*"The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future proceedings."*

The subsequent decisions of *Maness v. Meyers*, 419 U.S. 449, 95 S.Ct. 584 (1975), and *Pillsbury Company v. Conboy*, 459 U.S. 248, 103 S.Ct. 608 (1983), serve only to buttress this basic principle and apply it to specific situations. This rule is followed by the federal appellate courts; see *In re Kave*, 760 F.2d 343 (1st Cir. 1985); *National Life Ins. Co. v. Hartford Accident & Indemnity Co.*, 615 F.2d 595 (3rd Cir. 1980); *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979); *In Re Corrugated Container Anti-Trust Litigation*, 620 F.2d 1086 (5th Cir. 1980); *In re Morganroth*, 718 F.2d 161 (6th Cir. 1983); and *United States v. Jones*, 703 F.2d 473 (10th Cir. 1983).

Decisions on this point by various state courts reveal that this rule is not a modern one. In *Morris v. McClellan*, 154 Ala. 639, 45 So. 641, 645 (1908), that Alabama court acknowledged that a party in a civil case could claim the right against self-incrimination. In *International Brotherhood of Teamsters v. Hatas*, 287 Ala. 344, 252 So.2d 7, 21 (1971), the court held:

*"The privilege against self-incrimination afforded by section 6 of the 1901 Constitution of Alabama has been held available to a party in a civil action."*

Similar decisions have been made by courts in other States in the Union. In *State ex rel. Hudson v. Webber*, 600 S.W.2d 691, 692 (Mo. App. 1980), a judgment debtor pleaded his right against self-incrimination in answer to questions posed to him regarding his financial affairs, his fear of incrimination being related to federal taxes. The court sanctioned the answers of this party:

*"This privilege is available to a judgment debtor in proceedings pursuant to sections 513.380-513.390, RSMO 1978."*

The great weight of other State authorities holds that the right clearly applies in civil cases; see *Carson v. Jackson*, 466 So.2d 1188 (Fla.App. 1985); *Lewis v. First American Bank of Palm Beach*, 405 So.2d 300 (Fla.App. 1981);

*Travis Meat & Seafood Co. v. Ashworth*, 127 Ga. App. 284, 193 S.E.2d 166 (1972); *In re Zisook*, 88 Ill.2d 321, 430 N.E.2d 1037 (1982); *Martincich v. City of Hammond*, 419 N.E.2d 240 (Ind. App. 1981); *Whippany Paper Board Co. v. Alfano*, 176 N.J.S. 363, 423 A.2d 648 (1980); *Banca v. Town of Phillipsburg*, 181 N.J.S. 109, 436 A.2d 944 (1981); *People ex rel. Anonymous v. Saribeyoglu*, 131 Misc. 2d 647, 501 N.Y.S.2d 286 (1986); *Byrd v. Hodges*, 44 N.C.App. 509, 261 S.E.2d 269 (1980); *Ohio Civil Rights Commission v. Parklawn Manor, Inc.*, 41 Ohio St.2d 47, 322 N.E.2d 642 (1975); *Rey v. Means*, 575 P.2d 116 (Okl. 1978); *Caloric Corp. v. Unemployment Compensation Board of Review*, 452 A.2d 907 (Pa. Comwth. 1982); *Ex Parte Stringer*, 546 S.W.2d 837 (Tex.App. 1985); *Smith v. White*, 695 S.W.2d 295 (Tex.App. 1985); *Affleck v. Third Judicial District Court of Salt Lake County*, 655 P.2d 665 (Utah 1982); *Eastham v. Arndt*, 28 Wash. App. 524, 624 P.2d 1159 (1981); and *In re Grant*, 83 Wis.2d 77, 264 N.W.2d 587 (1978).

**END NOTES:**

[1] Pursuant to the 1982 TEFRA, summonses may now be issued solely for a criminal investigation, thus these decisions no longer have any effect. [Go Back](#)

[2] The statutory provisions regarding immunity grants are found in 18 U.S.C., §§ 6001, et seq. [Go Back](#)

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## U.S. Supreme Court

**BOYD v. U S, 116 U.S. 616 (1886)**

**116 U.S. 616**

**BOYD and others, Claimants, etc.,**

**v.**

**UNITED STATES.1**

**Filed February 1, 1886**

[116 U.S. 616, 617] E. B. Smith and S. G. Clarke, for plaintiffs in error.

Sol. Gen. Goode, for defendant in error.

BRADLEY, J.

This was an information filed by the district attorney of the United States in the district court for the Southern district of New York, in July, 1884, in a cause of seizure and forfeiture of property, against 35 cases of plate glass, seized by the collector as forfeited to the United States, under the twelfth section of the 'Act to amend the customs revenue laws,' etc., passed June 22, 1874, (18 St. 186.) It is declared by that section that any owner, importer, consignee, etc., who shall, with intent to defraud the revenue, make, or attempt to make, any entry of imported merchandise, by means of any fraudulent or false invoice, affidavit, letter, or paper, or by means of any false statement, written or verbal, or who shall be guilty of any willful act or omission, by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, shall for each offense be fined in any sum not exceeding \$5,000 nor less than \$50, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited. The charge was that the goods in question were imported [116 U.S. 616, 618] into the United States to the port of New York, subject to the payment of duties; and that the owners or agents of said merchandise, or other person unknown, committed the alleged fraud, which was described in the words of the statute. The plaintiffs in error entered a claim for the goods, and pleaded that they did not become forfeited in manner and form as alleged. On the trial of the cause it became important to show the quantity and value of the glass contained in 29 cases previously imported. To do this the district attorney offered in evidence an order made by the district judge under the fifth section of the same act of June 22, 1874, directing notice under seal of the court to be given to the claimants, requiring them to produce the invoice of the 29 cases. The claimants, in obedience to the notice, but objecting to its validity and to the constitutionality of the law, produced the invoice; and when it was offered in evidence by the district attorney they objected to its reception on the ground that, in a suit for forfeiture, no evidence can be compelled from the claimants themselves, and also that the statute, so far as it compels production of evidence to be used against the claimants, is unconstitutional and void. The evidence being received, and the trial closed, the jury found a verdict for the United States, condemning the 35 cases of glass which were seized, and judgment of forfeiture was given. This judgment was affirmed by the circuit court, and the decision of that court is now here for review.

As the question raised upon the order for the production by the claimants of the invoice of the 29 cases of glass, and the proceedings had thereon, is not only an important one in the determination of the present case, but is a very grave question of constitutional law, involving the personal security, and privileges and immunities of the citizen, we will set forth the order at large. After the title of the court and term, it reads as follows, to-wit:

'The United States of America against E. A. B., 1-35, Thirty-five Cases of Plate Glass.

'Whereas, the attorney of the United States for the Southern district of New York has filed in this court a written motion in the above-entitled action, showing that said action is a suit or proceeding other than criminal, arising under the customs revenue laws of the United States, and not for penalties, now pending undetermined in this court, and that in his belief a certain invoice or paper belonging to and under the control of the claimants herein will tend to prove certain allegations set forth in said written motion, hereto annexed, made by him on behalf of the United States in said action, to-wit, the invoice from the Union Plate Glass Company, or its agents, covering the twenty-nine cases of plate glass marked G. H. B., imported from Liverpool, England, into the port of New York, in the vessel Baltic, and entered by E. A. Boyd & Sons at the office of the collector of customs of the port and collection district aforesaid, on April 7, 1884, on entry No. 47,108:

'Now, therefore, by virtue of the power in the said court vested by section 5 of the act of June 22, 1874, entitled 'An act to amend the customs revenue laws and to repeal moietyies,' it is ordered that a notice under the seal of this court, and signed by the clerk thereof, be issued to the claimants, requiring them to produce the invoice or paper aforesaid before this court in the court-rooms thereof in the United States post-office and court-house building in the city of New York on October 16, 1884, at eleven o'clock A. M., and thereafter at such other times as the court shall appoint, and that said United States attorney and his assistants and such persons as he shall designate shall be allowed before the court, and under its direction and in the presence of the attorneys for the claimants, if they shall attend, to make examination of said invoice or paper and to take copies thereof; but the claimants or their agents or attorneys shall have, subject to the order of the court, the custody of such invoice or paper, except pending such examination.'

The fifth section of the act of June 22, 1874, under which this order was made, is in the following words, to-wit:

'In all suits and proceedings other than criminal, arising under any of the revenue laws of the United States, the attorney representing the government, whenever in his belief any [116 U.S. 616, 620] business book, invoice, or paper belonging to, or under the control of, the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion issue a notice to the defendant or claimant to produce such book, invoice, or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimants shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced the said attorney shall be permitted, under the direction of the court, to make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice, or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid.' 18 St. 187.

This section was passed in lieu of the second section of the act of March 2, 1867, entitled 'An act to regulate the disposition of the proceeds of fines, penalties, and forfeitures incurred under the laws relating to the customs, and for other purposes,' (14 St. 547,) which section of said last-mentioned statute authorized the district judge, on complaint and affidavit that any fraud on the revenue had been committed by any person interested or engaged in the importation of merchandise, to issue his warrant to the marshal to enter any premises where any invoices, books, or papers were deposited relating to such merchandise, and take possession of such books and papers and [116 U.S. 616, 621] produce them before said judge, to be subject to his order, and allowed to be examined by the collector, and to be subject to his order, and allowed deem necessary. This law being in force at the time of the revision, was incorporated into sections 3091, 3092, 3093, of the Revised Statutes.

The section last recited was passed in lieu of the seventh section of the act of March 3, 1863, entitled 'An act to prevent and punish frauds upon the revenue,' etc. 12 St. 737. The seventh section of this act was in substance the same as the second section of the act of 1867, except that the warrant was to be directed to the collector instead of the marshal. It was the first legislation of the kind that ever appeared on the statute book of the United States, and, as seen from its date, was adopted at a period of great national excitement, when the powers of the government were subjected to a severe strain to protect the national existence. The clauses of the constitution, to which it is contended that these laws are repugnant, are the fourth and fifth amendments. The fourth declares: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly

describing the place to be searched, and the persons or things to be seized.' The fifth article, among other things, declares that no person 'shall be compelled in any criminal case to be a witness against himself.' But, produce them. That is so; but it declares is contended that, whatever might have been alleged against the constitutionality of the acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection, because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so; but it declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production, for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching among his papers, are wanting, and to this extent the proceeding under the act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the constitution, in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object and purpose of search and seizure.

The principal question, however, remains to be considered. Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an 'unreasonable search and seizure' within the meaning of the fourth amendment of the constitution? or is it a legitimate proceeding? It is contended by the counsel for the government, that it is a legitimate proceeding, sanctioned by long usage, and the authority of judicial decision. No doubt long usage, acquiesced in by the courts, goes a long way to prove that there is some plausible ground or reason for it in the law, or in the historical facts which have imposed a particular construction of the law favorable to such usage. It is a maxim that, *consuetudo est optimus interpret legum*; and another maxim that, *contemporanea expositio est optima et fortissima in lege*. But we do not find any long usage or any contemporary construction of the constitution, which would justify any of the acts of congress now under consideration. As before stated, the act of 1863 was the first act in this country, and we might say, either in this country or in England, so far as we have been able to ascertain, which authorized the [116 U.S. 616, 623] search and seizure of a man's private papers, or the compulsory production of them, for the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property. Even the act under which the obnoxious writs of assistance were issued<sup>2</sup> did not go as far as this, but only authorized the examination of ships and vessels, and persons found therein, for the purpose of finding goods prohibited to be imported or exported, or on which the duties were not paid, and to enter into and search any suspected vaults, cellars, or warehouses for such goods. The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past;<sup>3</sup> and the like seizures have been authorized by our own revenue acts from the commencement of the government.

The first statute passed by congress to regulate the collection of duties, the act of July 31, 1789, (1 St. 43,) contains provisions to this effect. As this act was passed by the same congress which proposed for adoption the original amendments to the constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law [116 U.S. 616, 624] to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not within this category. *Com. v. Dana*, 2 Metc. 329. Many other things of this character might be enumerated. The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the fourth or fifth amendment, or any other clause of the constitution; nor is the examination of a defendant under oath after an ineffectual execution, for the purpose of discovering secreted property or credits, to be applied to the payment of a judgment against him, obnoxious to those amendments. But, when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from



whom they were stolen is entitled to their possession, and in the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment; and in the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt; and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, and is no more than what the court of chancery would direct on a bill for discovery. Whereas, by the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property.

In order to ascertain the nature of the proceedings intended by the fourth amendment to the constitution under the terms 'unreasonable searches and seizures,' it is only necessary to [116 U.S. 616, 625] recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.' <sup>4</sup> This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.

