MORNING SESSION 10:02 am

MR. CHIEF JUSTICE BURGER: We'll resume arguments.

Mr. Smith, you may proceed whenever you are ready.

MR. SMITH: Mr. Chief Justice, and may it please the Court:

When the Court adjourned yesterday, I had set forth the facts of this case which are essentially that an Internal Revenue Service summons was served upon Respondent, an officer of the Bank, in order to determine the identity of the depositor or transferor of some 400 $100 bills that were in seriously deteriorated condition.

The summons was drawn in the matter of the tax liability of John Doe because the identity of the depositor was what the Internal Revenue Service wanted to ascertain.

Now, Respondent refused to comply and after a hearing held in the United States District Court, brought by the Government, the District Court narrowed the summons to require production of all cash deposit tickets equalling $20,000 during a one-month period, October 16th, 1970 to November 16th, 1970 since the Federal Reserve Bank in Cincinnati had received these -- this cash on November 6th, I think and ten or fifteen days later and also --

QUESTION: "Deposit tickets equalling $20,000," do you mean the deposit tickets in which the single amount

of $20,000 would have been indicated as having been deposited?

MR. SMITH: Yes, that was one part of the order.

The second part of the order involved production of deposit tickets of cash equal to or in excess of $5,000.

The District Court felt that in that way, by narrowing the summons in that regard, the identity of the depositor could be ascertained with a minimum of disruption to the Bank.

Now, the Respondent appealed to the Court of Appeals for the Sixth Circuit which reversed and it is the correctness of that statutory ruling which is involved in this case.

The Court of Appeals held that the Internal Revenue Service has no statutory authority to issue a summons before it has discovered the identity of the particular person it wishes to investigate.

I think before I discuss the statute in some detail, I think it important to state at the outset what this case does not involve.

This case does not involve any application of a constitutional protection to the production of records by the Bank. I think that the Court's decision last term in California Banker's Association has made clear that there is no claim of privilege against self-incrimination which would

be applicable by the Bank, its officers or on behalf of this unknown taxpayer or taxpayers who may be incriminated by the records sought by the summons.

These are third-party records which are not protective.

The case, therefore, presents a statutory question the narrow focus of which is upon two provisions of the Internal Revenue Code which are presently set forth at Section 7601 and 7602 of the Code.

They are set forth on pages 2 and 3 --

QUESTION: 7801?

MR. SMITH: 7601 of the Code. They are set forth on pages 2 and 3 of our brief under the caption, "Statutes involved."

Now, these statutes, we submit, are cast in the broadest possible terms. Section 7601 admonishes the Secretary or the Treasurer or his delegate, here the Commissioner of Internal Revenue, to proceed from time to time to each Internal Revenue District and inquire after and concerning all persons therein who may be liable to pay any Internal Revenue tax.

Section 7602, which affords the Service the summons power designed to implement this canvass power in Section 7601 also is cast in broad terms and it is these two statutes which the Court recognized in the Donaldson

case to be both closely related and rooted in statutes enacted more than a century ago which we believe provide the statutory power for the Internal Revenue Service to issue a summons like this involved in the case.

QUESTION: When you say that these are the two statutes involved, that is really an issue in this case, isn't it? Your brother says that 7601 is not involved in this case, that we look to 7602.

MR. SMITH: Yes, Mr. Justice, I am aware that there is dispute about 7601 but in our view the statute that- the power that the Internal Revenue Service which we believe that Congress has accorded -- it can be viewed by looking at these statutes in tandem.

QUESTION: And, indeed, the Court of Appeals limited its consideration to the language of 7602, did it not?

MR. SMITH: I believe so. I believe so.

If I may, I would like to consider in detail the terminology of these statutes which I think are critical to a resolution of this case.

As I said, Section 7601 talks about a canvass power of the Internal REvenue Service to proceed from time to time and it talks about"inquiring after and concerning all persons," in our view, a broad phrase.

Now, when you get down to Section 7602, the statute

talks about four purposes for which a summons like this can be issued.

It talks about the purpose of ascertaining the correctness of any return, for making a return where none has been made, of determining the liability of any person for any Internal Revenue tax or collecting any such liability and we think that the summons in this case plainly falls within the statutory purposes.

