

Supreme Court of the United States

OCTOBER TERM, 1970

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In the Matter of:

Docket No. 65

KEVIN L. DONALDSON, f/k/a MERTON H.
SWEET,

Petitioner,

VS

THE UNITED STATES, ET AL.,

Respondents

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TABLE OF CONTENTS

ORAL ARGUMENT OF:

P A G E

Robert E. Meldman, Esq.
on behalf of the Petitioner

2

Lawrence G. Wallace, Esq.
Office of the Solicitor General
on behalf of the Respondents

19

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

KEVIN L. DONALDSON, fka MERTON H.
SWEET,

Petitioner,

vs

No. 65

THE UNITED STATES, ET AL.,

Respondents

The above-entitled matter came on for argument at
11:35 o'clock a.m., on Thursday, November 19, 1970.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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Washington, D. C. 20530

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in Number 55, Donaldson against the United States.

ORAL ARGUMENT BY ROBERT E. MELDMAN, ESQ.

ON BEHALF OF THE PETITIONER

MR. CHIEF JUSTICE BURGER: Mr. Meldman, you may proceed whenever you are ready.

MR. MELDMAN: Thank you.

Mr. Chief Justice and may it please the Court: This case involves two issues relating to administrative summonses.

The first issue concerns the right of intervention in summons enforcement proceedings. Intervention under Rule 24-A of the Federal Rules of Civil Procedure, an intervention under this Court's 1964 decision in *Reisman versus Caplin*.

The second issue relates to the use of administrative summonses in criminal investigations. Petitioner move to intervene in an enforcement proceeding in the District Courts and was denied intervention. There was no evidentiary hearing and there has been no written opinion by the trial court.

However, the court below, when it considered Petitioner's intervention, determined that intervention should be governed solely by this Court's decision in *Reisman versus Caplin*. And the 5th Circuit narrowly construed the *Reisman* decision to require that a proprietary interest or a privileged relationship be established by the proposed intervenor, before

1 he should be allowed to intervene in the case.

2 Secondly: the 5th Circuit held that the intervenor
3 must show that if he would be allowed to intervene he could
4 successfully defend in the summons enforcement proceedings.

5 The Court of Appeals found that Petitioner had not
6 met their requirements, and therefore denied him intervention.

7 I believe that the facts in this case are basically
8 undisputed. In 1968 the Internal Revenue Service began conduc-
9 ting an investigation of Mr. Donaldson concerning his alleged
10 failure to file Federal income tax returns. In connection with
11 this investigation special agents of the Internal Revenue Ser-
12 vice issued administrative summonses to the various third
13 parties with whom Mr. Donaldson had transactions.

14 The Respondents in this action, the Acme Circuit
15 Operating Company, Inc. and its accountant, Joseph J. Mercurio,
16 or such third party witnesses, to receive summonses. Acme
17 and Mercurio are not active parties in this appeal.

18 In September of 1968 when Donaldson learned that a
19 special agent had inquired at the Acme Circus Company and re-
20 quested certain information and certain documents. Acme in-
21 formed Mr. Donaldson that they would comply with any request
22 made by the Internal Revenue Service.

23 Now, Donaldson, believing that the procedures being
24 used to investigate him were not proper, sought to prevent the
25 voluntary compliance by the Acme Circus. Following the

1 guidelines set down by this Court in the Reisman case, Mr.
2 Donaldson petitioned the District Court for a temporary restrain-
3 ing order, enjoining this third party, Acme Circus from com-
4 plying with any requests or summonses by the Internal Revenue.

5 The District Court granted the temporary restraining
6 order and the third parties were then restrained. / out seven
7 weeks later the United States then commenced an independent
8 action on Petitioner, in order to show cause to enforce the
9 administrative summons that had been issued to the Acme Circus.
10 The summonses required that Acme and Mercurio furnish informa-
11 tion concerning their financing dealings with the taxpayer.

12 In the Government's petition they alleged that these
13 summonses issued by the special agent were to obtain informatio
14 necessary for a determination of Donaldson's correct tax
15 liability. Donaldson was not named a party to the summons
16 enforcement action and therefore moved to intervene under Rule
17 24(a) 2 of the Federal Rules of Civil Procedure: intervention
18 of rights.

19 Donaldson alleged that he had an interest in this
20 action and he would be bound by the decision of this action and
21 that he was not adequately represented by the existing parties.
22 He also filed proposed answers in which he alleged that the
23 purpose for which the special agent had issued the summons was
24 not, in fact, determination of correct tax liability, but rather
25 to gather evidence for use in a criminal prosecution.

1 Donaldson also alleged that Section 7602 of the
2 Internal Revenue Code, the statute under which the summons is
3 issued, does not authorize the use of a summons for criminal
4 investigations.

5 As we have mentioned, there was no evidentiary
6 hearing. The court simply denied intervention and the case
7 comes before this court on a writ of certiorari to the 5th
8 Circuit.

9 We believe that the courts below have erred in three
10 ways: first we believe that under Rule 24(a) of the Federal
11 Rules of Civil Procedure, Donaldson had an interest which was
12 not adequately represented or protected and therefore he should
13 have been allowed to intervene under Rule 24(a)2.

14 Secondly, this Court, in its decision in Reisman
15 versus Caplin, specifically approved taxpayer intervention in
16 third party summons enforcement proceedings, in order to allow
17 the taxpayer an opportunity to challenge an improper use of the
18 Section 7602 summons. And therefore, under the Reisman case,
19 Donaldson was also a proper party to the enforcement proceeding.

20 Finally, Section 76(a)22 the section of the Internal
21 REvenue Code under which this summons is issued, does not
22 authorize the use of an administrative summons to conduct
23 criminal investigations and therefore, Donaldson would have had
24 a proper defense had he been allowed into the District Court.

25 Q Suppose he would have; would you be here?

1 Would you still be -- I suppose you would still be asserting
2 that you would have, should have the right to intervene anyway,
3 even if you had lost.

4 A Yes, Your Honor, I think we would. I believe
5 that to determine the merits of the defense prior to allowing
6 an individual to litigate his defense, would be premature.

7 Q Well, what points are you urging here, just the
8 intervention point or that if you were in you would have had a
9 defense?

10 A Your Honor, the way this case came up here,
11 we had filed our petition for certiorari on the intervention
12 question. The court below, the 5th Circuit had denied interven-
13 tion because we could not have won, even if we were allowed in.
14 And at the suggestion of the Solicitor General, both the defense
15 in the Court itself is now raised, as well as the intervention
16 question.