'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.' These things, and the events which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government. In the period from 1762, when the North Briton was started by John Wilkes, to April, 1766, when the house of commons passed resolutions condemnatory of general warrants, whether for the seizure of persons or papers, occurred the bitter controversy between the English government and Wilkes, in which the latter appeared as the champion of popular rights, and was, indeed, the pioneer in the contest which resulted in the abolition of some grievous abuses which had gradually crept into the administration of public affairs. Prominent and principal among these was the practice of issuing general [116 U.S. 616, 626] warrants by the secretary of state, for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel. Certain numbers of the North Briton, particularly No. 45, had been very bold in denunciation of the government, and were esteemed heinously libelous. By authority of the secretary's warrant Wilkes' house was searched, and his papers were indiscriminately seized. For this outrage he sued the perpetrators and obtained a verdict of 1,000 against Wood, one of the party who made the search, and 4,000 against Lord Halifax, the secretary of state, who issued the warrant. The case, however, which will always be celebrated as being the occasion of Lord CAMDEN'S memorable discussion of the subject, was that of Entick v. Carrington and Three Other King's Messengers, reported at length in 19 How. St. Tr. 1029. The action was trespass for entering the plaintiff's dwelling-house in November, 1762, and breaking open his desks, boxes, etc., and searching and examining his papers. The jury rendered a special verdict, and the case was twice solemnly argued at the bar. Lord CAMDEN pronounced the judgment of the court in Michaelmas term, 1765, and the law, as expounded by him, has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British constitution, and is quoted as such by the English authorities on that subject down to the present time.<sup>5</sup>

As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds [116 U.S. 616, 627] of those who framed the fourth amendment to the constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures. We think, therefore, it is pertinent to the present subject of discussion to quote somewhat largely from this celebrated judgment. After describing the power claimed by the secretary of state for issuing general search-warrants, and the manner in which they were executed, Lord CAMDEN says:

'Such is the power, and therefore one would naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant. If it is law, it will be found in our books; if it is not to be found there it is not law.

'The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses,

executions, forfeitures, taxes, etc., are all of this description, wherein every man by common consent gives up that right for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing, which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show, by way of justification, that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.

'Papers are the owner's goods and chattels; they are his [116 U.S. 616, 628] dearest property, and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.

'But though it cannot be maintained by any direct law, yet it bears a resemblance, as was urged, to the known case of search and seizure for stolen goods. I answer that the difference is apparent. In the one, I am permitted to seize my own goods, which are placed in the hands of a public officer till the felon's conviction shall entitle me to restitution. In the other, the party's own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is declared by acquittal.

'The case of searching for stolen goods crept into the law by imperceptible practice. No less a person than my Lord COKE denied its legality, (4 Inst. 176;) and therefore, if the two cases resembled each other more than they do, we have no right, without an act of parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity. Observe, too, the caution with which the law proceeds in this singular case. There must be a full charge upon oath of a theft committed. The owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant, to show them to the officer, who must see that they answer the description. ...

'If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief would likewise in this case protect the subject by adding proper checks; would require proofs beforehand; would call up the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy,- my answer is that all these precautions would have been long [116 U.S. 616, 629] since established by law if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing.'

Then, after showing that these general warrants for search and seizure of papers originated with the Star Chamber, and never had any advocates in Westminster Hall except Chief Justice SCROGGS and his associates, Lord CAMDEN proceeds to add:

'Lastly it is urged as an argument of utility that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence there is no way to get it back but by action. In the criminal law such a proceeding was never heard of; and yet there are some crimes, such, for instance, as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libeling. But our law has provided no paper-search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself, because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty.'

After a few further observations, his lordship concluded thus:

'I have now taken notice of everything that has been urged upon the present point; and upon the whole we are all of opinion that the warrant to seize and carry away the party's papers in the case of a seditious libel is illegal and void.' 6 [116 U.S. 616, 630] The principles laid down in this opinion affect the very essence of

constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense, - it is the invasion of this sacred right which underlies and constitutes the essence of Lord CAMDEN's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other. Can we doubt that when the fourth and fifth amendments to the constitution of the United States were penned and adopted, the language of Lord CAMDEN was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and 'unreasonable' character of such seizures? Could the men who proposed those amendments, in the light of Lord CAMDEN's opinion, have put their hands to a law like those of March 3, 1863, and March 2, 1867, before recited? If they could not, would they have approved the fifth section of the act of June 22, 1874, which was adopted as a substitute for the previous laws? It seems to us that the question cannot admit of a doubt. They never would have approved of them. The struggles against arbitrary power in which they had been engaged for more than 20 years would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred.

The views of the first congress on the question of compelling [116 U.S. 616, 631] a man to produce evidence against himself may be inferred from a remarkable section of the judiciary act of 1789. The fifteenth section of that act introduced a great improvement in the law of procedure. The substance of it is found in section 724 of the Revised Statutes, and the section as originally enacted is as follows, to-wit:

'All the said courts of the United States shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order to produce books or writings it shall be lawful for the courts respectively, on motion, to give the like judgment for the defendant as in cases of nonsuit, and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion as aforesaid, to give judgment against him or her by default.'<sup>7</sup>

The restriction of this proceeding to 'cases and under circumstances where they [the parties] might be compelled to produce the same [books or writings] by the ordinary rules of proceeding in chancery,' shows the wisdom of the congress of 1789. The court of chancery had for generations been weighing and balancing the rules to be observed in granting discovery on bills filed for that purpose, in the endeavor to fix upon such as would best secure the ends of justice. To go beyond the point to which that court had gone may well have been thought hazardous. Now it is elementary knowledge that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property. § And any compulsory discovery by extorting the party's oath, or compelling the production of his [116 U.S. 616, 632] private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.

It is proper to observe that when the objectionable features of the acts of 1863 and 1867 were brought to the attention of congress it passed an act to obviate them. By the act of February 25, 1868, (15 St. 37,) entitled 'An act for the protection in certain cases of persons making disclosures as parties, or testifying as witnesses,' the substance of which is incorporated in section 860 of the Revised Statutes, it was enacted 'that no answer or other pleading of any party, and no discovery, or evidence obtained by means of any judicial proceeding from any party or witness in this or any foreign country, shall be given in evidence, or in any manner used against such party or witness, or his property or estate, in any court of the United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture by reason of any act or omission of such party or witness.' This act abrogated and repealed the most objectionable part of the act of 1867, (which was then in force,) and deprived the government officers of the convenient method afforded by it for getting evidence in suits of forfeiture; and this is probably the reason why the fifth section of the act of 1874 was afterwards passed. No doubt it was supposed that in this new form, couched as it was in almost the language of the fifteenth section of the old judiciary act, except leaving out the restriction to cases in which the court of chancery would decree a discovery,

it would be free from constitutional objection. But we think it has been made to appear that this result has not been attained; and that the law, though very speciously worded, is still obnoxious to the prohibition of the fourth amendment of the constitution, as well as of the fifth.

It has been thought by some respectable members of the profession that the two acts, that of 1868 and that of 1874, as being in *pari materia*, might be construed together so as to restrict [116 U.S. 616, 633] the operation of the latter to cases other than those of forfeiture, and that such a construction of the two acts would obviate the necessity of declaring the act of 1874 unconstitutional. But as the act of 1874 was intended as a revisory act on the subject of revenue frauds and prosecutions therefor, and as it expressly repeals the second section of the act of 1867, but does not repeal the act of 1868, and expressly excepts criminal suits and proceedings, and does not except suits for penalties and forfeitures, it would hardly be admissible to consider the act of 1868 as having any influence over the construction of the act of 1874. For the purposes of this discussion we must regard the fifth section of the latter act as independent of the act of 1868. Reverting, then, to the peculiar phraseology of this act, and to the information in the present case, which is founded on it, we have to deal with an act which expressly excludes criminal proceedings from its operation, (though embracing civil suits for penalties and forfeitures,) and with an information not technically a criminal proceeding, and neither, therefore, within the literal terms of the fifth amendment to the constitution any more than it is within the literal terms of the fourth. Does this relieve the proceedings or the law from being obnoxious to the prohibitions of either? We think not; we think they are within the spirit of both. We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the fifth amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the fourth amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms. We are also clearly of opinion that [116 U.S. 616, 634] proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. In this very case the ground of forfeiture, as declared in the twelfth section of the act of 1874, on which the information is based, consists of certain acts of fraud committed against the public revenue in relation to imported merchandise, which are made criminal by the statute; and it is declared, that the offender shall be fined not exceeding \$5,000, nor less than \$50, or be imprisoned not exceeding two years, or both; and in addition to such fine such merchandise shall be forfeited. These are the penalties affixed to the criminal acts, the forfeiture sought by this suit being one of them. If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants, -that is, civil in form, -can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. As showing the close relation between the civil and criminal proceedings on the same statute in such cases we may refer to the recent case of *Coffey v. U. S.*, 116 U. S., S. C. ante, 432, in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of goods, arising upon the same acts. As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the constitution, and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself, and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the fifth amendment to the constitution, and is the equivalent of a search and seizure - and an unreasonable search and seizure - within the meaning of the fourth amendment. Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. We have no doubt

that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law.

There have been several decisions in the circuit and district courts sustaining the constitutionality of the law under consideration, as well as the prior laws of 1863 and 1867. The principal of these are *Stockwell v. U. S.*, 3 Cliff. 284; *In re Platt*, 7 Ben. 261; *U. S. v. Hughes*, 12 Blatchf. 553; *U. S. v. Mason*, 6 Biss. 350; *Same v. Three Tons of Coal*, Id. 379; *Same v. Distillery No. 28*, Id. 483. The first and leading case was that of *Stockwell v. U. S.*, decided by Mr. Justice CLIFFORD and Judge SHEPLEY, the law under discussion being that of 1867. Justice CLIFFORD delivered the opinion, and relied principally upon the collection statutes, which authorized the seizure of goods liable to duty, as being a contemporaneous [116 U.S. 616, 636] exposition of the amendments, and as furnishing precedents of analogous laws to that complained of. As we have already considered the bearing of these laws on the subject of discussion, it is unnecessary to say anything more in relation to them. The learned justice seemed to think that the power to institute such searches and seizures as the act of 1867 authorized, was necessary to the efficient collection of the revenue, and that no greater objection can be taken to a warrant to search for books, invoices, and other papers appertaining to an illegal importation than to one authorizing a search for the imported goods; and he concluded that, guarded as the new provision is, it is scarcely possible that the citizen can have any just ground of complaint. It seems to us that these considerations fail to meet the most serious objections to the validity of the law. The other cases followed that of *Stockwell v. U. S.* as a precedent, with more or less independent discussion of the subject. The Case of *Platt and Boyd*, decided in the district court for the Southern district of New York, was also under the act of 1867, and the opinion in that case is quite an elaborate one; but, of course, the previous decision of the circuit court in the *Stockwell* Case had a governing influence on the district court. The other cases referred to were under the fifth section of the act of 1874. The case of *U. S. v. Hughes* came up, first, before Judge BLATCHFORD in the district court in 1875. 8 Ben. 29. It was an action of debt to recover a penalty under the customs act, and the judge held that the fifth section of the act of 1874, in its application to suits for penalties incurred before the passage of the act, was an *ex post facto* law, and therefore, as to them, was unconstitutional and void; but he granted an order *pro forma* to produce the books and papers required, in order that the objection might come up on the offer to give them in evidence. They were produced in obedience to the order, and offered in evidence by the district attorney, but were not admitted. The district attorney then served upon one of the defendants a subpoena *duces tecum*, requiring him to produce the books and papers; and this being declined, he moved for an order to compel him to produce them; but the court refused to make such order. The books and [116 U.S. 616, 637] papers referred to had been seized under the act of 1867, but were returned to the defendants under a stipulation to produce them on the trial. The defendants relied, not only on the unconstitutionality of the laws, but on the act of 1868, before referred to, which prohibited evidence obtained from a party by a judicial proceeding from being used against him in any prosecution for a crime, penalty, or forfeiture. Judgment being rendered for the defendant, the case was carried to the circuit court by writ of error, and, in that court, Mr. Justice HUNT held that the act of 1868 referred only to personal testimony or discovery obtained from a party or witness, and not to books or papers wrested from him; and, as to the constitutionality of the law, he merely referred to the Case of *Stockwell*, and the judgment of the district court was reversed. In view of what has been already said, we think it unnecessary to make any special observations on this decision. In *U. S. v. Mason*, Judge BLODGETT took the distinction that, in proceeding *in rem* for a forfeiture, the parties are not required by a proceeding under the act of 1874 to testify or furnish evidence against themselves, because the suit is not against them, but against the property. But where the owner of the property has been admitted as a claimant, we cannot see the force of this distinction; nor can we assent to the proposition that the proceeding is not, in effect, a proceeding against the owner of the property, as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited; and to require such an owner to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property, is surely compelling him to furnish evidence against himself. In the words of a great judge, 'Goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are.' 9

The only remaining case decided in the United States courts, [116 U.S. 616, 638] to which we shall advert, is that of *U. S. v. Distillery No. 28*. In that case Judge GRESHAM adds to the view of Judge BLODGETT, in *U. S. v. Mason*, the further suggestion, that as in a proceeding *in rem* the owner is not a party, he might be compelled by a subpoena *duces tecum* to produce his books and papers like any other witness; and that the warrant or notice for search and seizure, under the act of 1874, does nothing more. But we cannot say that we are any better satisfied with this supposed solution of the difficulty. The assumption that the owner may be cited as a witness in a proceeding to forfeit his property seems to us gratuitous. It begs the question at issue. A witness, as well as a party, is protected by the law from being compelled to give evidence that tends to criminate him, or to subject his property to forfeiture.