QUESTION: You may have answered Mr. Justice Stewart on this. If so, I missed it.

If you did not have 7601, would 7602 be enough to take care of your case?

MR. SMITH: We believe it would. We believe it would because we think that the summons that was issued in this case falls within the statutory purposes of Section 7602 alone.

When we are talking about the purpose of ascertaining the correctness of any return and making a return where none has been made, et cetera, et cetera, we think that the proper way to view this case is as the initiation of a process in which these statutory purposes are fully applicable.

In this particular case, the Internal Revenue Service does not know the identity of the depositor whose transactions are indeed suspicious. I think it is

undisputed that these transactions are suspicious and, presumably, once the identity is ascertained by the summons power, then the Internal Revenue Service will go on to ascertain the correctness of the depositor's returns, make the return if none has been made, determine his liability under the third purpose and so forth and so on.

In fact, the third purpose of the statute, determining the liability of any person for any Internal Revenue tax, we think is sufficiently broad enough to cover this case because what we are talking about here is -- the statute does not confine itself in the way that the Court of Appeals confined it to a determination of the tax liability of an identified person.

Rather, it talks about the liability of any person for any Internal Revenue tax and we think that what Congress has done here is to accord the Internal Revenue Service power to answer what we think is the basic, fundamental question in the enforcement of any law.

That is, who is responsible? Who has breached his responsibility under the law?

In the context of the Revenue statute, it is simply a question of who has not fulfilled his civil tax liability. That is what is involved here and we think the statute covers it.

Now, what the Court said -- that is, the Court of

Appeals, is that there is no particular taxpayer under investigation.

Now, in our view, that is not correct in any sense that is meaningful when one considers the Service's statutory responsibility to ascertain and to go through the Internal Revenue District and to determine the liability of any person.

It is only correct in the sense, which we think is a trivial sense, that the identity of the person has not been ascertained as yet. But there is no doubt in this case that there is a particularized person under investigation here.

QUESTION: There is doubt as to whether or not there is any tax liability. That is just a suspicion, isn't it?

MR. SMITH: Well, it is a suspicion, but --

QUESTION: Tax liability by anybody, any person or any other entity -- or any kind of tax.

MR. SMITH: Indeed. But we think that an event has occurred here which has properly raised the suspicion in the Internal Revenue Service that there is a tax liability involved here. Cash dealings of this magnitude are unusual and in this context --

QUESTION: But for all anybody knows, the cash -- well, cash dealings of this magnitude, they may be unusual.

I suppose they are. It doesn't mean that a person did not pay taxes.

MR. SMITH: Indeed, it doesn't. But our point simply is that Congress has given the Internal Revenue Service the power to ascertain the identity of such a person and then to determine whether he has, in fact -- it is quite possible --

QUESTION: Well, that means anybody, doesn't it?

MR. SMITH: It does. It indeed means anybody.

QUESTION: That means anybody on suspicion or even on --

MR. SMITH: I think that is right. I think that Mr. Justice Harlan, in setting forth the criteria in the Powell case under which an Internal Revenue Service summons could be issued said, "One of the purposes --" and there were four, "was that the investigation must be conducted pursuant to a legitimate purpose." And the second test that he used was whether the inquiry was relevant to that purpose.

I think under these circumstances, the Internal Revenue Service's desire to ascertain the identity of the depositor in this case under these circumstances is a legitimate inquiry and that is a legitimate investigation and that the inquiry as to ascertain his identity is relevant to that purpose.

QUESTION: And after you found his identity, then you might check his tax return and see whether he had been returning it?

MR. SMITH: Indeed, we would do so. And that, essentially, all of those acts would fall quite well within the statutory purposes here. I think that it would unduly cripple the Internal Revenue Service's power to ascertain the tax liability of any person if the rule in this case, promulgated by the Court of Appeals, that first the identity of the person has to be ascertained were the law here.

I think that the Internal Revenue Service has a broader power to -- under these statutes -- to ascertain the identity of the person under investigation.

Indeed, the depositor here is a particularized person or persons.

Now, what the Respondent has said here essentially is in support of the Court of Appeals test that no particular taxpayer is under investigation.