17 It's very difficult in this case to adequately dis-
18 cuss the defenses that could have been raised since we have no
19 record; there is no evidentiary hearing; there was no testimony
20 whatsoever. And when we prepared our brief we did it in an
21 objective manner --

22 Q Your position is that if you are right, if we
23 think you are right on intervention and hold that you are right
24 on intervention, we should remand without reaching any other
25 question or not?

1 A Your Honor, I would hope that you would reach
2 the second question in our case. However, if the Court chose
3 not to --

4 Q Whether the administrative summons can be used
5 when there is a criminal prosecution in the background?

6 A Yes, Your Honor. As a practical matter of
7 possibly which Your Honor says, if truly the Court does not
8 reach the second issue: intervention, it may be meaningless
9 back in the District Court.

10 However, I think there are other cases pending that
11 this Court may review that may be better vehicles for a decision
12 on the improper purpose.

13 As I was saying, we believe there is a number of ways
14 we can reach the intervention question. The first would be
15 under Rule 24(a) of the Federal Rules of Civil Procedure. Under
16 that rule where an individual claims an interest in the subject
17 matter disposition of the action, may as a practical matter,
18 impair or impede his ability to protect that interest and the
19 existing party has not adequately represented his interest, he
20 is to be allowed to intervene in a proceeding in the District
21 Court.

22 Now, recently Rule 24 was amended so as to eliminate
23 two requirements which previously existed. First, that the
24 mover be bound by a decree in that action and secondly: that he
25 have either a legal or equitable claim in the property. I

1 believe that under 24(a) 2 as it's now amended this taxpayer
2 meets the test for the rule: the subject to the Internal Revenue
3 investigation is the taxpayer's affairs, a matter in which I
4 think every taxpayer has both a legitimate and substantial
5 interest. This interest would clearly be impaired if improper
6 investigative procedures are utilized to go about making an
7 investigation.

8 And finally, I think it's clear, even on the limited
9 record we have here, that the third parties who were partici-
10 pants in the District Court action had no interest in defending
11 any of Mr. Donaldson's rights; no challenging the summons.
12 They were willing to comply with whatever the Court had ruled,
13 both in the District Court, the Court of Appeals and in its
14 own forum: this Court.

15 I think in the context of this test that limited
16 intervention where a taxpayer has a proprietary interest or a
17 privileged relationship in the summons material would be im-
18 proper. Donaldson is protesting the procedures being used to
19 investigate him and not the ownership of the documents that are
20 sought by the Internal Revenue.

21 In this case we really only have two interested
22 parties: we have Donaldson on the one hand, who has attempted to
23 prevent disclosure of information through improper procedures;
24 the United States, on the other hand, was trying to require dis-
25 closure of information under what they claim are proper

1 procedures.

2 The third party who was the litigant in the District
3 Court really has no interest in which side wins.

4 Q Is it your suggestion that if the United
5 States is investigating a criminal case and it goes to some
6 third parties who had some documents that belonged to them and
7 the documents were want to their investigation, that they
8 shouldn't be able to take those -- those third parties should
9 not be permitted to voluntarily hand over those documents to the
10 United States unless you have some opportunity to litigate about
11 it?

12 A No, Your Honor; we would have no objection to
13 a third party voluntarily turning the papers over. Our objec-
14 tion --

15 Q So, in this case if the third parties had
16 simply said, "If you want these papers we will give them to
17 you". You wouldn't claim you would have a right to go in and
18 get an injunction against turning the papers over?

19 A Your Honor, the way the request is made in
20 the Internal Service investigations is that the agent will make
21 an oral request under Section 7602. He will use this as his
22 guide.

23 Q You're really making purely a statutory argu-
24 ment without any constitutional overtones?

25 A No, Your Honor, I don't believe there are any

1 constitutional claims here. I think if you would have a
2 situation where a government agency would simply walk in and
3 ask for some papers and the third party would voluntarily turn
4 them over, I don't think that we would have a situation where
5 we would have an objection.

6 As we pointed out in our brief, we think that there
7 are other means to get these records. We're not really objec-
8 ting to their investigation, but rather the means in which they
9 are going about it.

10 Q Well, you did get an injunction here against
11 the third parties turning them over; didn't you?

12 A Yes, Your Honor; we did.

13 Q Or restraining order.

14 A Yes; it was a restraining order.

15 Q The third party was perfectly willing to turn
16 them over?

17 A Yes, Your Honor. The request, however, again
18 was made under the statutory authority.

19 Q Well, doesn't your -- even though it's a
20 statutory argument -- doesn't your position go to the length of
21 saying that any administrative summons procedure under these
22 sections, the person whose records -- who is the subject of
23 investigation has a right to intervene at the threshold because
24 his interest is not being protected?

25 A Yes, Your Honor; I think that would be a correct

1 statement.

2 Q Yes; that's what I thought. It's the broad
3 proposition you're arguing.

4 A Yes, Your Honor. I believe this is --

5 Q These other subsidiary questions as to the
6 construction of the section itself and/or matters that are to
7 be determined after you once intervene?

8 A Yes, Your Honor. I believe that would be
9 correct, in view of our case.

10 Q Yes.

11 A We believe that when the Court considered this
12 issue, which it did in the Reisman case, that this was the in-
13 terpretation that the Court had given. If the Court will re-
14 call on the Reisman case a special agent had issued a summons
15 to a taxpayer's accountant for work papers and some documents.

16 The taxpayer's attorney brought an injunctive action
17 against both the accountant and the Commissioner of Internal
18 Revenue, going to the District Court, the Court of Appeals
19 level; each level had a different theory for denying the tax-
20 payer the right to restraint.

21 When it came before this Court, this Court simply
22 said that what they are asking for is equitable relief. "There
23 is an adequate remedy at a lower level. We dismiss the suit
24 against the Commissioner of Internal Revenue and the accountant."

25 However, the Court went further. I believe that the

1 Court could have stopped at that point had they not wanted to
2 examine the entire procedures under which summonses are issued
3 in Internal Revenue investigations. And it is our belief and
4 the Court of Appeals for the 3rd and the 6th Circuits agree
5 with us, that upon this examination the Court found that the
6 proper procedures to be used would be for a taxpayer to inter-
7 vene in an enforcement proceeding.

8 Now, the Court went on then and said, "Should you
9 have a willing third party such as Peat-Marwick, the accountants
10 in Reisman, obviously the taxpayer would have no opportunity to
11 raise any defenses if they voluntarily turn the records over.
12 So the Court suggested the procedure to be followed in a
13 situation like that was to restrain that third party and thereby
14 trigger an enforcement proceeding for which the taxpayer could
15 then intervene and have an adversary hearing. And this is the
16 procedure that we have attempted to follow in this particular
17 case.