Queen v. Newel, Parker, 269; 1 Greenl. Ev. 451-453. But, as before said, although the owner of goods, sought to be forfeited by a proceeding in rem, is not the nominal party, he is, nevertheless, the substantial party to the suit; he certainly is so, after making claim and defense; and, in a case like the present, he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offense.

We find nothing in the decisions to change our views in relation to the principal question at issue. We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings. We are of opinion, therefore, that the judgment of the circuit court should be reversed, and the cause remanded, with directions to award a new trial; and it is so ordered.

MILLER, J.

I concur in the judgment of the court, reversing that of the circuit court, and in so much of the opinion of this court as [116 U.S. 616, 639] holds the fifth section of the act of 1874 void as applicable to the present case. I am of opinion that this is a criminal case within the meaning of that clause of the fifth amendment to the constitution of the United States which declares that no person 'shall be compelled in any criminal case to be a witness against himself.' And I am quite satisfied that the effect of the act of congress is to compel the party on whom the order of the court is served to be a witness against himself. The order of the court under the statute is in effect a subpoena duces tecum, and, though the penalty for the witness' failure to appear in court with the criminating papers is not fine and imprisonment, it is one which may be made more severe, namely, to have charges against him of a criminal nature, taken for confessed, and made the foundation of the judgment of the court. That this is within the protection which the constitution intended against compelling a person to be a witness against himself, is, I think, quite clear. But this being so, there is no reason why this court should assume that the action of the court below, in requiring a party to produce certain papers as evidence on the trial, authorizes an unreasonable search or seizure of the house, papers, or effects of that party. There is in fact no search and no seizure authorized by the statute. No order can be made by the court under it which requires or permits anything more than service of notice on a party to the suit. That there may be no mistake as to the effect of the statute and the power to be exercised under it, I give the section here verbatim:

'Sec. 5. That in all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the attorney representing the government, whenever, in his belief, any business book, invoice, or paper, belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is [116 U.S. 616, 640] pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper, in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendants or claimant, by the United States marshal, by delivering to him a certified copy thereof, or otherwise serving the same as original notice of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced, the said attorney shall be permitted, under the direction of the court, to make examination-at which examination the defendant or claimant, or his agent, may be present-of such entries in said book, invoice, or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid.' 18 St. 187.

Nothing in the nature of a search is here hinted at. Nor is there any seizure, because the party is not required at any time to part with the custody of the papers. They are to be produced in court, and, when produced, the United States attorney is permitted, under the direction of the court, to make examination in presence of the claimant, and may offer in evidence such entries in the books, invoices, or papers as relate to the issue. The act is careful to say that 'the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid.'

The fourth amendment says: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.' [116 U.S. 616, 641] The things here forbidden are two: search and seizure. And not all searches nor all seizures are forbidden, but only those that are unreasonable. Reasonable searches, therefore, may be allowed, and if the thing sought be found, it may be seized. But what search does this statute authorize? If the mere service of a

notice to produce a paper to be used as evidence, which the party can obey or not as he chooses, is a search, then a change has taken place in the meaning of words, which has not come within my reading, and which I think was unknown at the time the constitution was made. The searches meant by the constitution were such as led to seizure when the search was successful. But the statute in this case uses language carefully framed to forbid any seizure under it, as I have already pointed out.

While the framers of the constitution had their attention drawn, no doubt, to the abuses of this power of searching private houses and seizing private papers, as practiced in England, it is obvious that they only intended to restrain the abuse, while they did not abolish the power. Hence it is only unreasonable searches and seizures that are forbidden, and the means of securing this protection was by abolishing searches under warrants, which were called general warrants, because they authorized searches in any place, for any thing.

This was forbidden, while searches founded on affidavits, and made under warrants which described the thing to be searched for, the person and place to be searched, are still permitted.

I cannot conceive how a statute aptly framed to require the production of evidence in a suit by mere service of notice on the party, who has that evidence in his possession, can be held to authorize an unreasonable search or seizure, when no seizure is authorized or permitted by the statute.

I am requested to say that the chief justice in this opinion.

## Footnotes

[ [Footnote 1](#) ] S. C. 24 Fed. Rep. 690, 692.

[ [Footnote 2](#) ] 13 & 14 Car. II. c. 11, 5.

[ [Footnote 3](#) ] 12 Car. H. c. 19; 13 & 14 Car. II. c. 11; 6 & 7 W. & M. c. 1; 6 Geo. I. c. 21; 26 Geo. III. c. 59; 29 Geo. III. c. 68, 153; etc.; and see the article 'Excise,' etc., in Burn, Just. and Williams, Just., passim, and 2 Evans, St. 221, sub-pages 176, 190, 225, 361, 431, 447.

[ [Footnote 4](#) ] Cooley, Const. Lim. 301-303. A very full and interesting account of this discussion will be found in the works of John Adams, vol. 2, Appendix A, pp. 523-525; vol. 10, pp. 183, 233, 244, 256, etc., and in Quincy's Reports, pp. 469-482; and see Paxton's Case, Id. 51-57, which was argued in November of the same year, (1761.) An elaborate history of the writs of assistance is given in the appendix to Quincy's Reports, above referred to, written by Horace Gray, Jr., Esq., now a member of this court.

[ [Footnote 5](#) ] See 3 May, Const. Hist. England, c. 11; Broom, Const. Law, 558; Cox, Inst. Eng. Gov. 437.

[ [Footnote 6](#) ] See further as to searches and seizures, Story, Const. 1901, 1902, and notes; Cooley, Const. Lim. 299; Sedgw. St. & Const. Law, (2d Ed.) 498; Whart. Com. Amer. Law, 560; Robinson v. Richardson, 13 Gray, 454.

[ [Footnote 7](#) ] Sixty-two years later a similar act was passed in England, viz., the act of 14 & 15 Vict. c. 99, 6. See Poll. Prod. Doc. 5.

[ [Footnote 8](#) ] See Poll. Prod. Doc. 27; 77 Law Lib.

[ [Footnote 9](#) ] VAUGHAN, C. J., in Sheppard v. Gosnold, Vaughan, 159, 172; approved by PARKER, C. B.,

in Mitchell v. Torup, Parker 227, 236.

## *Petitioner Seeks to Quash Eight Summons*

- A. You have the slight chance to quash an IRS Summons.
1. By that we mean that it is very hard to quash a summons against a bank or other type of financial institutions.
  2. You can quash a summons against a third party record keeper such as someone who holds your records i.e. CPA, Bookkeeper, Attorney, etc.
  3. What will usually happen, if you bring in the action correctly, is that the IRS will withdraw the Summons.
- B. In the following case the action to quash the IRS Summons was dismissed. But it serves as a learning tool to see how the court comes up with ways to rule against you.
1. Read section II Motion for Summary Denial.
    - a. “The government, however, is entitled to enforcement of an IRS Summons when it has established a prima facie case for enforcement and the taxpayer fails to show sufficient facts that indicate the existence of a defense to enforcement.”
    - b. It goes on to say the governments burden is “a slight one”... sworn declaration of the revenue agent.”
    - c. You must establish a valid defense to the summons.
    - d. Even the court uses the term “internal revenue tax” not “income tax”.
    - e. In summary, petitioner has not established any defense to the summons.
- C. Here the court has given us the requirements to quash the summons.
- D. FACTS! All the court wants to see is FACTS. What facts? Where do you come up with those facts?
1. What facts?
  2. Where do you come up with these facts?
  3. How do you organize these facts?



4. How do you use these facts?
  5. How do you use these facts in your defense?
- E. How can you defeat a summons, which is based upon negative law?
  - F. Turn this IRS Summons, which is based upon negative law, into a positive law argument by using your facts to rebut their negative summons.
  - G. We will be the first ones to admit that this is not an easy task.
  - H. By at least making the attempt to quash the summons, whether you are successful or not, shows them that you are not going to be an easy hit.
    1. You learn valuable courtroom procedure that may help you down the road if the need should arise.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

RODNEY R. COOK, ) CV 01-951-BR  
)  
Petitioner, ) OPINION AND ORDER  
)  
v. )  
)  
UNITED STATES; INTERNAL )  
REVENUE SERVICE; SUSAN SIGNOR,)  
Internal Revenue Agent; )  
MARDI VANDYKE, Group Manager; )  
and GREG MEADORS, Group )  
Manager, )  
)  
Respondents. )

RODNEY R. COOK  
1822 Westberry Court  
West Linn, OR 97  
(503) 504-0145

*Pro se* Petitioner

MICHAEL W. MOSMAN  
United States Attorney  
1000 S.W. Third Avenue, Suite 600  
Portland, OR 97204  
(503) 727-1015

1 - OPINION AND ORDER

**JEREMY N. HENDON**

Trial Attorney, Tax Division  
U.S. Department of Justice  
P.O. Box 683  
Ben Franklin Station  
Washington, D.C. 20044-0683  
(202) 353-2466

Attorneys for Respondents

**BROWN, Judge.**

Petitioner, appearing *pro se*, seeks to quash eight summonses issued by the United States Internal Revenue Service (IRS) to various third-party recordkeepers pursuant to 26 U.S.C. § 7609. This matter comes before the Court on Respondent United States' Motion for Partial Dismissal of the First Amended Petition to Quash Third Party Summons and Motion for Summary Denial of the Remaining Portions of the First Amended Petition to Quash Third Party Summons (#16). This Court has jurisdiction pursuant to 26 U.S.C. §§ 7604(a) and 7609(h)(1).

For the reasons that follow, the Court **GRANTS** Defendant's Motions and **DENIES** Petitioner's First Amended Petition to Quash Third Party Summonses (#4).

**BACKGROUND**

On June 5, 2001, IRS Service Agent Susan Signor issued administrative summonses to the following entities:

1. Fish Construction NW, Inc., 1834 S.W. 58<sup>th</sup> Avenue,

2 - OPINION AND ORDER

- Suite 206, Portland, OR 97221;
2. Primevest Financial Services, Inc., 400 First Street South, St. Cloud, MN 56301;
  3. Prudential Mutual Fund Services, LLC, P.O. Box 8098, Philadelphia, PA 19101;
  4. U.S. Bank, 2<sup>nd</sup> and Columbia Branch, 1340 S.W. 2<sup>nd</sup> Avenue, Portland, OR 97201;
  5. Wells Fargo Bank Northwest, N.A., 5639 Hood Street, West Linn, OR 97068;
  6. Pershing Division of Donaldson, Lufkin, Jenrette Securities Corporation, One Pershing Plaza, 10<sup>th</sup> Floor, Jersey City, NJ 07399;
  7. Homeside Lending Inc., 9601 McAllister Freeway, San Antonio, TX 78216.

Agent Signor issued an additional administrative summons on July 11, 2001, to Wells Fargo Bank Nevada, N.A., P.O. Box 4063, Concord, CA 94524. Each summons directed a third party recordkeeper to produce certain financial records pertaining to Petitioner. The IRS seeks these records in furtherance of its investigation of Petitioner's federal tax liabilities for the years 1998 and 1999.

Petitioner asserts the Court should quash the eight administrative summonses. Petitioner makes various challenges to the sufficiency of the summonses and the IRS's authority to issue

them.