Now, in an Amicus brief filed by the American Banker's Association, they, in facing these broad statutory purposes of Section 7601 and 7602 say simply that with respect to the statutory phrase, "Determining the liability of any person for any Internal Revenue tax," they would impose loss on that person. They would say that the Internal REvenue Service either had to have the name of the

person or some evidence of liability.

Now, we say, with respect to the first -- their first test, we think that is answered by the fact that we have a particularized deposit in there.

With respect to whether the Internal Revenue Service has some evidence of liability, we would submit that that would resurrect the very probable cause requirement which the Court firmly rejected in Powell.

The Internal Revenue Service is not bound by any probable cause requirement in issuing a summons. All that it need have is an official suspicion and, indeed, under these circumstances, the suspicions are amply justified by the transactions that occurred in this case, not only the magnitude of the money involved, but the fact that money was found in a rather unusual condition which suggested a long period of storage.

People do not usually keep money in an airless place unless they are hiding it for some reason and we think under these circumstances the Internal Revenue Service had ample justification to seek the identity of the depositor here.

QUESTION: Is the Bank required to keep the numbers of bills over certain denominations when they are deposited, under any provision of the Code?

MR. SMITH: To keep the currency itself, or the --

QUESTION: The serial --

MR. SMITH: Oh, the serial numbers. No, I am not aware of any provision in the Code that requires that. But there are, of course, reporting requirements, Federal Reserve reporting requirements that were involved here, which is how the Internal Revenue Service picked this transaction up.

QUESTION: Does that include reporting the serial numbers?

MR. SMITH: I don't think so because, Mr. Chief Justice, if you look at page 16 of the record Appendix, you can see the copy of the report of the currency transaction that was filed by the Federal Reserve Bank in this case.

It simply talks about "amount of denominations of $100 or higher," and you can see in the third column of that in the middle of the page, here are these two instances within ten days of the deposit of $20,000 in hundreds and there is a notation, "Hundred's in deteriorated condition, apparently from long period of storage," and there is a bank and the name of the bank, the Federal Reserve Bank, is at the bottom and the name of the depositor bank is at the top.

Now, we think it is absolutely clear on the basis of Powell that there is no probable cause requirement that binds the service. Indeed, the court analogized the power of the Internal Revenue Service in this case, the power to

the inquisitorial power of a grand jury and, surely, the grand jury can sit in and investigate an entire industry for a particular period of time and look in and call people before it to offer testimony with respect to the subject matter of the investigation.

Now, we set forth in our brief what we think is rather strong legislative history in support of this statutory argument that the Internal REvenue Service has this power.

In 1954 at the time of the codification of the present tax law, the summons power and the canvass power represented an amalgamation of three different provisions which were in the 1939 Code and which, in turn, date back to statutes going back as far as 1864.

Now, the particular statute which we think is relevant to Section 3654-A of the 1939 which similarly talks about the Internal REvenue Service's power to look into and to ensure that the tax laws are being faithfully obeyed and that the collector had this power. And we think it is not without significance that in 1878 when Congress was debating the very -- sort of procedural question as to whether to transfer the or to accord the summons powers that were held by collectors to agents in the Internal Revenue Service, the debates made a reference to an incident where the Internal Revenue Service served a summons upon a railroad in order to

ascertain the identity of the shipper of liquor which was believed to have been shipped untaxed and the railroad complied with that provision, with that summons, and it offered up its books of account in connection with that inquiry.

Of course, there was no income tax in 1878, but there were excise taxes on liquor and we think that Congress was well-aware of the fact that it accorded this power to the Internal Revenue Service to ascertain the identities of persons.

Now, we think further that this legislative understanding which was almost 100 years ago -- occurred almost 100 years ago, is also reflected in the decisions of the lower court.

Indeed, apart from this case and the Humble Oil Case which is presently pending on the Government's petition for writ of certiorari and which I would imagine the Court is holding in connection with the disposition of this case, the circuits have pretty well uniformly given the Internal REvenue Service the power to ascertain the identities of unknown persons.

One of the prime examples of this power is in connection with tax return preparers. Four circuits have held that tax return preparers must, under compulsion of Internal Revenue summons, issue -- give over to the Internal

Revenue Service the names and social security numbers of their clients when the Internal Revenue Service has reason to believe that the preparer has filed returns which may not be completely accurate.

I think if the Court has no further questions, I would like to save the remaining time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Smith.