18 Q But, if the third party, Peat-Marwick, for
19 example, delivered the documents or made them available on a
20 simple request, the taxpayer would be denied the kind of pro-
21 tection you are arguing for; wouldn't he?

22 A Your Honor, that may be true. However --

23 Q Peat-Marwick might lose a client, but that
24 would be the only sanction; wouldn't it?

25 A Your Honor, it would probably be so. As a

1 practical matter the only reason that an accountant or bank or
2 anyone would turn these records over to the Internal Revenue
3 Service is because of the statutory authority that is built up
4 and the exposure that it gets. And an accountant is well aware
5 of 7602 and its sanctions. There can be an attempt if there is
6 a malicious refusal. This is the reason that these people turn
7 the records over.

8 There have been instances, such as Your Honors
9 pointed out, which we call a "soft summons," where a special
10 agent would come in and say, "You know I have the authority
11 under the Internal Revenue Code to demand the records with a
12 summons. Now, I won't bother with this piece of paper; just
13 give me the records; I'll give you a receipt. And this is not
14 an uncommon situation.

15 Now, we don't believe that the spirit of the law and
16 the ruling of this Court can be simply pushed aside because the
17 agent doesn't mention the statute and I think as a practical
18 matter this is what's happening

19 Q What do you do about this situation that I
20 set up? Do you say there is any remedy?

21 A Well, Your Honor, I believe that this Court
22 would find, as we are urging them to do, that Section 7602
23 summonses cannot be used in criminal investigations; that the
24 matter would, as a practical sense, resolve itself since the
25 special agents are the ones issuing these summonses. We have

1 no objection to a summons by a revenue agent in a civil audit
2 and I don't believe that there has ever been any controversy
3 in that at all. And I don't think that any taxpayer would
4 object to it.

5 Q Where, however, do we draw the line; the
6 moment the special agent steps into the picture?

7 A Yes, Your Honor; this would be the line. To
8 base this on the fact that this is where the Internal Revenue
9 Service has separated its civil and criminal investigations.

10 For example in 1968 they made a public announcement
11 that the purposes of the special agents was to investigate
12 criminal tax frauds; that henceforth this special agent must
13 issue Miranda warnings to the taxpayer upon his contact.

14 Thirdly, the Internal Revenue regulations separate
15 this function at this point in time. They say that all civil
16 aspects of this case must stop when a special agent enters the
17 case.

18 For this reason this is where we believe the line
19 should be drawn. We may point out to the Court that in the past
20 few months the Internal Revenue Service has now turned to using
21 its regular search warrants by their special agents.

22 Q Well, isn't much of that, though, prompted by
23 Miranda in the new ruling. In a sense, this is all new;
24 special agents have been used for years and years and these
25 arguments have never appeared before.

1 A Your Honor, I believe that as we pointed out
2 in our brief, at page 29 in the green cover: the regulations
3 that govern the functions of the special agents change. The
4 case most prominently cited by the courts is Boren versus
5 Tucker, saying that there really is no distinction.

6 And the regulations existing in 1956 give a very
7 -- at best, a gray area between the functions.

8 However, the regulations were changed in 1966 and
9 now under the regulations this special agent has but one
10 function: to investigate criminal cases. He is not responsible
11 in any manner for either civil penalties or civil tax or civil
12 determinations of any kind and we have made a comparison at
13 page 29 of the brief of the two regulations.

14 And I think this is a critical difference that has
15 come about, as you say, within the last few years.

16 I might also point out to the Court in this connec-
17 tion that there is a specific section of the Internal Revenue
18 Code, Section 7608, that authorizes the special agent to use
19 a search warrant and he need not go outside of the scope of the
20 Internal Revenue Code to find this.

21 Now, we believe that an examination of the history
22 of Section 7602 and the purposes for which it was issued makes
23 it clear that this was meant to aid the Internal Revenue in
24 determining correct tax liability; not to allow the Internal
25 Revenue Service to conduct criminal investigations.

1 There may be instances during the pendency of the
2 criminal case where tax liability may be a necessary element.
3 However, we wish to point out to the Court that, for example,
4 in this case where the investigation is for alleged failure to
5 file, that there is no need for a civil tax liability to be
6 determined and we don't feel that this is truly the function
7 that the special agent here is meeting.

8 The second alternative that's suggested by the
9 Solicitor General would be suppression. He said this may be
10 an adequate remedy; allow the sentence to be enforced and then
11 if and when there is a criminal prosecution the taxpayer could
12 then bring a suppression action.

13 Now, we would like to point out two things to the
14 Court on this point: first, I think suppression's a very
15 drastic remedy and by its very nature can be employed only in
16 limited circumstances. The issuance of the summons if it's
17 invalidly issued, I don't think would be proper under the
18 section, the Rule 41(e) motion. If it was issued for an im-
19 proper purpose, this too may not be a proper 41(e) motion for
20 suppression.

21 Secondly, we believe, had this Court believed that
22 the proper procedure to be followed was suppression, that they
23 could have done away with the entire scope of the Reisman
24 opinion; simply denied that taxpayer relief and stopped and
25 said that any time a summons is issued for any purpose whatsoever,

1 let the summons be complied with and let suppression be the
2 remedy.

3 However, I think this is a very impractical test to
4 use. Many times, as the Court well knows, when you get to the
5 suppression evidence has been comingled, and there's no way to
6 marshal one from the other.

7 I think if the Court determines and sets down a
8 specific point in time when this summons can no longer be used
9 that the controversy that's going on throughout the country
10 will come to an immediate stop and we will have no longer a
11 problem with the special agent trying to use a civil summons
12 for a criminal case and I think this is --

13 Q You would take the same position if the third
14 party was summonsed to give testimony?

15 A Yes, Your Honor; I think the same thing would
16 be true.

17 Q You would want the right to sit there and
18 make sure they didn't ask him a question which went beyond the
19 proper use of a 7602?

20 A Your Honor, I would believe, whether we would
21 request it at the administrative level, I don't know. I would
22 have to say as a practical matter we would have to go with the
23 good faith of the Government.

24 The only determination we can ever make is that
25 when a special agent comes in that they have now started a

1 criminal case. There are rare instances where a civil agent
2 is used to bird-dog, but I think this is a very rare instance
3 and I think most taxpayers would take the position that if a
4 Revenue Agent wanted to question the third party they would
5 have no objection at all.

6 Q Yes, but if he wanted to summons him; I mean
7 actually ---

8 A If a Revenue Agent wanted to summon a third
9 party I don't think the taxpayer would object. If a special
10 agent attempted to do this then we think that what he's doing
11 is, in essence, usurping the power given to the grand jury.