Pursuant to Fed. R. Civ. P. 12(b)(1), the IRS moves to dismiss that part of the First Amended Petition that seeks to quash the summonses issued to the Pershing Division of Donaldson, Lufkin, Jenrette Securities Corporation and to Homeside Lending, Inc. The IRS asserts the Court lacks subject matter jurisdiction to adjudicate Petitioner's challenge to these summonses. The IRS also moves for "summary denial" of Petitioner's efforts to quash the remaining summonses.

**I. Motion to Dismiss for Lack of Subject Matter Jurisdiction**

**A. Standards**

Pursuant to 26 U.S.C. § 7609(h)(1), subject matter jurisdiction over a petition to quash a summons lies in the "United States district court for the district within which the person to be summoned resides or is found." Petitioner has the burden of establishing that this Court possesses the necessary subject matter jurisdiction. *Association of American Medical Colleges v. United States*, 217 F.3d 770 (9<sup>th</sup> Cir. 2000).

When deciding a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the court may consider affidavits and other evidence supporting or attacking a petitioner's jurisdictional allegations. See *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

**B. Jurisdiction to Quash the Summonses Issued to Pershing**

**Division of Donaldson, Lufkin, Jenrette Securities Corporation and to Homeside Lending, Inc.**

This Court's subject matter jurisdiction over Petitioner's effort to quash summonses is governed by 26 U.S.C. § 7609(h)(1) of the Internal Revenue Code. The Fifth Circuit has interpreted 26 U.S.C. § 7609(h)(1) as limiting jurisdiction to the district where the summons is to be answered. *Masat v. United States*, 745 F.2d 985, 987 (5<sup>th</sup> Cir. 1984). This Court has found no other case analyzing the statutory language "resides or is found." Courts that have addressed the issue summarily conclude they lack jurisdiction if the recordkeeper is "located" or has its principal place of business outside the district. See, e.g., *Manikranz v. United States*, 612 F. Supp. 590, 592 (S.D. Ind. 1985) (no jurisdiction when recordkeeper's principal place of business is outside the district); *Cosme v. United States*, 708 F. Supp. 45, 47 (E.D.N.Y. 1989) (jurisdiction exists where the third party resides or does business); *Bilodeau v. United States*, 577 F. Supp. 234 (D.N.H. 1983) (New Hampshire court does not have jurisdiction to quash summons issued to Massachusetts bank).

Petitioner has not shown that Pershing Division or Homeside Lending has an office in Oregon or that the records the IRS seeks from them are located in Oregon. Petitioner argues, however, that Homeside Lending "is found" in Oregon because it is registered with the Oregon Corporation Division and does business in Oregon. Petitioner also contends Pershing Division "is found"

in Oregon because the entity of which it is a division, Donaldson, Lufkin, Jenrette Securities, is licensed with the Oregon Division of Finance and Corporation Securities. Petitioner, however, offers no affidavit or other evidence to support these assertions. In any event, Petitioner cites no authority to support his contention that such registry or licensing would satisfy the jurisdictional requirement of 26 U.S.C. § 7609(h)(1), and the Court has found none. The personal jurisdiction cases cited and discussed by Petitioner are inapposite to the Court's analysis of subject matter jurisdiction pursuant to 26 U.S.C. § 7609(h)(1).

In the absence of Ninth Circuit precedent on the subject, this Court adopts and applies the Fifth Circuit's analysis set forth in *Masat*. The Fifth Circuit observed the statutory jurisdictional requirement "is not intended to permit a summons directed to a third-party recordkeeper at that recordkeeper's residence to be challenged wherever else in the world the recordkeeper may be found." *Masat*, 745 F.2d at 987.

In this case, Petitioner has not shown that either Pershing Division or Homeside Lending reside in Oregon. Neither company has an office in Oregon and, more significantly, Petitioner has not shown the records the IRS seeks are located in Oregon. This Court concludes it lacks subject matter jurisdiction to quash the summonses issued to Pershing Division and Homeside Lending.

## II. Motion for Summary Denial

### A. Standards and Burden of Proof

The Internal Revenue Code allows the IRS to issue a summons for production of information relevant to "determining the liability of any person for internal revenue tax." 26 U.S.C. § 7602(a). The taxpayer has the right to attempt to quash any such summons. 26 U.S.C. § 7609(b). The government, however, is entitled to enforcement of an IRS summons when it has established a *prima facie* case for enforcement and the taxpayer fails to show sufficient facts that indicate the existence of a defense to enforcement. *United States v. Powell*, 379 U.S. 48, 58 (1964).

To obtain judicial enforcement of a summons issued pursuant to 26 U.S.C. § 7609, the IRS need only show 1) the summons was issued for a legitimate purpose, 2) the information sought is relevant to that purpose, 3) the information is not already in the government's possession, and 4) the administrative steps required by the Internal Revenue Code have been followed. *Powell*, 379 U.S. at 57-58. "The government's burden is 'a slight one' and is typically satisfied by the introduction of the sworn declaration of the revenue agent who issued the summons that the *Powell* requirements have been met." *Fortney v. United States*, 59 F.3d 117, 120 (9<sup>th</sup> Cir. 1995) (quoting *United States v. Dynavac, Inc.*, 6 F.3d 1407, 1414 (9<sup>th</sup> Cir. 1993)).

In an enforcement proceeding, after the government



establishes a *prima facie* case, the burden shifts to the petitioner to show sufficient facts to establish a defense to the summons. See, e.g., *Lidas, Inc. v. United States*, 238 F.3d 1076, 1081-82 (9<sup>th</sup> Cir.), cert. denied, 121 S. Ct. 2245 (2001).

In this case, however, the government has not moved to enforce the summonses, but only to dismiss the First Amended Petition. This Court, therefore, adopts the approach set forth by the court in *Cosme v. Internal Revenue Service*, 708 F. Supp. 45 (E.D.N.Y. 1989) for determining such a motion. In *Cosme*, the court explained:

[W]hen faced with a petition to quash an IRS third-party summons, the government need not move to enforce the summons. Instead the government can rely on the voluntary compliance of third parties to effectuate the summons. Thus, when a taxpayer petitions to quash a summons, the government *can move to dismiss the petition*. Such a motion mirrors a 12(b)(6) motion to dismiss for failure to state a claim. In a motion to dismiss the petition, the government does not have to establish a *Powell* prima facie case. Instead, the burden shifts immediately to the petitioner to establish a valid defense to the summons.

*Id.* at 48 (citations omitted, emphasis in original).

Accordingly, this Court treats Respondents' Motion as a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

**B. Petitioner Has Failed to Establish a Valid Defense to the Summonses**

Petitioner raises several arguments in support of his request that the summonses be quashed. Petitioner's primary

argument appears to be that the IRS's authority to issue summonses pursuant to 26 U.S.C. § 7602 is limited to information related to liquor, tobacco products, and cigarette papers and tubes. Petitioner's argument is without merit. The IRS is authorized to summon any records relevant to "determining the liability of any person for internal revenue tax." 26 U.S.C. § 7602(a). The IRS's authority is not limited in the manner Petitioner suggests.

Petitioner also contends the IRS failed to provide him with "IRS Form 12180, Third Party Authorization Form." The IRS, however, issued the summonses pursuant to 26 U.S.C. §§ 7602 and 7609, which do not require such a form.

Petitioner next claims the summonses are not sufficiently specific to satisfy 26 U.S.C. § 7603(a), which requires a summons to describe the records sought "with reasonable certainty." This argument also is without merit. Each summons is accompanied by a "summons rider" that describes the records sought with sufficient particularity to satisfy the statute.

Petitioner also maintains the summonses are unenforceable because the IRS "fails to state with specificity which particular tax Respondents are basing their claim on." Petitioner does not identify any authority to support his assertion, and the Court finds no such requirement.

Petitioner further contends the summonses are invalid

because IRS Revenue Agents are not authorized to issue them. In support of this argument, Petitioner cites a "Handbook for Special Agents." The page attached to Petitioner's affidavit appears to be a page from a handbook specifically designed for Special Agents with instructions on the proper use of IRS Form 2039. It does not purport to restrict the service of administrative summonses only to Special Agents nor does it prohibit IRS Revenue Agents from issuing summonses.

Petitioner additionally argues Respondents' Motion to Dismiss does not comply with the Federal Rules of Civil Procedure and various local rules. Petitioner contends Respondents' Motion should be denied because Respondents did not follow the rules applicable to a motion for summary judgment. As noted, the Court finds Respondents' Motion is in the nature of a motion to dismiss and satisfies the procedural requirements applicable to such a motion.

Finally, Petitioner contends the declaration of Agent Michele McGeachy is defective because she has no personal knowledge of the facts set forth therein. Petitioner does not object to any particular factual assertions in Agent McGeachy's 12-page declaration. To prevail in his argument, Petitioner must offer some evidence that specific factual assertions in the declaration are incorrect or that Agent McGeachy falsely attested to her knowledge of them. See *Fortney*, 59 F.3d at 121 (taxpayer

is not entitled to an evidentiary hearing unless he or she factually opposes the government's allegations by affidavit). Petitioner has not presented any such evidence. Moreover, Respondents' argument that Agent McGeachy is offering evidence from IRS business records is well taken. There is no requirement that Agent McGeachy have personal knowledge of facts reflected in IRS records.

In summary, Petitioner has not established any defense to the summonses.

#### CONCLUSION

For the reasons set forth above, the Court **GRANTS** Respondents' Motion for Partial Dismissal of the First Amended Petition to Quash Third-Party Summonses and Motion for Summary Denial of the Remaining Portions of the First Amended Petition to Quash Third Party Summons (#16). Accordingly, Petitioner's First Amended Petition to Quash Third Party Summons (#4) is **DENIED**, and this case is **DISMISSED**.

IT IS SO ORDERED.

DATED this 8<sup>th</sup> day of January, 2002.

/s/ Anna J. Brown

---

ANNA J. BROWN  
United States District Judge

## 2039 SUMMONS HEARING TRANSCRIPT

- A. The following 156 pages contains a good overview of what can transpire at a 2039, summons hearing for books and records of an individual if you let us help you prepare for it.
  - 1. Note this is not a collection due process hearing so please do not confuse the two.
- B. As you read through this transcript you will find a number of issues raised by supporting documents from the IRS it's self or some other government agency.
- C. We have found over the years that the best way to learn from a transcript is to roll play with friends so that each reads his or her part. You can then stop a discuss any specific area you wish. Some how reading it aloud makes it more alive specially if you read it more then once or stop and go back over certain parts.
- D. Hopefully as people work with us we can instill in them the confidence necessary to go into one of these hearings and take charge of that hearing. So that you control the hearing not them.
- D. Is this transcript perfect? No, but it was her first time but she did a very good job.
- E. We will be going over much of this on the 90 minute cassette tape.

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE

IRS INTERVIEW

IN RE:

SSN:

**CERTIFIED  
COPY**

DEPARTMENT OF TREASURY  
INTERNAL REVENUE SERVICE  
7850 S.W. 6th Court  
Stop 4541  
Plantation, Florida 33324  
September 4, 2002  
11:00 o'clock a.m.

HAHN & BAILEY REPORTING  
200 S.E. 6th Street  
Suite 102  
Fort Lauderdale, Florida  
33301  
September 4, 2002  
2:50 o'clock p.m.

APPEARANCES:

INTERNAL REVENUE SERVICE,  
Cynthia M. Evans, Revenue Agent.

INTERNAL REVENUE SERVICE,  
Maria M. Roman-Torres, Group Manager.

INTERNAL REVENUE SERVICE,  
Nancy Santiago, Secretary.

, Interviewee.

Witness.

, Witness.

Witness.

E X H I B I T S

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Composite Exhibit A.

1 (Whereupon, the following proceedings were  
2 had:)

3 MS. EVANS: We are going to get started.  
4 Today is -- Today is September the 4th, 2002. It  
5 is now 11:10 a.m. Located here at the Internal  
6 Revenue Service, 7850 Southwest 6th Court in  
7 Plantation, Florida, 33324. The taxpayer's name  
8 is , social security number

9  
10 Mrs. , can I get you to verify the  
11 spelling of your name and verify your social  
12 security number for me?

13 MS. : First of all, I want to say that  
14 I'm not -- I don't agree that I'm a taxpayer  
15 until we prove the definition of taxpayer.

16 MS. EVANS: Okay. But right now these are  
17 the --

18 MS. : I'll go ahead --

19 MS. EVANS: If you could just identify  
20 yourself.

21 MS. . I do not agree with being called  
22 a taxpayer until we prove what the definition of  
23 taxpayer is, but I will give you the correct  
24 spelling of my name and my, what the Social  
25 Security Administration has given me as a



1 number. And that's

2 The last name, . And then the social  
3 security number is

4 MS. EVANS: Okay. Thank you very much. The  
5 purpose of this proceeding, we are here at a  
6 meeting today. The IRS has requested that we  
7 meet and interview with the taxpayer, Mrs. ,  
8 to secure documents and records to determine if  
9 the taxpayer has correctly filed or is required  
10 to file tax returns. And this is per Internal  
11 Revenue Code Sections 7602 of the Code which  
12 gives the service of power to examine any books,  
13 records, papers, or other data which may be  
14 relevant to a material tax examination.