Mr. Watson.

ORAL ARGUMENT OF WILLIAM A. WATSON, ESQ.,

ON BEHALF OF RICHARD V. BISCEGLIA

MR. WATSON: Mr. Chief Justice and may it please the Court:

I would like to respond briefly to some of the remarks made by counsel.

He uses, repeatedly in his argument, the term "depositor" and "this depositor." He mentions the person who may be liable for unpaid taxes and there is nothing in this record that says in the first place that this money came to this bank from a depositor.

We don't know where it came from. I make such a distinction in my brief between customer who may bring in a cash exchange and a depositor.

QUESTION: You mean the bank does not know where the money came from?

MR. WATSON: Not to my knowledge but I am making a

distinction here as to the possibility that it came in off the street as a cash exchange, in which instance the record reflects that there is no way of identifying the source.

QUESTION: Well, Mr. Watson, looking at this page 16, the report to the Federal Reserve at the right, there seems to be a column where it is supposed to be indicated whether a deposit, withdrawal/exchange of currency, cashing or purchase of check -- is that right?

MR. WATSON: You are referring now to --

QUESTION: I am looking at page 16 in the report to the Federal Reserve.

MR. WATSON: TCR 1?

QUESTION: Yes.

QUESTION: That's right.

MR. WATSON: That form was not utilized in this instance, as the record shows. When this money went to the Federal Reserve in November --

QUESTION: This was not used? I thought Mr. Smith told us this was the report by which the Internal Revenue came upon this transaction.

MR. WATSON: No, the way the Internal Revenue Service came upon it was simply an employee in the Federal Reserve Bank in Cincinnati noticed the condition and, based upon an earlier experience where some old money had come through which they in some way had determined had been

buried in concrete, his suspicions were again aroused on this transaction and the IRS was verbally notified.

QUESTION: Was this ever used?

MR. WATSON: The TCR 1 was never filed by the bank concerning this transaction. That is, just the form.

QUESTION: Who wrote up the detail here showing November 6th, 1970, $54,600 -- $20,000 in $100 bills?

MR. WATSON: Well, now, that is the report compiled by the Federal Reserve people, I presume, your Honor, which describes the entire shipment if I am correct about that.

QUESTION: That is the report from the bank to the Federal Reserve and that doesn't indicate at all that it was a depositor of the bank. That is your point, isn't it?

MR. WATSON: Yes.

QUESTION: Mr. Watson, if you don't know where the money came from or anything, what are you worried about?

MR. WATSON: Well, sir, we have, of course, the basic question of whether the IRS can use a summons under these facts. Do they have this unlimited authority?

QUESTION: Well, how are you hurt by that?

MR. WATSON: Well, we, of course, are involved with confidential relationship of banks with its customers. That is the underlying concern of the facts.

QUESTION: Well, you said it might have come in off the street and somebody changed it, or something like

that.

MR. WATSON: Theoretically, yes, sir.

QUESTION: Well, if that had happened, how would the bank be responsible for anything there?

MR. WATSON: Well, it means that the bank can disclose all of these records, however many depositors' records may be involved.

QUESTION: Well, do you keep a record when you change money?

MR. WATSON: No, sir.

QUESTION: Well, so you would say this came in and changed money. We don't know who did it.

MR. WATSON: That is right.

QUESTION: And you have no problem at all.

MR. WATSON: But we don't want the IRS to rummage through records of people who are not involved.

QUESTION: You don't want them to ask any questions

MR. WATSON: Sir?

QUESTION: You don't want them to ask any questions.

MR. WATSON: Well, not so much asking questions of the bank, but of taking the records, let's say, of a half-a-dozen or a dozen or however many depositors we may fit in the category of the summons as narrowed by the court and subject innocent depositors to --

QUESTION: Invasion of privacy.

MR. WATSON: The invasion of their privacy.

QUESTION: Mr. Watson, does the record here show -- I don't recall -- how many customers did enter into this category you described --

MR. WATSON: No, sir.

QUESTION: -- in this one month.

MR. WATSON: No, sir.

QUESTION: It does not show that.

QUESTION: But may I get back to the statement in Petitioner's Trial Exhibit 1? I am confused about what this report is. Who prepared it, your client or the Federal Reserve Bank?