12 Q But you should think that as soon as a special
13 agent does it, you should be there to listen to the question-
14 ing?

15 A Your Honor, I believe that if a special agent
16 issues the summons the third party should not be compelled to
17 comply with it.

18 Q We'll take that up after lunch if you want to
19 enlarge on it.

20 A Thank you.

21 (Whereupon, the argument in the above-entitled matter
22 was recessed at 12:00 o'clock p.m. to resume at 1:00 o'clock
23 p.m. this day).

1 1:00 o'clock p.m.

2 MR. CHIEF JUSTICE BURGER: Do you want to continue
3 with your argument in chief or do you want to save the rest
4 for rebuttal? You've got five minutes left.

5 MR. MEIDMAN: I'll reserve it if I may. Thank you.

6 MR. CHIEF JUSTICE BURGER: Mr. Wallace.

7 ORAL ARGUMENT BY LAWRENCE G. WALLACE, ESQ.

8 OFFICE OF THE SOLICITOR GENERAL ON BEHALF

9 OF THE RESPONDENTS

10 MR. WALLACE: Mr. Chief Justice and may it please
11 the Court: This case is here in the form of a denial of inter-
12 vention affirmed by the Court of Appeals and we have briefed
13 and are prepared to argue the issues involved, partly with
14 reference to general principles of the law of intervention.
15 But, the manner in which the case arose suggests that the sub-
16 stance of what is at issue is no ordinary question of interven-
17 tion at all. This has been illuminated to some extent by
18 questions from the bench, but I believe it would be helpful to
19 make this analytical framework explicit.

20 The court proceedings in which the Petitioner seeks
21 to intervene is, in effect, one that he himself created. There
22 would have been no summons enforcement proceeding in the
23 District Court and indeed, no judicial proceeding of any kind
24 in which the Petitioner or anyone else could seek to intervene
25 had the Petitioner not secured from the District Court a

1 preliminary injunction restraining the witnesses summoned by
2 the Internal Revenue Service from complying with the summons
3 until ordered by a court of competent jurisdiction to do so.

4 The record shows they were willing to comply with the
5 summons and but for that preliminary injunction there would
6 have been no occasion for enforcement proceedings.

7 The Petitioner, in one important sense, understates
8 the case when he contends that he is the real party in interest
9 in the enforcement proceeding. There simply is no issue in
10 that proceeding other than the question whether a petitioner
11 will be permitted to intervene and if so, whatever issues he
12 will be allowed to raise.

13 In other words, the case in substance, involves
14 nothing but an attempt by the petitioner to secure judicial
15 interference with the conducting of an Internal Revenue Service
16 investigation, an investigating relating to his past liabilities
17 but directed in this instance, only to third persons and to
18 records that are not his and that do not embody any confidential
19 communications, whose disclosure he claims he is legally
20 privileged to prevent.

21 On this view of the case it is difficult to see why
22 the Petitioner stands on any different footing from that of any
23 other person who wishes to prevent or interfere with an in-
24 vestigation of third persons by government officials, because
25 he fears that the investigation may eventuate in the bringing of

1 civil or criminal proceedings against him.

2 Q Mr. Wallace, are you suggesting that if the
3 material is material which could be secured by a subpoena
4 duces tecum in a tax law case, or by other discovery processes,
5 that that automatically means it's available under an administra-
6 tive subpoena or summons?

7 A Well, there is an issue if, indeed, there are
8 parties who would raise it here. The first issue is whether
9 there is any right of the petitioner to intervene, to raise the
10 7602 issue. That is the statutory issue under 7602 that I
11 believe you have posed.

12 Q I mean, I thought you started out by saying
13 that intervention was not the real issue here, but lurking under
14 this issue is --

15 A It's really a question of whether -- this is,
16 in effect, born of his trying to enjoin the use of the summons
17 here. It comes to us in the form of an intervention but in
18 effect, the proceeding was begun by his application for the
19 restraining order.

20 Q I don't know what your friend's position would
21 be on it, but he might answer the question I put to you by
22 saying that even if, even if this would be available upon a
23 subpoena served after they were in trial or just before trial in
24 the tax case, that doesn't mean it's available for the investi-
25 gation and preparation of the tax case against him. That's the

1 point I'm trying to --

2 A That is the contention that he is trying to
3 make here, that it is not available in the investigatory stage.
4 And we answer that, both in our brief, and I propose to answer
5 in the argument, but I think first there is this preliminary
6 question of whether he has any right to raise it at all at this
7 stage of the proceeding, in his effort to enjoin pro tanto the
8 investigation by preventing this particular summons from being
9 enforced.

10 Q Well, of course as a practical matter, if he
11 can't raise it now, raising it at any other occasion is some-
12 what academic; isn't it? After the cat is out of the bag?

13 A Well, there is the question of whether the
14 fruits can be introduced against him if and when a civil or
15 criminal proceeding is ever brought against him. No such pro-
16 ceeding has ever been brought. This is an anticipatory suit on
17 his part.

18 Q Just what is the issue to be decided?

19 A He has sought a hearing --

20 Q I'm not talking about in the court; I'm
21 talking about when you take it before the Internal Revenue
22 Officer, what is the issue before him? And do they take
23 evidence?

24 A Oh, in the summons proceeding itself?

25 Q Yes.

1 A The witness is summoned to bring with him
2 records to be produced which is what is at issue here, but also
3 sometimes he's asked questions; usually questions concerning
4 those records. The witness is usually a bank or an employer or
5 a corporate official. He will have records bearing on the
6 possible tax liability of a third person, when the witness
7 isn't the taxpayer himself.

8 Q Of course if it was a grand jury he couldn't
9 hope to intervene, but what is the authority of the Commission
10 to hold a secret hearing which involves another man's fate,
11 and decline to let him in or let his lawyer in.

12 A Well, the authority is in Section 7602 if
13 there is a question of statutory authority. It is not very
14 different from the authority of a police officer who goes into
15 a business office and questions someone and gets information to
16 see whether there may be a violation of law that --

17 Q -- here because they issue a summons and have
18 a secret hearing, do they?

19 A Yes, the summons, it's a form of subpoena.
20 It's a form of administrative subpoena very similar to what
21 the Securities and Exchange Commission issues or the Federal
22 Trade Commission.

23 Q It's his complaint that he wants to intervene
24 to show that he is an object of investigation and that secret
25 hearing?

1 A Oh, not only his complaint, but the summons
2 itself says that the purpose of it is to get information re-
3 lating to his past liability. There is no dispute about that.