15 Miss , do you have a Power of Attorney  
16 present?

17 MS. : No.

18 MS. EVANS: No Power of Attorney. At this  
19 time what I'm going to do is have each person  
20 identify themselves.

21 Again, I'm Cynthia Evans, Revenue Agent,  
22 Badge Number 65-02210.

23 MS. ROMAN-TORRES: I'm Group Manager, Badge  
24 Number 65-04502, Maria Roman-Torres.

25 And our secretary.

1 MS. SANTIAGO: Nancy Santiago, Badge Number  
2 65-04795.

3 MS. EVANS: Okay. Before I have your  
4 witnesses identify themselves, I just want to  
5 just get permission from you, because we will be  
6 discussing taxpayer information regarding your  
7 social security number and your account, so if it  
8 it's okay with you to go ahead and have each one  
9 of your members identify themselves?

10 MS. : Yes. As a matter of fact, I was  
11 reading that in the manuals yesterday, that one  
12 of the exceptions to the confidentiality of  
13 information is the witness testimony like this.  
14 So yes, I give authorization for them to hear  
15 whatever information we are going to discuss.

16 MS. EVANS: Okay.

17 Sir, if you would give your name?

18 MR.

19 MS. EVANS: How do you have spell that,  
20 please?

21 MR.

22 MS. EVANS:

23 MR.

24 MS. EVANS: Okay.

25 MS.

1 MS. EVANS: Okay.

2 MR.

3 MS. EVANS:

4 And your name?

5 COURT REPORTER: My name is Jennifer Stork,  
6 S-T-O-R-K, court reporter.

7 MS. EVANS: At this time we have identified  
8 all parties sitting in on the examination.

9 Okay, Miss your tax returns --

10 MS. : Wait. Wait. Wait. Before we  
11 get to that, I'd like to have the court reporter  
12 at least swear me in. And I'd like to swear you  
13 in if --

14 MS. EVANS: We don't swear in.

15 MS. ROMAN-TORRES: We are not doing swearing  
16 in. You can do your swearing in.

17 MS. : Can you please swear me in,  
18 Jennifer?

19 (Whereupon, Ms. was placed  
20 under oath.)

21 MS. Do you need to swear in the  
22 witnesses even though they're not going to say  
23 anything? They are --

24 COURT REPORTER: If they are not going to  
25 say anything --

1 MS. : They are not going to give any  
2 testimony at all.

3 COURT REPORTER: Then I don't need to swear  
4 them in.

5 MS. : Okay.

6 MS. EVANS: So at this point now I just want  
7 to identify the tax years that are on the  
8 examination. Your 1997, 1998, and 1999 tax years  
9 are on the examination.

10 Mrs. : can I get your occupation?

11 MS. : First I want to go through the  
12 paperwork that I have to present.

13 MS. EVANS: I'm going to get to that.

14 MS. : I will too, but first, according  
15 to the Publication Number 1 that you presented to  
16 us, the Taxpayer Rights, first I'd like to put  
17 into the record the IRS Mission which is to,  
18 "Provide America's taxpayers top quality service  
19 by helping them understand and meet their tax  
20 responsibilities and by applying the tax law with  
21 integrity and fairness to all."

22 Second, the Declaration of Taxpayer Rights.  
23 Section I, protection of my rights, or it says  
24 your rights. I'm going to read "your" and  
25 everywhere where it says "your", this is a

1 publication to me, so it's going to be "my"  
2 rights.

3 MS. ROMAN-TORRES: Did Cynthia send you that  
4 publication? Had you read it before you came  
5 here?

6 MS. : Yes. As a matter of fact, I've  
7 highlighted it. And what I want to do is submit  
8 it --

9 MS. ROMAN-TORRES: Do you --

10 MS. What --

11 MS. ROMAN-TORRES: Do you need an  
12 explanation on --

13 MS. I'm not going to read the whole  
14 thing. I'm only going to read certain parts.  
15 What I'm choosing to do is put certain  
16 information into the record so that as we move  
17 forward we have an understanding.

18 The protection of my rights is that, "IRS  
19 employees will explain and protect your rights as  
20 a taxpayer throughout your contact with us."

21 Next, under Privacy and Confidentiality,  
22 which is Section II, "The IRS will not disclose  
23 to anyone the information you give to us except  
24 as authorized by law. You have the right to know  
25 why we are asking you for information, how we

1 will use it, and what happens if you do not  
2 provide the requested information."

3 Under Section III, Professional and  
4 Courteous Service, "If you believe that an IRS  
5 employee has not treated you in a professional,  
6 fair, and courteous manner, you should tell that  
7 employee's supervisor."

8 And I know you're Cynthia's supervisor, and  
9 she's been wonderful.

10 MS. ROMAN-TORRES: She's always very  
11 professional.

12 MS. : Yes. She's been very  
13 professional.

14 Section Number IV, Representation. "You can  
15 have someone accompany you at an interview. You  
16 may make sound recordings of any meetings with  
17 our examination, appeal, or collection personnel,  
18 provided you tell us in writing ten days before  
19 the meeting."

20 Now, I did send Miss Evans a letter on  
21 August 20th indicating that when we meet I may  
22 have a witness and/or court reporter present, and  
23 I will be audio taping the meeting. So that was  
24 prior to ten days.

25 Then Section Number V, Payment of Only the

1 Correct Amount of Tax. "You are responsible for  
2 paying only the correct amount of tax due under  
3 the law--no more, no less."

4 And then under Section VII, Appeals and  
5 Judicial Review, "If you agree with us about the  
6 amount of your tax liability or certain  
7 collection actions -- I'm sorry, if you disagree  
8 -- certain collections actions, you have the  
9 right to ask the Appeals Office to review your  
10 case."

11 So according to -- I'd like to read into the  
12 evidence what it says on the Summons. In the  
13 matter of Internal Revenue  
14 Service Division, which is small business/self  
15 employed. The area number is Area 5. The  
16 periods in question as Miss Evans said were  
17 January 1, 1997 through December 21, 1999.

18 It's addressed to at the  
19 home address. And it says, "You are hereby  
20 summoned and required to appear before Cynthia  
21 Evans, an officer of the Internal Revenue  
22 Service, to give testimony and to bring with you  
23 and to produce for examination the following  
24 books, records, papers, and other data," et  
25 cetera.

1           Item Number 1, "The physical presence of  
2 Mrs.                           to be interviewed." And I  
3 am here.

4           Number 2, (A), "All bank checking and  
5 savings accounts; (B), canceled checks; (C),  
6 Deposit slips; (D), mortgage records and  
7 applications. "

8           Under Attestation, "I hereby certify that I  
9 have examined and compared this copy of the  
10 Summons with the original and that it is a true  
11 and correct copy of the original."

12           Signature of the IRS Officer serving the  
13 Summons is Cynthia Evans and her title, Revenue  
14 Agent. Then it gives a date, which we've altered  
15 to today. Then issued under authority of the  
16 Internal Revenue Code this 15th day of July,  
17 2002, signature of the issuing officer is Cynthia  
18 Evans, title, Revenue Agent. Signature of the  
19 approving officer, Maria Roman-Torres,  
20 T-O-R-R-E-S, Group Manager.

21           Under United States Attorney's Bulletin,  
22 April, 1998, the title of the document is the  
23 Summons Enforcement: Some Special Problems.

24           MS. ROMAN-TORRES: Miss           , I'm sorry.  
25 Let me interrupt you. You know, we are here to



1       conduct the examination of your tax return. And  
2       if you want to read all of that information for  
3       her to copy, you can do it at the end of the  
4       examination. But we would like to get started.

5               MS.               : Well, before I can answer your  
6       questions, I have to get certain information into  
7       the record. Because it --

8               MS. ROMAN-TORRES: If that information is in  
9       the record, you can use it at any time. It's not  
10      a problem. I don't see why you would have to  
11      have it on record right now when we need to  
12      conduct the examination.

13              MS.              The purpose of that --

14              MS. ROMAN-TORRES: It's your time and our  
15      time and I know all your witness' time is also  
16      being considered. So we would like to go ahead  
17      and continue with the examination.

18              MS.              Okay. The reason that I'm  
19      talking about this --

20              MS. ROMAN-TORRES: I understand your  
21      reason. I understand your reason.

22              MS.              : I don't think you do. If you  
23      would like to listen to the reason, I will make  
24      it clear. The reason that I'm reading this  
25      information is so that you will know and I will

1 know and we will be on the same footing and the  
2 same, coming from the same groundwork of the  
3 laws, the regulations, and the information in the  
4 Internal Revenue Manual and other documents that  
5 drive how we communicate. So that's why I'm  
6 entering this.

7 MS. ROMAN-TORRES: I'm glad that you  
8 understand the Code, the Rights, and other  
9 regulations --

10 MS. I am here to ask you to be sure  
11 I understand it properly.

12 MS. ROMAN-TORRES: And I'm quite sure that  
13 if you don't understand a question, you can ask  
14 for clarification at any time while she's doing  
15 the examination.

16 MS. : As I'm going through this,  
17 because I did several weeks worth of research  
18 before coming here, I came up with information  
19 where I do have questions.

20 MS. EVANS: That's fine. We can get to that  
21 at the end.

22 MS. ROMAN-TORRES: We can start the audit  
23 and at the end we'll answer all your questions.  
24 That's perfectly fine.

25 MS. According to this document,

1       which is the United States Attorney's Bulletin,  
2       it says an IRS summonses are not self-enforcing.  
3       The reason for me to bring that up is that  
4       because this is not an enforcement meeting, I  
5       have the opportunity and I have the right to be  
6       in control of the information that I'm choosing  
7       to put into the record.

8               MS. ROMAN-TORRES: You have perfect control  
9       to put whatever information --

10              MS.           : I'm choosing to do that because  
11       this is my meeting since --

12              MS. ROMAN-TORRES: This is our meeting.

13              MS.           : It's a meeting that you -- Go  
14       ahead.

15              MS. ROMAN-TORRES: This is meeting that we  
16       have asked for to be able to complete the  
17       examination of your tax return. And we would be  
18       perfectly glad to answer all of your questions  
19       within the examination period or at the end of  
20       the examination period. But what we don't want  
21       to do is to sit here and listen to everything  
22       that you want to bring up right now when we still  
23       have to conduct the examination. That might not  
24       be even necessary. So, I mean --

25              MS.           : It's necessary. In my opinion

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1 it is necessary, because she has specifically  
2 asked me a question which relates to what will  
3 come after I review this information.

4 Therefore, I believe because this is not an  
5 enforcement meeting, this is an administrative  
6 hearing, that I am allowed to enter my  
7 information first into evidence and then we can  
8 get to -- Because before I can answer or address  
9 those issues, there are some things that have to  
10 be clear and that's what --

11 MS. ROMAN-TORRES: What else do you need to  
12 have clear?

13 MS. I have all of this.

14 MS. ROMAN-TORRES: We are not --

15 MS. : It's not all of this. I have a  
16 pile of paper here. It's not all of this. This  
17 specific issue --

18 MS. ROMAN-TORRES: Mrs. has at least  
19 thirty, thirty-five papers that she would like to  
20 discuss before we conduct the examination. We  
21 are not going to do that.

22 MS. EVANS: We can entertain that at end.

23 MS. ROMAN-TORRES: We have to get started  
24 with the examination.

25 MS. : Is this an enforcement meeting

1 or is this not an enforcement meeting?

2 MS. ROMAN-TORRES: No. This is a regular  
3 examination meeting.

4 MS. Okay. Good. So I get to --

5 MS. ROMAN-TORRES: An enforcement summons  
6 would not be handled by us. It would be handled  
7 by district counsel.

8 MS. : So, "In most cases the IRS is  
9 able to obtain information it needs by asking for  
10 it informally."

11 MS. ROMAN-TORRES: Exactly. That's what we  
12 are trying to do.

13 MS. "If a taxpayer or relevant third  
14 party refuses to produce information informally,  
15 the IRS's only means of compelling the production  
16 of the information (short of referring the case  
17 for a grand jury investigation) is the service  
18 and subsequent enforcement of an administrative  
19 summons." Which is what we are here for.