MR. WATSON: My understanding of that, sir, is that that is prepared by the bank, the Federal Reserve Bank. It just shows how much money came in in those two shipments.

QUESTION: Cash.

MR. WATSON: In cash. But actually --

QUESTION: Well, who is supposed to fill in, under "nature of transaction," whether it is a deposit, a withdrawal/exchange of currency, cashing or purchasing of check? Who is supposed to fill that in?

MR. WATSON: Well, the bank was, the Commercial Bank, the local bank, was supposed to provide that information. It was not done in this instance. I don't know

that the record reflects, but it is my understanding that it was routinely not done, in all transactions.

QUESTION: What is the purpose of having the form, then?

MR. WATSON: Well, the purpose was rather obvious, to comply with the existing regulation, which requires the reporting of these currency transactions.

QUESTION: Reporting by whom?

MR. WATSON: This was not enforced.

QUESTION: Reporting by your client?

MR. WATSON: Yes, sir.

QUESTION: Well, then, is this a report by your client? You have been telling us it was something prepared by the Federal Reserve.

MR. WATSON: It is the Petitioner's trial exhibit number 1 and, as I understand it, that was prepared by the Federal Reserve Bank in Cincinnati.

QUESTION: Well, what does your client prepare in the way of a report?

MR. WATSON: They have the TCR 1 form which was supposed to be prepared by them but which was not prepared by them.

QUESTION: Where is that? Is that form here?

MR. WATSON: I am sure it is set forth in the record somewhere, your Honor, but I could not put my finger

right on it.

QUESTION: Well, if they didn't prepare it, as they are required to prepare it, what explanation are you prepared to offer, or what hypothesis would you suggest?

MR. WATSON: Well, I could only say that it is my information that it was routinely not observed and the -- and likewise, by the Federal Reserve, they did not routinely require it to be observed.

QUESTION: And then the Internal Revenue comes in and indicates that they would like to have that requirement complied with.

MR. WATSON: Well --

QUESTION: That is your case.

MR. WATSON: Sir?

QUESTION: And that is your case.

MR. WATSON: I am not sure I understand in what context you have asked the question, Judge, when you say that is our case.

QUESTION: Well, you are not -- you don't want to supply it because of the reasons stated in your argument.

MR. WATSON: Yes, and presumably, that may be why the bank did not provide the information on the form. The record does not reflect precisely the reasons why it was not supplied in the first place. This apparently was not --

QUESTION: Well, is this form called for by some

statute or regulation of the Federal Reserve or --

MR. WATSON: There was a Treasury regulation in effect which is mentioned in the footnote in the Sixth Circuit's opinion.

QUESTION: It is 31 Code of Federal Government Regulations, 102.

MR. WATSON: That has been in effect, apparently, since around 1959, according to that footnote, but there were no sanctions involved, as I understand it. There are sanctions under the present domestic currency reporting requirements of the Bank Secrecy Act which this Court took up last time.

QUESTION: How large a bank is this? Do you know what its footings are?

MR. WATSON: In terms of total assets, around $18 million.

QUESTION: Seven tellers, I think the record tells us, something like this.

MR. WATSON: At the main branch, you have about three -- two at the other branch. I'd say six or seven would be correct, yes, sir.

QUESTION: Well, if these bills came in off the street, I take it the record indicates that it was a most unusual street day or period because this is the only time, apparently, they have had this kind of deposit.

MR. WATSON: Yes.

QUESTION: It surely would not be unusual for somebody to bring in $40,000 in hundreds within a two-week period and want to change, would it?

MR. WATSON: Presuming that a single individual brought it in in a single amount, yes, I think your Honor would be correct and I think the record shows that perhaps Mr. Bisceglia answered that affirmatively.

QUESTION: Well, I suppose you don't have to make that presumption, at any time --

MR. WATSON: I don't know of any presumption along those lines, sir, and, in fact, I don't know of any presumption that old money is tainted money.

This is the basis of the Government's suspicion, but people do keep money. They keep it long times in odd places. It doesn't mean that when they finally bring it in that it necessarily represents a fraud on the IRS or any other type of crime.

QUESTION: Does the Government have to meet a burden of showing that it is tainted in order to make an inquiry under 7602?