4 Q And he asked to intervene.

5 A He asked to intervene but in a judicial
6 proceeding that he has brought, in effect.

7 Q Is this a judicial proceeding?

8 A Well, he has brought a judicial proceeding.

9 Q Well, in his judicial --

10 A He hasn't -- he never asked to intervene in an
11 administrative proceeding. He asked that the records not be
12 produced. He asked to interfere with it. He didn't ask to be
13 present to question the witness; he asked that the witness be
14 restrained from attending it at all. He said that the whole
15 thing is improper and can't be had.

16 Q He didn't ask to be permitted to be there?

17 A No, he didn't; that is not his request. He's
18 not trying to intervene in an administrative proceeding. He's
19 trying to prevent the summons at all. He says that it can't
20 be issued; there can't be any inquiry. That is his contention.

21 Q On what grounds?

22 A On the ground that it's unauthorized for the
23 Internal Revenue Service to inquire about someone's income if
24 the inquiry may lead to criminal proceedings later on if they
25 find out that he has fraudulently understated his tax.

1 That is his contention.

2 Now, the court -- well, he upheld the denial of
3 intervention --

4 Q For lack of standing.

5 A For lack of standing, but he did say that the
6 standing question to some extent implicates rather what is
7 alleged in the motion to intervene, would be any ground for
8 refusing to enforce the summons, to see what interest was being
9 alleged, in deciding whether there was standing. It is a
10 form of the standing question.

11 Q What kind of proceeding is it before the
12 Internal REvenue? How did you designate it?

13 A It's just a subpoena that he wanted someone to
14 produce records so that he could examine them. And that's done
15 by having the man bring the records to him and if he sees
16 something there that he thinks is of importance the Internal
17 Revenue Service reproduces the record and makes a copy of it
18 and then gives them back to him.

19 Q Does the statute authorize that he bring in a
20 witness in the secret hearing?

21 A Well, the statute doesn't specify that and --

22 Q Well, wasn't done before, then they have
23 a right to do that?

24 A That's not at issue here. We're not resisting
25 any effort of the taxpayer to attend the hearing. In fact,

1 counsel for the taxpayer just said he didn't want to attend the
2 hearing, just before lunch. He said that he had to rely on the
3 good faith of the Government. That's not at issue here.

4 The only thing that is at issue is whether the --
5 he can prevent the Government from subpoenaing the records at
6 all. That's his claim, that the Government has no right to
7 subpoena the records at all.

8 Now, this is the kind of anticipatory challenge by
9 someone not yet directly effected by an investigation that the
10 court has generally refused to entertain with regard to any
11 kind of official investigation. The general rule in our view,
12 and it can be recognized that there are exceptions to it, but
13 the general rule, whether articulated in terms of standing or
14 of ripeness or the adequate remedy at law, has been that such
15 challenges should be made in the form of a motion to suppress
16 or another proper objection, to the use of the fruits of the
17 investigation when and if civil or criminal proceedings are
18 actually brought against the complainant.

19 And one consideration underlying this general rule
20 is the prejudice to the public interest that would result from
21 unwarranted interruptions and postponements of official in-
22 vestigations. To cite only one example: statutes of limitations
23 would continue to run while possibly protracted litigation might
24 take place concerning the manner in which the officials were
25 attempting to conduct the investigation.

1 And, this general rule is also intended to protect
2 the courts against unnecessary impositions on their time by the
3 bringing of anticipatory and placemeal litigation by persons
4 who may never be harmed and who will have adequate opportuni-
5 ties to assert their claims if and when they are directly
6 affected. And, indeed, judicial economy is also a significant
7 consideration in the law of intervention itself.

8 For example: on pages 14 and 15 of our brief there
9 is a quotation from a recent thoughtful opinion of the Court of
10 Appeals here in the District of Columbia on the subject of
11 intervention, in Smuck against Hobson. And with the Court's
12 permission I would like to read the first sentence of that
13 quotation, which says: "

14 "The decision, whether intervention of right is
15 warranted thus involves an accommodation between two potentially
16 conflicting goals: to achieve judicial economies of scale by
17 resolving related issues in a single lawsuit, and to prevent
18 the single lawsuit from becoming fruitlessly complex or
19 unending."

20 But in the present case both of these considerations
21 are on the same side of the balance, the side opposing inter-
22 vention. Instead of seeking to consolidate lawsuits the
23 Petitioner here is attempting to proliferate them, not only by
24 inducing the presence of its enforcement proceeding, but also
25 as we show in our brief in footnote 8 on page 23, by inducing

1 similar proceedings in the District Courts in the Eastern
2 District of Louisiana and the Southern District of Illinois,
3 in which the same issues were raised in an attempt to intervene
4 against subpoenas of other witnesses who had records bearing on
5 Mr. Donaldson's tax liabilities.

6 If there are counterbalancing considerations favor-
7 ing intervention or favoring standing, may be a more accurate
8 way to put it, they must adhere and whatever interest of his
9 that the petitioner claims would be adversely affected by com-
10 pliance with the subpoenas.

11 And we believe, therefore, that the Court of Appeals
12 correctly analyzed this case as turning on the nature of the
13 interest the petitioner is asserting and how those interests
14 would be affected by compliance with the subpoenas. And we
15 contend that the Court correctly concluded that the interests
16 asserted are not sufficient to bring the petitioner within any
17 proper exception to the general rule against interference with
18 investigations of third persons.

19 Q This would be, according to the petitioners,
20 it wouldn't make any difference what they were investigating
21 for, except let's assume admittedly they were pursuing a
22 criminal investigation.

23 A Well, if that is improper and if the fruits of
24 it are sought to be used against him that's the time when he may be
25 permitted to raise that issue.

1 Q Well, would you suggest that --

2 A In fewer than half of these investigations.

3 Q Well, I know, but would you suggest that it
4 wouldbe improper?

5 A No, no; my suggestion is quite the contrary,
6 that it's an investigation into whether there has been fraudu-
7 lent understatement of taxes which involve both civil and
8 criminal implications.

9 Q Do you say it would be quite all right for
10 the Congress to arm the Internal Revenue Service with coercive
11 investigative powers in criminal tax cases that may not be
12 available in other kinds of criminal cases?

13 A Well, this is not in a criminal case. There
14 is no pending criminal case; it's just an investigation.

15 Q I know. Well, I mean, but --

16 A This is not unusual.

17 Q -- what they're investigating is whether or
18 not there is a criminal liability. Assume that that --

19 A As well as whether or not there is a civil
20 liability or possibly no liability at all. It's the same thing
21 that the Securities and Exchange Commission investigates with
22 their subpoenas. This is not unusual. It's -- the Federal
23 Trade Commission subpoenas -- this is the nature of investi-
24 gation to --

25 Q Your quite willing to take this position even

1 though you say, "Yes, we are investigating to see whether there
2 is criminal liability or not, although we also investigate
3 civil liability.