20 So I was not requested informally to come  
21 and produce this information. I wanted to get  
22 that into the record. My first contact was a  
23 Summons.

24 MS. ROMAN-TORRES: You were requested by  
25 letter.

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1 MS. : For 1997, 1998, and 1999

2 MS. EVANS: There were letters that went out  
3 before the Summons.

4 MS. : That requested what?

5 MS. EVANS: That requested the information  
6 that was on the Summons.

7 Are you saying that that was your first, you  
8 know, your first time being contacted is with the  
9 Summons?

10 MS. : That's all I that recall.

11 MS. EVANS: No. No.

12 MS. : I will stand corrected.

13 MS. EVANS: There were definitely two or  
14 three letters before the Summons. We get to the  
15 Summons once we've issued initial appointment  
16 letters and there is a no-show or no respond from  
17 the taxpayer. Then we get to the next step, and  
18 that's the Summons in the information.

19 MS. : Okay. I'm not aware of those  
20 letters. I don't --

21 MS. EVANS: I have copies here.

22 MS. : If you have them that will be  
23 great. I just don't remember receiving any of  
24 those.

25 MS. ROMAN-TORRES: That's when we thought

1 you did not live at the address because it was  
2 mailed.

3 MS. EVANS: The letters never came back and  
4 you never showed up for the appointment.

5 MS. I got the Summons paperwork and  
6 I -- Then we adjusted our appointment.

7 MS. EVANS: The day you got the Summons,  
8 that was the reason I came to your residence.  
9 Because once we send the information through the  
10 mail and we don't get a response, the next step  
11 is deliver it in person. But there were letters  
12 that were sent out.

13 MS. : Do you have copies of those  
14 letters?

15 MS. EVANS: Yes. I can get you copies of  
16 these letters.

17 Initially, the first letter --

18 MS. ROMAN-TORRES: You can give them the  
19 letters at the end.

20 MS. EVANS: At the end, but there was an  
21 appointment scheduled May 16th of 2002 to have  
22 you appear in my office. And I believe that's  
23 another one. I'll give you the exact date. But  
24 I'll get you copies of all these letters.

25 The first appointment was scheduled for

1 April 26th. The letter was sent to the address,

2  
3 When there was no response,  
4 there was a second letter sent out scheduling  
5 another appointment for May 16, 2002, at the same  
6 time, same address, at the agent's office. Those  
7 two I will get you copies of.

8 MS. : And then after that, there was  
9 the Summons?

10 MS. EVANS: Then the third was when  
11 I appeared --

12 MS. : Well, I apologize. I don't  
13 recall getting those letters. Because it's not  
14 my normal MO to not address things like that.

15 MS. EVANS: We send you appointment  
16 letters. We at least try to contact you at least  
17 twice, three times. And when there is no  
18 response, we proceed with the Summons.

19 MS. : I apologize. Now, I did want to  
20 get more information about --

21 MS. ROMAN-TORRES: At this time Cynthia is  
22 going to get more information.

23 Cynthia?

24 MS. : I need some badge information.

25 MS. EVANS: We've gone over the badge



1 information.

2 MS. ROMAN-TORRES: This is the second time.  
3 We are not going to do it a third time. You have  
4 it on record.

5 MS. [REDACTED]: Is there a pseudonym on your  
6 badge?

7 MS. EVANS: We have no pseudonym.

8 MS. [REDACTED]: What's your GS level?

9 MS. ROMAN-TORRES: Tell the lady, ask your  
10 questions.

11 MS. EVANS: We went over your appeal  
12 rights. You've indicated you understood what  
13 they were?

14 MS. [REDACTED]: No. I have more appeals  
15 information in my package which we've not gone  
16 over.

17 MS. EVANS: We'll get to that at a later  
18 point in the examination. Right now let's get  
19 started and then as we go through -- The sooner  
20 we get through this --

21 MS. [REDACTED]: Well, I think -- Please ask your  
22 first question, because I think I need to get  
23 back to this.

24 MS. EVANS: First of all, I just want you to  
25 be aware that the years are '97, '98, '99

1 MS. [REDACTED] Correct.

2 MS. EVANS: What I need to do at this point  
3 is your occupation.

4 MS. [REDACTED]: Before I give any information  
5 like that, I need to give you some of this  
6 information.

7 MS. ROMAN-TORRES: Cynthia, you need to go  
8 over each one of the questions and let her tell  
9 you that.

10 MS. EVANS: This is information I'm going to  
11 need to know. This is part of our initial  
12 interview; occupation, -your age, your current  
13 address.

14 MS. ROMAN-TORRES: Ask each question.

15 MS. EVANS: Occupation of taxpayer?

16 MS. [REDACTED]: We'll get to that later.

17 MS. EVANS: Age of taxpayer?

18 MS. [REDACTED]: Forty-two.

19 MS. EVANS: Current address?

20 MS. [REDACTED]:

21 MS. EVANS: That's [REDACTED] ?

22 MS. [REDACTED]: Right. That's the same address  
23 that was on the Summons.

24 MS. EVANS: Your telephone number?

25 MS. [REDACTED]: The one you've been contacting

1 me on. It's 954-290 -- I don't want to give that  
2 information in this particular meeting, so no.

3 MS. ROMAN-TORRES: Just go ahead and write  
4 that down.

5 MS. EVANS: You don't want to give a phone  
6 number. Okay.

7 MS. ROMAN-TORRES: Because I believe according to  
8 the Summons, this is considered testimony. So  
9 I'm choosing to --

10 MS. EVANS: My next question to you, whether  
11 or not you had any question, that you received  
12 your Taxpayer Rights and Appeal Rights and if you  
13 understood them.

14 MS. ROMAN-TORRES: Only the Publication Number 1.  
15 I don't recall getting a document on the Appeal  
16 Rights.

17 Oh, that little piece of paper?

18 MS. EVANS: Yeah, Privacy Act Notice.

19 MS. ROMAN-TORRES: 609, I did not read that.

20 MS. EVANS: That was sent out.

21 MS. ROMAN-TORRES: I did not read it so, no, I do  
22 not have an understanding of that. However, I  
23 did read Publication 1, which is the Taxpayer  
24 Rights.

25 MS. ROMAN-TORRES: So you might as well tell

1 her what Publication 609 is.

2 MS. Publication 609 or Notice 609,  
3 Privacy Act Notice, which says --

4 MS. EVANS: Basically what 609 says, that  
5 the Privacy Act of 1974 says that when we ask you  
6 for information, we will first tell you why and  
7 our legal rights for asking for the information.  
8 And basically like when I stated when the audit  
9 initially started, the purpose for this meeting  
10 was to determine, you know, your tax status,  
11 where it is, and where you should be, and whether  
12 or not you should file tax returns, and whether a  
13 liability should be assessed.

14 MS. To continue with that sentence,  
15 it says why we are asking for it and how it will  
16 be used in Publication 609.

17 MS. EVANS: And asking to make sure the  
18 correct tax liability determination is made.  
19 That's basically why we are asking for that. You  
20 okay with that?

21 MS. I haven't read the whole thing  
22 though, so until I have some time to do that, I  
23 wouldn't say that I understand.

24 MS. EVANS: Are you a U.S. citizen?

25 MS. Yes. Well, wait a minute,

1 depends on the definition of U.S. citizen.

2 MS. EVANS: Were you born in the United  
3 States or --

4 MS. : I was born in New Haven,  
5 Connecticut.

6 MS. EVANS: Then you are a U.S. citizen.

7 MS. Depending on the definition.

8 MS. EVANS: Born within the United States.

9 MS. ROMAN-TORRES: Go ahead.

10 MS. EVANS: Next question is filing of tax  
11 returns. Did you file a tax return for 1997,  
12 1998, and 1999?

13 MS. : Now's the time when I need to  
14 get back to my information.

15 MS. EVANS: But right now if you could  
16 answer yes or no. Do you --

17 MS. That's not a yes or no answer.  
18 That's why --

19 MS. EVANS: What type of answer could you  
20 give me? I'm asking did you file a tax return  
21 for 1997?

22 MS. : Let me pull out this Handbook  
23 for Special Agents.

24 MS. ROMAN-TORRES: We are not special agents  
25 so that doesn't apply to us.

1 MS. However, this does state case  
2 law. So that's what I'm choosing to bring up  
3 here.

4 MS. ROMAN-TORRES: If that's a handbook,  
5 that's not applicable to us.

6 MS. It's applicable to all of us as  
7 you'll hear. Under section 342.5, Waiver of  
8 Constitutional Rights.

9 Again, this is the Handbook for Special  
10 Agents. Number four, "Courts have held in income  
11 tax evasion cases that there has been no waiver  
12 of constitutional rights where taxpayers have  
13 given verbal information or exhibiting books and  
14 records during so called "routine audits," as a  
15 result of deception practiced by government  
16 agents." That's U.S. versus Lipshitz,  
17 L-I-P-S-H-I-T-Z.

18 And then under Number (1), "The privilege  
19 against self-incrimination must be specifically  
20 claimed or it will be considered to have been  
21 waived." That's Lisansky versus U.S.,  
22 L-I-S-A-N-S-K-Y.

23 "In Nicola, N-I-C-O-L-A, versus U.S., the  
24 taxpayer permitted a revenue agent to examine his  
25 books and records. The taxpayer was indicted for

1 income tax evasion and invoked his constitutional  
2 rights under the Fifth Amendment for the first  
3 time at the trial by objecting to the revenue  
4 agent's testimony concerning his findings."

5 And then the Court said on the question of  
6 waiver, "But he did not refuse to supply the  
7 information required. Did he waive his  
8 privilege? The constitutional guarantee is for  
9 the benefit of the witness and unless invoked is  
10 deemed to be waived."

11 So I am not -

12 MS. ROMAN-TORRES: So are you invoking?

13 MS. I am requesting that I preserve  
14 my constitutional rights.

15 MS. EVANS: Okay. And let me just, you  
16 know, go over our authority. Internal Revenue  
17 Code Section 6001, 6011, and 6012(a), which  
18 states that you must file a tax return or  
19 statement with the Internal Revenue Service for  
20 any tax for which you are liable. The federal  
21 income tax is imposed in section one or taxable  
22 income on every individual.

23 Okay. You know, if you're working in United  
24 States, you earn income, you must file a tax  
25 return.

1 MS. It depends on the definition of  
2 income which is in this information which you are  
3 asking me to wait until the end to discuss but  
4 which I'm choosing to discuss now. And whether  
5 you are allowed to ask for it or not, according  
6 to your rules, there is also the rule of not  
7 waiving your constitutional rights, which has  
8 specifically been proven in court, which says  
9 that at the point in which you meet with a  
10 revenue agent, you must invoke that right. And  
11 I'm choosing in some cases to --

12 MS. EVANS: At this point are you choosing  
13 to invoke your rights?

14 MS. I'm always going to invoke my  
15 constitutional rights.

16 MS. EVANS: Okay.

17 MS. Also included in this  
18 information is it has to be done on a question by  
19 question basis.

20 MS. ROMAN-TORRES: Correct. So we can do  
21 that.

22 MS. So as each question comes up,  
23 then I may choose not to answer the question.

24 MS. ROMAN-TORRES: Okay.

25 MS. EVANS: So my next question will be if



1       you did not file for those tax years, did you  
2       know that you had a requirement to file? Were  
3       you aware that you were required to file a tax  
4       return?

5               MS.               I can't answer the question.

6               MS. EVANS: Did you have knowledge of that?

7               MS.               I want to have my information  
8       heard so that we can both understand why I might  
9       answer questions with not answering a question.

10              MS. ROMAN-TORRES: You can do that after.

11              MS. EVANS: Do you know what was the last  
12       year return you filed, the last time you filed a  
13       return?

14              MS.               . Refuse to answer the question.

15              MS. EVANS: Have you had any prior audits  
16       prior to this examination? Have you had ever  
17       been audited in the past?

18              MS.               Refuse to answer the question.

19              MS. EVANS: Have you ever amended a tax  
20       return? Have you ever filed a return and gone  
21       back and made changes or corrections to a tax  
22       return?

23              MS.               I won't answer the question.

24              MS. EVANS: Have you ever received any  
25       correspondence from Internal Revenue Service

1 requesting you to file a tax return?