MR. WATSON: I would think that they must have some strong reason for indulging the authority and I think that they must act within the authority of the statute.

They say that this is enough to justify their

actions here.

QUESTION: Well, aren't there a lot of IRS activities that are practiced and sustained which don't involve any taint? That is, let me give an illustration. A taxpayer was consistently reporting, taking deductions for $40,000 of interest payments out each year on an income of $50,000.

MR. WATSON: Yes.

QUESTION: Wouldn't you think that would reasonably allow some inquiry?

MR. WATSON: That would warrant inquiry, I would think so, yes, sir.

QUESTION: There doesn't have to be any taint, does there?

MR. WATSON: True.

QUESTION: He might be just overloaded with debts.

MR. WATSON: There are some like that. But, again, in that instance, you have the taxpayer. You know that there is a taxpayer. You are not asking someone -- well, perhaps we could use the example of a man who sells new automobiles. He sells Cadillac cars.

Can an IRS agent walk into his office and say, "You must sell to a lot of people with a lot of money. I want to see all your records. I'm not investigating

anybody, I am just curious."

Now, what is the limit on official curiosity?

QUESTION: Mr. Watson, does the record show whether these were the old-fashioned big bills or not?

MR. WATSON: It does not, to my knowledge, sir, just that they were old, deteriorated $100 bills.

QUESTION: It must have been hard for the tellers to count if it was hard for the Federal Reserve people to count.

MR. WATSON: Presumably so.

Of course, the district judge, as you know from the record, suggested that the agent was making a mountain out of a molehill here, that there was an easier way, procedurally, anyway, to get to this and that was to summons the head teller, who is Mrs. Dorothy Sufferidge and, in fact, the record shows that Agent Brutscher talked to her and she could not recollect at the time and suggested perhaps the records perhaps might refresh her recollection.

She was never summonsed, either by summons or by supoenae. Of course, we get into another can of worms if she had been and what might have happened then, but it was the district court's thinking that in any bank he had ever been in, the teller would remember without the necessity of invading all these records.

QUESTION: May I ask, Mr. Watson, I am looking at

Judge McCree's opinion, footnote 1 at page 9-a of the Government's petition in which this sentence appears.

"It does appear, however, that this regulation --" that is, Regulation 102, "required the Commercial Bank in this case to file a form TCR-1 in which, of course, the information sought by the IRS in this proceeding would have been disclosed."

Does that mean that had Commercial complied with the regulation, the name of the depositor would have appeared in the TCR-1?

MR. WATSON: I think so, if it was a deposit and they had furnished that information, it would have been there.

QUESTION: And I gather that what you are telling us is that the Commercial Bank did not comply with the regulation.

MR. WATSON: That is correct.

QUESTION: Because there was no compulsion upon them to comply?

MR. WATSON: Now, that is as I understand it. Now, again, that is not precisely stated in the record, but that is the information that I have.

QUESTION: May that have been changed by the Currency Act of 1970?

MR. WATSON: Oh, I think so because under the

Currency Act, you not only have the requirement of reporting domestic transactions of $10,000, but you also have some actions whereby the Secretary-Treasurer does not report it.

QUESTION: So if this case would arise after the 1970 law, we would not be here with it? You would have reported it.

MR. WATSON: I would think so, yes.

QUESTION: Unless you said the regulation was invalid on the same basis you say the subpoena is.

MR. WATSON: Yes, unless it were challenged on some appropriate ground.

Of course, the Currency Reporting Act talks in terms of $10,000 currency transactions. Again, we don't know in what --

QUESTION: Incidentally, I've had answered the question I first put to you, who prepared the Petitioner's trial exhibit 1. According to Judge McCree, it was, as you suggested, prepared by the Cincinnati Branch of the Federal Reserve.

MR. WATSON: Yes, sir.

Of course, the Sixth Circuit decided this case, as you know, simply on the basis that those four requirements set forth in 7602 did not apply here. They did not reach the constitutional or the philosophical issue, if you will.

They simply said that you had to have the taxpayer at least identifiable, if not by name as an existing taxpayer or, in the case of the tax preparer cases upon which the United States relies, there was known to be taxpayers whose returns had been prepared by those people and the Government wanted to check them.