4 A Of course; that is the duty of the Internal
5 Revenue Agent, to conduct the investigation, see what the in-
6 vestigation discloses and whether he should recommend a
7 criminal prosecution or that a civil penalty be assessed or
8 that no action be taken, or possibly both the criminal
9 prosecution and the civil assessment and then his recommenda-
10 tions are reviewed and sometimes overruled.

11 Q But you would argue that if there was some
12 objection to these records at the trial that they should be
13 overruled if the only objection is that they were coercively
14 sought before any case was filed?

15 A I agree with that contention; it should be
16 overruled if that is the only basis for the objection, but I
17 also say that that is the kind of objection that only someone
18 with an interest in the records should have the standing to
19 make at that stage in the first place, at the investigative
20 stage in the first place.

21 Q When you say "an interest," you really mean a
22 proprietary interest; don't you?

23 A Privileged.

24 Q Privileged or proprietary?

25 A That is the kind of interest that was involved

1 in Reisman against Caplin.

2 Q He has a general interest, certainly, in this
3 information. In a broad sense he obviously has a general
4 interest in not letting the government see it, but what you
5 mean is to narrow down the proprietary or privileged interest.

6 A That is an interest in the records themselves;
7 yes, a proprietary or privileged interest in the records.

8 Q Can Section 7602 and this process be the means
9 by which the Internal Revenue Agents would go to a bank and find
10 out the total amount of deposits that a taxpayer made and how
11 much he paid in interest, for example, to see if he had a basis
12 for his deductions?

13 A That is very frequently the case. Infact,
14 very often the bank will supply such information upon a formal
15 request and if a summons is issued at all it is more or less
16 simultaneously issued to be put in the files against a possi-
17 bility of future complaint that the bank needlessly turned over
18 the records to a government investigator.

19 This is the method in which these investigations are
20 made, and it has been for a very long time. We have traced the
21 genesis of Section 7602 in our brief and it has always been used
22 in this manner and as Mr. Justice Blackmun suggested from the
23 bench, this use has never been questioned until very recently.
24 There were no cases under the 1939 Code. Then the provisions
25 explicitly said that these summonses could be used for fraud

1 investigations to show that this has been consolidated now into
2 one provision and it means the same thing but there were no
3 cases at all challenging this on the basis of the criminal
4 purpose argument.

5 The only issue that ever arose was the issue that
6 this Court settled in the Powell case, that there need not be
7 a showing of probable cause in order to obtain enforcement.
8 But, no one ever claimed that because of the possibility of
9 criminal liability this process couldn't be used at all.

10 Q -- your view of the rules is that the law of
11 intervention doesn't come into play at all?

12 A Well, it is a useful reference. I don't think
13 that the issue would be essentially different if we happened to
14 be in a case in which the witness himself had interposed an
15 objection and an enforcement proceeding had been brought and
16 then the Petitioner, without having induced that proceeding,
17 tried to intervene in that proceeding. It just seems to me that
18 the way this case arose highlights what's really involved here
19 and that the operative consideration is the stage of the pro-
20 ceedings at which he is trying to assert his interest and the
21 kind of interest he is trying to assert and that, it seems to
22 me, is why Rule 81 says that the rules are applicable in these
23 proceedings to enforce a subpoena only insofar as, in its dis-
24 cretion, the District Court thinks the rule is a proper guide-
25 line in the case.

1 We argue in terms of the rule, but the case is not
2 really a conventional intervention case and I don't think it's
3 a case about the law of intervention as such.

4 Q If I understand it, on his application, which
5 I just read, he seems to be asking for more than I understood
6 you to say. Didn't he ask to intervene in the administrative
7 proceeding where this witness was going to be examined?

8 A He --his application was to intervene in the
9 enforcement proceeding in the District Court. That's his
10 application. He wants to intervene in the enforcement proceed-
11 ing and ask the judge not to enforce the summons; not to let
12 there be a subpoena.

13 Q He asked the District Court to protect him
14 against the Government's action in that subpoena; did he not?

15 A He first got a temporary restraining order,
16 telling the witness that he couldn't comply with the subpoena
17 until ordered by a court to do so. And then the summons en-
18 forcement proceeding was brought and that's what he wanted to
19 intervene in to prevent the court from ordering the witness to
20 comply with the summons. His whole contention is to try to get
21 the witness not to comply with the summons, that there cannot
22 be any summons.

23 Q I thought his contention in his complaint was
24 that he wanted to intervene in this case.

25 A In the --

1 Q To protect his interests.

2 A No; that is not what he asserted, because just
3 before lunch he did not want to attend the administrative
4 hearing as such. He's never made that claim, Mr. Justice
5 Black. He's claimed only that it's improper to have a summons
6 in this kind of a witness at all.

7 Q Well, is it the Government's position that an
8 Internal Revenue collector has a right to summons somebody and
9 make out a case against the defendant and not let the person
10 who is the contemplated defendant get into the hearing?

11 A I think we've already answered that question,
12 Mr. Justice, because it's not an issue in this case, and I have
13 never had any occasion to look into it.

14 Q It rather looks to me like it is.

15 A Well, that's not the way we understand the
16 case. That isn't what he's asked to do.

17 Q Was he offered an opportunity --

18 A Well, no one is ever offered an opportunity,
19 no one is ever notified of a summons; it's only through sort of
20 a haphazard situation that someone other than the witness knows
21 that the summons has been issued. This is true also of ad-
22 ministrative procedure subpoenas in the agencies: the Security
23 and Exchange Commission, for example, issues a subpoena to a
24 bank and doesn't notify anyone else about it, and if the bank
25 produces the records that are asked for, that's that.

1 This is not a hearing. All this is is an investi-
2 gation.

3 Q I thought it was a hearing.

4 A Oh, no; the summons is nothing but an investi-
5 gation.

6 Q What?

7 A That's not a hearing.

8 Q And I don't know how you define a hearing, but
9 if you summon a witness to come up before a man who is not a
10 lawyer; he's not a judge; he's not a notary public ex officio
11 justice of the peace even, and you summon him in there to take
12 evidence pointed directly at some individual. Is it the Govern-
13 ment's position that he has no right to be there or know any-
14 thing about it?

15 A Well, as I say, that's not an issue in this
16 case; I don't know what our position is. I don't feel I should
17 take a position on the spur of the moment on that question. I
18 think it would be improper for me to do so.