2 MS. Don't recall.

3 MS. EVANS: Mrs. , what is your  
4 educational level?

5 MS. It's not relevant. Refuse to  
6 answer.

7 MS. EVANS: Have you ever prepared any tax  
8 returns yourself, have any self-prepared returns?

9 MS. Refuse to answer the question.

10 MS. EVANS: Are you employed, Miss ?

11 MS. Refuse to answer the question.

12 MS. EVANS: What is your marital status?

13 MS. I'm married.

14 MS. EVANS: First marriage? One -- Married  
15 once?

16 MS. Irrelevant.

17 MS. EVANS: Do you have any exemptions or  
18 children?

19 MS. : Irrelevant.

20 MS. EVANS: How long have you been located  
21 at the current address you just stated,

22

23 MS. It's  
24 right. And I refuse to answer the question.

25 MS. EVANS: Do you rent or own?

1 MS. Refuse to answer the question.

2 MS. EVANS: How much did you pay for your  
3 home?

4 MS. Refuse to answer the question.

5 MS. EVANS: Do you own any other real  
6 estate?

7 MS. Refuse to answer the question.

8 MS. EVANS: I'm going to ask you some  
9 questions about banking information. Do you have  
10 any bank accounts, and if so, what types?

11 MS. I will not divulge any financial  
12 information whatsoever. So I don't know if you  
13 want to ask each question individually or if you  
14 just want to put refuse.

15 MS. ROMAN-TORRES: Yes. We do.

16 MS. EVANS: If you are employed, is your  
17 paycheck deposited into a bank account?

18 MS. Refuse to answer the question.

19 MS. EVANS: Do you own any type of  
20 investments, stocks, bonds?

21 MS. Refuse to answer the question.

22 MS. EVANS: Do you own any automobiles?

23 MS. Refuse to answer the question.

24 MS. EVANS: Numbers in your family members?  
25 How many family members are in your household?

1 MS. Refuse to answer the question.

2 MS. EVANS: Do you own a safe deposit box?

3 MS. Refuse to answer the question.

4 MS. EVANS: Okay. During the years on the  
5 exam, '97 through 1999, did you receive any  
6 taxable income such as W2's, interest dividends,  
7 rent, pension?

8 MS. Refuse to answer the question.

9 MS. EVANS: Did you receive any non-taxable  
10 sources of income; unemployment, social security,  
11 child support, VA benefits, gifts, insurance  
12 proceeds?

13 MS. Refuse to answer the question.

14 MS. EVANS: Any loans from family members or  
15 related corporations?

16 MS. Refuse to answer the question.

17 MS. EVANS: Do you have any type of foreign  
18 transaction, foreign income?

19 MS. Refuse to answer the question.

20 MS. EVANS: Did you loan anyone money during  
21 the years in exam, '97 through '99?

22 MS. Refuse to answer the question.

23 MS. EVANS: Within the three years under the  
24 examination, 1999 through 19, I mean, 1997  
25 through 1999, did you make any major purchases

1 such as home, vacation home, rental property,  
2 business property, or personal property?

3 MS. Refuse to answer the question,  
4 or should I say reserve my rights.

5 MS. ROMAN-TORRES: It would be understood.

6 MS. Okay.

7 MS. EVANS: Did you sell any personal, any  
8 items, personal property, business property  
9 during 1997 through 1999?

10 MS. I reserve my rights.

11 MS. EVANS: Did you receive any loans from  
12 anyone; family members, related entities, any  
13 loans received between '97 and '99?

14 MS. Reserve my rights.

15 MS. EVANS: Okay. About how much cash on  
16 hand did you have at the beginning of '97 and at  
17 the end of 1999?

18 MS. I reserve my rights.

19 MS. ROMAN-TORRES: Go each year, beginning  
20 and ending cash.

21 MS. EVANS: Beginning 1997 ending 1997?

22 MS. Reserve my rights.

23 MS. EVANS: Okay. For 98?

24 MS. Reserve my rights.

25 MS. EVANS: And '99?

1 MS. Reserve my rights.

2 MS. EVANS: Do you have any type of  
3 insurance policies; life insurance, disability,  
4 homeowner's insurance policies?

5 MS. Reserve my rights.

6 MS. EVANS: Hobbies, do you have any income  
7 or expenses from hobby activities --

8 MS. Reserve my rights.

9 MS. EVANS: -- for any of the years  
10 involved? Do you know of any income deductions  
11 or credit that should have or could have been  
12 reported on a tax return for 1997, 1998, or  
13 1999?

14 MS. Reserve my rights.

15 MS. EVANS: I'm not sure if -- Did you have  
16 a Schedule C business in 1997?

17 MS. Reserve my rights.

18 MS. EVANS: Or 1998 or 1999?

19 MS. Reserve my rights. Reserve my  
20 rights.

21 MS. EVANS: If you had a business, were  
22 there books and records kept?

23 MS. Reserve my rights.

24 MS. EVANS: And if you had a Schedule C  
25 business, did you devote time to that business,

1 and if so, how much time?

2 MS. : Reserve my rights.

3 MS. EVANS: Would you and did you maintain  
4 records for a type of Schedule C business for any  
5 of the years involved, '97 through '99?

6 MS. Reserve my rights.

7 MS. EVANS: Okay. And if you did have a  
8 Schedule C business during those periods, did you  
9 have any employees and were employment taxes  
10 considered or paid?

11 MS. Reserve my rights.

12 MS. EVANS: Do you have any related entities  
13 such as corporations or partnerships that you  
14 would have been involved with for 1997 through  
15 1999?

16 MS. : Reserve my rights.

17 MS. EVANS: Did you receive any sources of  
18 income from any other related companies in 1997,  
19 1998, or 1999?

20 MS. Reserve my rights.

21 MS. EVANS: Were you employed with anyone,  
22 any company in 1997, 1998, 1999?

23 MS. Reserve my rights.

24 MS. EVANS: Okay. When you initially  
25 received your initial appointment letter and the

1 Summons there was some additional information  
2 that was requested that you bring to the  
3 examination. And I believe we requested bank  
4 statements from January 1, 1997, through December  
5 31, 1999. Do you have those records in your  
6 possession?

7 MS. I have the records in my  
8 possession.

9 MS. EVANS: Okay. Can we secure the records  
10 and, you know, start with the examination of  
11 these records?

12 MS. I reserve my rights.

13 MS. EVANS: So you have the records but you  
14 reserve your rights to submit the records?

15 MS. Is the production of the books  
16 and records voluntary or mandatory?

17 MS. ROMAN-TORRES: It's up to you if you  
18 want to present the records.

19 MS. If it's up to me does that mean  
20 that it's voluntary? I believe that sounds like  
21 the definition of voluntary.

22 MS. ROMAN-TORRES: It's up to you. If you  
23 want to bring them here now -- First of all, we  
24 want to confirm that you do have the records.

25 MS. EVANS: So you stated you do have the



1 records?

2 MS. I brought any records that I  
3 have. And I reserve my right.

4 MS. ROMAN-TORRES: Which consists of --

5 MS. I reserve my right.

6 MS. ROMAN-TORRES: So you won't -- You can't  
7 tell us what those records are?

8 MS. I reserve my right.

9 MS. ROMAN-TORRES: But you do have records?

10 MS. (Indicating).

11 MS. ROMAN-TORRES: Okay.

12 MS. EVANS: We also requested statements  
13 from savings and any type of investment accounts  
14 for 1997, 1998, 1999. Do you have those records  
15 in your possession?

16 MS. I didn't have a request for  
17 that, I don't believe. All I have --

18 MS. EVANS: It was number three.

19 MS. What did it say? I'm sorry.

20 MS. EVANS: All statements from passports,  
21 savings, and other investment accounts.

22 MS. : That was the bank or savings  
23 accounts?

24 MS. EVANS: Right.

25 MS. I reserve my rights.

1 MS. EVANS: And I believe --

2 MS. ROMAN-TORRES: You do have those records  
3 only you reserve your rights?

4 MS. I reserve my rights to answer  
5 the question.

6 MS. ROMAN-TORRES: Okay.

7 MS. EVANS: Okay. Do you have in your  
8 possession any 1099's you would have received  
9 from any related --

10 MS. Now that --

11 MS. EVANS: -- or unrelated corporations?

12 MS. : I apologize for interrupting.  
13 Where was that request?

14 MS. EVANS: Number four.

15 MS. I'm sorry. I only got number  
16 one and number two. And of number two I have  
17 banking accounts, which you just asked me about,  
18 canceled checks, deposit slips, and mortgage  
19 records and applications. That's all that I have  
20 on this Summons.

21 MS. EVANS: Okay. This one went out with --

22 MS. ROMAN-TORRES: That's an IDR what you  
23 are talking to her about. That was the  
24 information documents request that was sent with  
25 your appointment letter, the two appointment

1 letters that were sent to you.

2 MS. Uh-uh. This is it. Unless it  
3 was one of the letters that I didn't --

4 MS. ROMAN-TORRES: Yes. It would have been  
5 included.

6 MS. Okay. So I apologize. All that  
7 I did do was get together the information  
8 requested on the Summons to bring it with me.  
9 And that's all that was on the Summons, was the  
10 four things that I just mentioned.

11 MS. ROMAN-TORRES: Okay.

12 MS. EVANS: And then there was one more  
13 thing. If you received any type of non-taxable  
14 income during 1997, 1998, 1999, we just wanted to  
15 know what type of non-taxable sources of income  
16 was received.

17 MS. I reserve my rights.

18 MS. EVANS: Okay. That's all on the  
19 document request.

20 And you did reserve your right to answer  
21 what last known return was filed, right?

22 MS. Correct.

23 MS. EVANS: And you reserve your rights on  
24 what type of income was received, if you received  
25 income in 1997, 1998, 1999?

1 MS. Correct. I reserve my rights.  
2 I do have a copy with me of my internal, what's  
3 it called, the IMF, Internal Master File, and I  
4 had some questions on that as it relates to those  
5 particular years. But I would assume that that  
6 would show on it any activity, like any returns  
7 filed if there were any and things like that.

8 MS. ROMAN-TORRES: Uh-huh.

9 MS. To go through those.

10 MS. EVANS: At this point you reserve your  
11 rights on basically the information that I  
12 requested to secure and look at today.

13 MS. ROMAN-TORRES: Okay. You're going to  
14 discuss the information that we do have.

15 MS. EVANS: Right. What we have --

16 MS. You did receive my letter I  
17 believe, let me find it, which stated that I did  
18 not give authorization for any third party  
19 contact?

20 MS. EVANS: Right. I did receive that  
21 letter.

22 MS. I have here the Internal Revenue  
23 Manual, Part 5, Collecting Process, Chapter 1,  
24 General, and Section 17, Third Party Contact. So  
25 it's the specifics about what you're able to do

1 per your manuals for --

2 MS. ROMAN-TORRES: We are not a collection  
3 division. We are an examination division. So I  
4 don't know how much of that applies to us. But  
5 Cynthia has the Code section for you.

6 And you're going to give her a copy, right,  
7 Cynthia?

8 MS. EVANS: Yeah.

9 MS. Which section, Code section,  
10 because there are specifics in here where it  
11 mentions the Code section and then it gives the

12 --

13 MS. ROMAN-TORRES: Cynthia, you have the  
14 Code section here.

15 MS. EVANS: The first Code section I  
16 basically want to go over is Code Section 7602,  
17 Examination of Books and Witnesses. And  
18 basically what it says that for the purpose of  
19 asserting the correctness of any return, making a  
20 return where none has been made, determining the  
21 liability of any person for any internal revenue  
22 tax or the liability at law on any person,  
23 secretary is authorized to exam any books,  
24 records, papers, or data which are relevant to  
25 such inquiry. And also it does state here notice

1 of contact of third party.

2 Let me give you -- These are your copies.

3 MS. I have it.

4 MS. EVANS: You do have it?

5 MS. I pulled off 7602 from the  
6 internet yesterday. So it's whatever was up to  
7 date as of yesterday.

8 MS. EVANS: Basically it does -- What it  
9 does say, an employee of Internal Revenue Service  
10 may not --

11 MS. Wait a minute. Can you read  
12 that in its entirety starting from C?

13 MS. EVANS: C what?

14 MS. Here.

15 MS. EVANS: Notice of contact of third  
16 parties.

17 MS. Correct.

18 MS. EVANS: General notice.

19 MS. Correct.

20 MS. EVANS: "An officer or employee of the  
21 Internal Revenue Service may not contact any  
22 person other than the taxpayer with respect to  
23 determination or collection of the tax liability  
24 of such taxpayer without providing reasonable  
25 notice in advance to the taxpayer that contacts

1 with persons other than the taxpayer may be  
2 made."

3 And I believe -- I don't know if you have  
4 the exceptions there.

5 MS. First there is Number 2. The  
6 exceptions are Number 3. Number 2 says notice of  
7 specific contacts. "The secretary shall  
8 periodically provide to a taxpayer a record of  
9 persons contacted during such period by the  
10 Secretary with respect to the determination or  
11 collection of the tax liability of such  
12 taxpayer. Such record shall also be provided  
13 upon request of the taxpayer." Which I did  
14 request and you said you have it today.