19 Q Well, that's all right. At the present time
20 it looks to me like it is --

21 Q From your point of view, Mr. Wallace, is this
22 different in any way from a government agency, whether Treasury
23 or FBI or others, calling on a person, a third person, for
24 example, a gun shop and asks the gun shop to disclose its
25 records to see whether they have sold a .38 caliber Smith and

1 Wesson to a man who is under investigation. Is this fundamen-
2 tally any different than that? Or is it essentially the same?

3 A I think it's essentially the same, that this
4 is the kind of thing that a policeman does every day when he
5 questions people.

6 Q Where does the policeman have authority to
7 summon people into ---

8 A Well, not through a summons, but --

9 Q I understand here it was a summons.

10 A Yes, but it's very little different. All it
11 is is that he is going to ask these questions. As a matter of
12 fact, usually the summons operates, not by having a man come to
13 the Internal Revenue man at all, but the Internal Revenue man
14 goes to the office and says he'd like to see these records, and
15 the custodian of the records says, "All right; why don't you
16 look at the records, but please give me a summons to put in my
17 file."

18 Q That's different; isn't it than summoning a
19 person to come before a man who is not a judge, has no judicial
20 capacity, to give evidence which is to be used to convict a man
21 of a crime?

22 A This is an evidence that can be used in a
23 criminal case --

24 Q Maybe it can --

25 A The records;-- the records can be introduced

1 and he has a chance to object to the introduction of the
2 records at the time of the trial, but nobody --

3 Q I'm talking about the witness --

4 A Well, he has a right to confront a witness
5 before his testimony can be used against him. That's the same
6 as if the policeman asked somebody on the street something
7 about him and you have to bring him into court and make him say
8 it again and have him cross-examined.

9 Q I can't quite understand why you say it's the
10 same as simply meeting a man on the street and asking him a
11 question. You summon him up before a United States officer and
12 ask him questions. Is he put under oath?

13 A I don't have any answer to that. I assume he
14 is.

15 Q And somebody finds out that they are interested
16 in it to the extent that they want to be there to protect --

17 A No; he wants to stop it altogether; he doesn't
18 want to be there. He just wants to stop it. He says it can't
19 be done. That's what at issue here.

20 Q Well, that may be.

21 A That's the only claim he made, was that it
22 can't be done.

23 Q I hope you are going to get a chance to give
24 your views about the Reisman case.

25 A Well, the Reisman case -- yes -- however it's

1 pronounced -- I don't know how the gentleman pronounces his
2 name -- that involved an attempt to get from the accountant the
3 working papers of the taxpayer's attorney, and in that situa-
4 tion there was a proprietary interest being asserted by the
5 attorney and a claim of privilege that the taxpayer might want
6 to assert and in that situation the court said that the gen-
7 eral method that is used by the petitioner here is the appro-
8 priate way to assert those interests.

9 Now, he just used general language, but I don't
10 think that it forecloses the issue of whether, when there is no
11 comparable interest in the records being disclosed there
12 shouldn't be any kind of anticipatory way that a taxpayer can
13 prevent the investigation from going ahead or the records from
14 being turned over to be used by a third person who is willing
15 to produce them. I don't -- our view is that the case simply
16 did not address itself to that question and the Courts of
17 Appeals have differed as to the implications of the case, as to
18 that question.

19 Our position is that this kind of anticipatory cut-
20 off of the investigation can take place only at the behest of
21 someone with that kind of an interest.

22 Q What you're saying, I take it, is that the
23 broad language, and it is broad language in the Reisman, has to
24 be read in the context of what the particular issue was there?

25 A Well, I think so. I think that was the

1 taxpayer and that was the intervenor that the court was refer-
2 ring to. And the court did keep talking about "to assert
3 their interest," and that was the kind of interest involved.

4 Q Would you say that the material sought in the
5 Reisman case was nearer to being the kind in which the tax-
6 payer took a proprietary interest than in the present case?
7 Or less so?

8 A Oh, it was much nearer to it. I think the
9 taxpayer had a claim of privilege that may or may not have been
10 a valid claim, but what was involved there, according to the
11 complaint, was the working papers of the taxpayer's attorney,
12 which the attorney had turned over to the accountant and the
13 accountant was being asked to produce them in the investigation.
14 And the attorney wanted to enjoin that, claiming a proprietary
15 interest in those papers and the court said that the attorney
16 could intervene to assert that interest in a summons enforce-
17 ment proceeding and that the taxpayer could intervene to assert
18 his interest, which would have been a privilege interest, an
19 interest in what would be disclosed there, other than antici-
20 patory interest about possible future use that might be made of
21 it.

22 Q Mr. Wallace, is it your position that this
23 may actually accrue to the benefit of the taxpayer, to wit: if
24 your investigation turns up nothing, that then no criminal pro-
25 secution will ever be instituted?

1 A Well, that is true. I always hesitate to say
2 what may accrue to someone else's benefit when he is opposing
3 my position, but it certainly is true that in fewer than half of
4 the cases in which full-scale fraud investigations are made by
5 special agents, are criminal prosecutions ever brought and yet
6 in many more of the cases fraud penalties are collected.

7 Q Did I get your answer to Mr. Justice Black's
8 question as to whether the witness would be under oath, to be
9 that you didn't know?

10 A I believe he would be under oath, but I just
11 -- I, frankly, am not very knowledgeable about the proceedings
12 at the summons.

13 Q If so, that's something new in recent years,
14 because in former years they were not; they were merely
15 questioned.

16 A Well, then, perhaps that's what it is. I'm
17 sure there would be no oath taken in the business office when
18 the Internal Revenue Agent goes there and --

19 Q Would you mind giving us a memorandum on it?
20 I understood it the other way.

21 A Oh, I would be happy to furnish you a memoran-
22 dum. Certainly, Mr. Justice.

23 Q Well, on that particular point.

24 A Yes; on that point.

25 Q Because Mr. Justice Clark said in the Reisman

1 case that "however the Government concedes that a witness or
2 any interested party may attack the summons before the hearing
3 officer." Now, was the man to whom he was required to appear,
4 a hearing officer?

5 A No. I believe that reference in the Reisman
6 opinion is to the hearing before the judge or before a magis-
7 trate as to whether --that's right, as to whether the summons
8 would be enforced. I believe he's referring to the summons
9 enforcement proceeding.

10 Q Before the hearing officer; not before the
11 judge.

12 A Well, it can be brought before a magistrate,
13 this kind of enforcement proceeding, although it's usually
14 brought before the judge.

15 Q Well, I imagine he knew the difference between
16 the judge and the hearing officer. And he said "before a
17 hearing officer." They have them, don't they?

18 A Not in the Internal Revenue Service; no, sir.
19 No; there are no hearings in the Internal Revenue Service. It's
20 not an administrative agency; it's a part of the Executive.

21 Q Very well, Mr. Wallace.

22 You have about five minutes left, Counsel.

23 REBUTTAL ARGUMENT BY ROBERT E. MELDMAN, ESQ.

24 ON BEHALF OF THE PETITIONER

25 MR. MELDMAN: Thank you, Mr. Chief Justice.

1 If I may possibly I can clarify some of the questions
2 that were left open.

3 In response to your inquiry, Mr. Justice Black, as
4 to whether or not the individual was put under oath: there, as
5 a practical matter, are two procedures followed. When a
6 summons is served if it is served at the place of business an
7 individual is not formally sworn under oath and then asked to
8 give the records over. However, under the Internal Revenue
9 Code, any information given to an officer of the Internal
10 Revenue Service is considered to be the equivalent of being
11 given under oath, since it is subject to a perjury charge if it
12 is false, whether he be sworn actually or not sworn.

13 The section of the Internal Revenue Code provides
14 specifically for perjury cases.

15 The second type of practical application is where an
16 individual would be served with a summons and requested to
17 appear at the Internal Revenue office in an office there.

18 The reference to the hearing officer in the Reisman
19 case as is indicated further on in the case, is to the agent
20 that issued the summons. He, in essence, conducts a hearing.

21 I think as Mr. Justice Black pointed out, it's an
22 informal grand jury, if you would, with a one-man grand jury
23 sitting there. He proceeds to gather evidence and information.

24 I might point out to the Court that on page 9 of our
25 appendix in the brown cover, the summons is reproduced and the

1 beginning of the summons reads: "Greetings. You are hereby
2 summoned and required to appear before me, an officer of the
3 Internal Revenue Service." It goes on in the same style that
4 a subpoena would be given.

5 The summons on the bottom makes note of the fact
6 that failure to comply with this summons will render you liable
7 to proceedings in the District Court and on the back side of
8 the summons it proceeds to tell you you can be found in contempt
9 and fined up to \$1,000 and so on.

10 It's a very commanding thing given to an individual
11 on the outside.

12 Chief Justice Burger had asked whether the United
13 States, in essence, is really saying that had something else
14 been used the taxpayer would not have objected, if the same
15 information could have been gotten by a subpoena duces tecum.

16 Mr. Chief Justice, I think that this is the nub of
17 our case. We say that there are grand jury proceedings; we say
18 that there are search warrants; there are many remedies avail-
19 able to the Internal Revenue Service, but what we're objecting
20 to is the use of this administrative internal coercive summons:
21 take this taxpayer or take this third party and bring him in.

22 Q Well, are you conceding that a grand jury
23 could get this information without any difficulty?

24 A Yes, Mr. Chief Justice. We have never denied
25 that. We are strictly —

1 Q Well, are you suggesting, as part of your
2 total argument that Congress has no power to get it in this way,
3 that that leaves the enforcement aspect to calling people
4 before grand juries. That's where it would be; would it not?

5 A I don't believe so, Mr. Chief Justice, because
6 a search warrant is the other thing that can be used. And the
7 Internal Revenue Service is now beginning to use that. This is
8 what all the other law enforcement agencies use, is a search
9 warrant.

10 As to the question of whether this is criminal or --

11 Q May I ask you one question?

12 A Yes.

13 Q For whom did you ask to intervene and before
14 what agency?

15 A Mr. Justice Black, it is not in the record
16 that came up here. Originally a letter was sent to the agent
17 that issued this summons; the Internal Revenue agent. We had
18 objected to the issuance of the summons by the Revenue Agent
19 and asked to either confer or have a hearing with him. Because
20 of what had happened in the past, our letter read if we did
21 not receive a reply within 20 days we would assume that you
22 have rejected our request. This is what happened.

23 Q Well, do you concede that you were not seeking
24 some kind of an order to intervene before the hearing officer
25 here in order to present your views before him?

1 A Well, we were objecting to the summons and
2 be it before the hearing officer or otherwise. If the hearing
3 officer would sit in a position where he could make a deter-
4 mination whether or not that summons was valid, we would have
5 sought a full hearing there. We made a token attempt to make
6 an intervention there, if you would.

7 Q But your issue is that they aren't entitled to
8 get the records at all by this mode?

9 A By this mode; yes. This is correct.

10 Q And it wouldn't satisfy you if the ruling was
11 that yes, they can get them but you can be present after they
12 get them?

13 A I think this would be a great step forward,
14 Mr. Justice White.

15 Q But that isn't your argument here?

16 A No, it isn't. I may tell you that --

17 Q Well, in effect, is the result of your posi-
18 tion, if it is upheld, that 7602 is nullified for all practical
19 purposes?

20 A No, I don't believe so. 7602 is to be used in
21 investigating civil tax liability; in checking the man's income
22 tax return and it should be left and it should have this power
23 to verify deductions, to see if proper interest has been
24 reported and so on. We have no quarrel with that.

25 Q Sometimes we know as a practical matter that

1 if the agent went by this process under 7602 and found out that
2 the deductions the taxpayer had been claiming were interest for
3 a long period past, as a regular practice and there never had
4 been any tax paid. That civil inquiry would lead very likely
5 to a criminal prosecution; would it not?

6 A That's true, Mr. Chief Justice. However, we
7 had not even objected to the use of the summons in that case.
8 We only objected to the use of the summons by a special agent
9 after the referral to the Intelligence Division, when he is
10 making a full-scale criminal investigation. Our objection is
11 that virtually now the only use of this summons, and the
12 Government admits this at page 38 of their brief, is in criminal
13 cases and not for the statutory authority that they were
14 originally granted.

15 Q Well, if that is so, then your position
16 doesn't mean that 7602 is nullified?

17 A If they continue to only make this use of the
18 summons; yes, it would.

19 Q Well, the way to enforce your position, I
20 suppose, would be to say that whenever a 7602 summons is issued
21 and responded to the taxpayer then being investigated cannot be
22 criminally prosecuted. That would be the sanction to enforce
23 your position; wouldn't it?

24 A Yes, Your Honor, and there have been cases
25 cited in our brief. I believe Hinchcliff versus Clarke, which

1 did just that. The District Court enforced the summons with
2 the provision that they could not be used in criminal cases.

3 MR. CHIEF JUSTICE BURGER: Thank you.

4 MR. MELDMAN: Thank you.

5 MR. CHIEF JUSTICE BURGER: The case is submitted.

6 (Whereupon, at 1:45 o'clock p.m. the argument in the
7 above-entitled matter was concluded)