15 And then Number 3, Exceptions.

16 MS. EVANS: Now, there are some exceptions.  
17 "This subsection shall not apply." And 3(a)  
18 says, "to any contract which the taxpayer has  
19 authorized; (b) if the Secretary determines for  
20 good cause shown that such notice would  
21 jeopardize collection of any tax or such notice  
22 may involve reprisal against any person; or 3,  
23 with respect to any criminal investigation."

24 Now, what I also have here, and I'm not sure  
25 if you have it, also for third party contacts

1 under RRA98, Section 3714.

2 MS. What is an RRA?

3 MS. ROMAN-TORRES: Revenue Reconciliation  
4 Act of 1998.

5 MS. : But that's not the Code. That's  
6 not law.

7 MS. ROMAN-TORRES: That's law, yeah.

8 MS. Don't they write the Code from  
9 that, or that's -- So you are talking about U.S.  
10 Code Section 30-

11 MS. EVANS: The RRA98, Section 3417.

12 MS. Section 34 what?

13 MS. EVANS: 3417.

14 MS. And what's the title of that  
15 section?

16 MS. EVANS: It's called Third Party  
17 Contact. And it prohibits on IRS contact of  
18 third parties without taxpayer pre-notification.  
19 And basically what it's saying, it requires that  
20 IRS provide taxpayer with prior notification that  
21 third parties may be contacted during an  
22 examination.

23 And it also states that it requires that you  
24 provide a list. And basically what it goes on to  
25 say is however, and basically in this -- There



1 are certain cases where, you know, we have  
2 situations. In your case you are considered a  
3 non-filer because the returns have not been filed  
4 or we have not received the tax returns based on  
5 our Code section where you record your income and  
6 your deduction and you either get a tax liability  
7 or refund.

8 So however, in that case when that is  
9 present on a tax period, the examiner, which is  
10 myself, is not required to provide prior  
11 notification to the taxpayer or input the third  
12 party information on the --

13 MS. Wait a minute. That's not  
14 completely what it says. It says however, if a  
15 potentially dangerous taxpayer indicator. So  
16 what that's saying is that you believe I'm a  
17 potentially danger taxpayer.

18 MS. EVANS: No. First let me tell you what  
19 that is. Let me go to the definition of that.

20 MS. ROMAN-TORRES: That's not correct. What  
21 Cynthia's trying to tell you is that according to  
22 this Code section, she's to give you notification  
23 that she will be contacting third parties. And  
24 that letter was sent to you. After you don't  
25 respond you have -- You don't need to respond.

1 We only need to notify you. If we mail the  
2 letter, we wait ten days. And after ten days we  
3 can contact the third parties.

4 MS. However, that process and  
5 procedure was not followed because -- Did you get  
6 the copy of the letter from Mr. Burgess that was  
7 sent out the same day that you sent me  
8 notification and he was contacting third  
9 parties?

10 MS. EVANS: The letter you sent Mr.  
11 Burgess?

12 MS. Right. I'm not sure if you got  
13 a copy of that. I'll show you. On the same day  
14 that you sent me notification according to what  
15 it says, that you are required to notify me. And  
16 then in your Internal Revenue Manual that we  
17 discussed a second ago it says --

18 MS. ROMAN-TORRES: The letter was sent  
19 before. It was sent before the Summons was  
20 issued.

21 MS. Same day. No. The Summons --  
22 Unfortunately I don't know what day the Summons  
23 was issued. What day was the Summons issued?  
24 I'll find the letters.

25 MS. EVANS: The Summons was issued July 26,

1 2002.

2 MS. What day was notification  
3 given?

4 MS. EVANS: There was also a letter sent out  
5 on that same day. And I don't know if you would  
6 have gotten it with the other packet.

7 MS. I have the letter. Right. And  
8 I also sent a --

9 MS. EVANS: Basically we were just required  
10 --

11 MS. Wait a minute. I sent a  
12 rebuttal back against that letter saying I do not  
13 authorize any third party contact. And let me  
14 find that. Hold on one moment.

15 MS. EVANS: And while you are looking for  
16 that --

17 MS. Do you want to flip your tape?

18 MS. ROMAN-TORRES: Do we need to flip the  
19 tape?

20 MS. SANTIAGO: No. We already did.

21 MS. . You said July 26th?

22 MS. EVANS: Yeah, July 26th. And while you  
23 are looking for that letter, I basically want to  
24 -- When you mentioned potentially dangerous  
25 taxpayer, I just want to basically go over

1 basically the definition of what a frivolous  
2 filer is, when a non-filer has not filed a  
3 complete tax return.

4 MS. Wait. Wait. Before we go on,  
5 because I just found it. Hold on. So the  
6 Summons was dated July 26th. The letter that you  
7 sent me which says information only, no response  
8 is necessary. Says, "We are writing to let you  
9 know that during the determination or collection  
10 of your tax liability, the Internal Revenue  
11 Service may need to contact third parties." And  
12 that was dated July 26th as you had said.

13 Now, also dated July 26, 2002, and I  
14 included this in the letter to you, the  
15 and which are two third  
16 party contacts, sent a letter on the same day.  
17 That's a third party contact without the required  
18 ten days notice. And it was sent by Steven K.  
19 Burgess or K. Steven Burgess.

20 MS. EVANS: You got to remember now, the ten  
21 days includes the two prior appointments that  
22 there was a no-show.

23 MS. How could it include  
24 appointments when I don't even have recollection  
25 of the appointment?

1           So no, you said of notification. And this  
2           is the notification right here dated information  
3           only, no response. That's my notification that  
4           you may contact third parties. And that's dated  
5           the 26th of July. And the contacts to the third  
6           parties are also dated the 26th of July.

7           MS. EVANS: Okay. But what you fail to  
8           understand, the third parity was done after the  
9           two attempts to get an appointment scheduled.

10          MS. ROMAN-TORRES: Do you have another  
11          letter, because the other letter would --

12          MS.           Do the other letters indicate  
13          that you might contact third parties, because  
14          I've never seen them?

15          MS. ROMAN-TORRES: It's a separate  
16          attachment.

17          MS. EVANS: The other letters are requesting  
18          the information that I needed to examine the  
19          return.

20          MS.           : So they did not say on them that  
21          you were going to contact third parties, is that  
22          what you are saying?

23          MS. EVANS: When you send an initial  
24          appointment letter, no, we don't tell you we are  
25          going to contact. After we don't receive the

1 information from you, then that's our next step,  
2 to contact third party to inform you of it.

3 MS. But according to -- You inform  
4 me of it, but you have to give me ten days before  
5 you contact any of my third parties according to  
6 --

7 MS. EVANS: Ten days from the two letters.

8 MS. No. Ten days from the --

9 MS. ROMAN-TORRES: Ten days from the day the  
10 notice was issued.

11 MS. Correct. Third party contacts.  
12 Internal Revenue Manual Part 5. It says  
13 Notification Requirements, which is part  
14 5.1.17.3.1. And the date of that is 04/26/2000.  
15 Number (1), "If the employee has determined", and  
16 that's the IRS employee, "that the taxpayer has  
17 not received the required advanced notifications,  
18 these procedures should be followed: Prepare the  
19 appropriate Letter 3164", which is the letter you  
20 prepared for me, 3164. "B, include the employee  
21 identification number and telephone number on the  
22 letter", which you did. "And hand carry or mail  
23 the letter". And you mailed the letter.

24 It says "CAUTION: If Letter 3164 was  
25 mailed, do not make any third party contact until

1 ten days from the date the letter was mailed."

2 But on the same day that the letter was  
3 mailed, I have two letters. One that was sent to  
4 and one that was sent to the  
5 both dated the same day, July 26th,  
6 requesting third party information.

7 MS. EVANS: Okay. And also --

8 MS. So I wanted to make you aware of  
9 that, that the ten day notification was not  
10 allowed and I was not given time to rebut the  
11 fact that you were requesting third party  
12 information, which I did not agree with.

13 MS. EVANS: But like I said, based on  
14 Section 3417, we weren't required to give you  
15 notification.

16 MS. What? But your own procedure  
17 and policy says CAUTION, you must give ten days  
18 notification.

19 MS. ROMAN-TORRES: Let me clarify something  
20 so that you can understand it. When we send the  
21 third party letter out to the taxpayer, if the  
22 taxpayer doesn't respond, or if the taxpayer  
23 doesn't come forward with the information, we  
24 have the right to go and get the information from  
25 third parties.

1 MS. After ten days notification --

2 MS. EVANS: After. That's correct.

3 MS. -- of the taxpayer. You gave me  
4 notification. On the same day someone else, not  
5 you -- I'm not saying that you did it, so as far  
6 as I'm concerned, you were following your proper  
7 procedure within your part of the organization.  
8 However, somewhere else, because I know the IRS  
9 is big, we all do, and there was someone else in  
10 another division that didn't review the record  
11 properly to be sure that the 31, whatever the  
12 letter number is, 3164, is that it, that the 3164  
13 letter was in my file before he sent his third  
14 party contacts.

15 So unfortunately, that procedure which you  
16 were supposed to follow regarding third party  
17 contacts was not followed. And I immediately, as  
18 soon as I got Cynthia's letter, which is dated  
19 July 26th, started researching and prepared a  
20 response saying you may not contact -- I do not  
21 authorize you to contact third party folks about  
22 my account.

23 MS. ROMAN-TORRES: However, we do not have  
24 to get your authorization to contact third  
25 parties.



1 MS. . According to that -- What's that  
2 Code section?

3 MS. EVANS: 3417.

4 MS. : Hold on a second.

5 MS. EVANS: Of the RRA98

6 MS. So are you saying that that's  
7 the same as Title 26 Code Section

8 MS. ROMAN-TORRES: After ten days --

9 MS. Wait. I want to go to the law  
10 to be sure that proper procedures is being  
11 followed, because a lot of this is all about  
12 procedure. So Code -- Are you saying that that's  
13 U.S. Code Section 3417 within Title 26, because I  
14 don't understand what the RRA is?

15 MS. EVANS: It's Section 3417 of the U.S.  
16 Code.

17 MS. ROMAN-TORRES: Yes. Tax Code.

18 MS. : Hold on a second then. I  
19 thought I had it together.

20 MS. ROMAN-TORRES: It seems you are very  
21 well prepared. Have you taken any courses in  
22 this?

23 MS. : It's interesting.

24 MS. ROMAN-TORRES: Or do you do this on your  
25 own?

1 MS. I study it.

2 MS. ROMAN-TORRES: You studied it?

3 MS. No, not formally. Informally I  
4 study it.

5 Now, before I can get to that, I have to get  
6 to this. All right. Before I can show you what  
7 I have in the Code, and that was 3417, let me  
8 look at this.

9 I have a U.S. Supreme Court case, United  
10 States versus Mersky, M-E-R-S-K-Y. It's 361 U.S.  
11 431. And it's the Supreme Court ruling on this  
12 case. And the lead opinion was Mr. Justice Clark  
13 who delivered the opinion of the Court. "An  
14 administrative regulation, of course, is not a  
15 statute. While, in practical effect, regulations  
16 may be called little laws, they are, at most, but  
17 offspring of statutes ... Here the statute is not  
18 complete by itself, since it merely declares the  
19 range of it's operation, and leaves to it's  
20 progeny the means to be utilized in the  
21 effectuation of it's command."

22 MS. ROMAN-TORRES: Okay. Excuse me a  
23 minute. Since what the information that Cynthia  
24 has to discuss with you is not information that  
25 we gathered from third parties, and as you

1 probably well know, we haven't received any of  
2 that information, the information that we have is  
3 information that is internal information that we  
4 would like to talk to you about.

5 MS. : So you have not received any  
6 third party information?

7 MS. ROMAN-TORRES: As of today we have  
8 received none.

9 MS. . Have you requested it other than  
10 what I know? And I guess you are going to give  
11 me a 12175 which will tell me all the third  
12 parties that you contacted, right?

13 MS. ROMAN-TORRES: Yes. You have to request  
14 it in writing and we will give it to you.

15 MS. I did. I gave it in that letter  
16 I requested it. And then I requested it verbally  
17 again. In writing I asked that it be forwarded  
18 immediately to my home address; however, I also  
19 requested it of Cynthia yesterday. I asked her  
20 if it was going to be available here. And she  
21 said yes, it would.

22 MS. ROMAN-TORRES: So the information that  
23 we have to talk to you about and we need to talk  
24 to you about is information that we have  
25 internally.