Now, every circuit court and district court which has talked about Bisceglia since its rendition has distinguished Bisceglia on the facts from all of these other cases. I don't know of a single authority for the Government's position here on these facts.

QUESTION: Does the second phrase of 7602 have a rather broad sweep"for the purpose of making a return where none has been made?"

Now, doesn't that suggest that it is a rather wide-ranging authority in the IRS?

MR. WATSON: I don't give it that broad an interpretation, Mr. Chief Justice. I think it is implicit in that phrase as in the others that you know a taxpayer exists. You know or have reason to believe he has not made a return and you are going to make one for him which, of course, the IRS has the authority to do.

QUESTION: Well, aren't there some reasonable presumptions that should be indulged in that people making deposits of this amount might conceivably have some tax

liabilities?

MR. WATSON: I don't think so. I really don't think so. Even if it is old money, I don't think that presumption arises.

QUESTION: Your position is, as I understand it, that the Internal Revenue Service under the statute in the regulation had no authority whatsoever to ask the bank anything unless it knows the name of the taxpayer and the breadth of the subpoena has nothing to do with it.

MR. WATSON: Not unless it knows the name of the taxpayer.

QUESTION: That is what I mean.

MR. WATSON: But, certainly, they must know that there is a taxpayer. I don't think the IRS has the authority just to browse.

QUESTION: Well, there is no browsing here if -- let's assume that within that subpoena there could only be one person.

MR. WATSON: We can't assume that, your Honor.

QUESTION: Let's just assume it for the moment.

MR. WATSON: All right.

QUESTION: Wouldn't you still be taking the same position?

MR. WATSON: I would be, yes.

QUESTION: Yes. So it isn't a browsing problem

at all. It is just your assertion that -- that unless the Internal Revenue Service either knows the name of the taxpayer or knows a tax is owing, it hasn't any business issuing subpoenas.

MR. WATSON: It has no business in the records.

QUESTION: Supposing the IRS asks the question of the bank, we'd like the name and address of the man who deposited $102,000 in your bank at 3:30 yesterday afternoon? Would you --

MR. WATSON: I don't think that is any of their business.

QUESTION: You don't?

MR. WATSON: No, sir.

QUESTION: Why not.

MR. WATSON: That is invading a private transaction for no lawful purpose, absent --

QUESTION: Well, isn't auditing of income tax return invading the privacy?

MR. WATSON: Not under the statutes, I don't believe, sir.

QUESTION: Well, they do it every day.

MR. WATSON: They do it every day and they would certainly do it to every customer this bank has that fits in this category if they were disclosed.

QUESTION: Well, if they came to you and said, we

are investigating the tax returns of Joe Bloke and we'd like to see the returns, would you give them to him?

MR. WATSON: If I am the preparer of his returns?

QUESTION: No, sir. You are the bank. Now, "We are investigating Joe Bloke and we want his bank statement."

MR. WATSON: Oh, I think they are entitled to have it. They --

QUESTION: Is that an invasion of privacy?

MR. WATSON: Well, sir, it may go farther than I would go if I wrote the statute, but they have the statutory authority and I think that this Court has held in Donaldson and some other cases that they can seize the records of third parties and that there is no abuse under the self-incrimination or unreasonable search and seizure per se on that basis.

QUESTION: Right.

QUESTION: Mr. Watson, if we disagree with the Court of Appeals on the interpretation of these statutes, what do we do about the constitutional question that you raised and that the Sixth Circuit didn't reach? As I understand it, the only question you raised was the Fourth Amendment prohibition, wasn't it?

MR. WATSON: Yes. Then that question must be faced, if this Court feels that --

QUESTION: You don't think we have already

decided that in some of these other cases?

MR. WATSON: Not on these facts.

QUESTION: So what would you have us do, decide the Fourth Amendment question here or send it back to the Sixth Circuit to decide it first?

MR. WATSON: I would be just as happy that the Court affirm the Sixth Circuit on the basis --

QUESTION: I know, but supposing we don't. Suppose we disagree with the Sixth Circuit on the interpretation of these statutes?

MR. WATSON: Well, the Court could, of course, remand for that purpose, but -- and I think that would be just as satisfactory with me but I believe our ground is solid on that issue. I think that this does --

QUESTION: I know you do.

MR. WATSON: This does go far, far beyond any reasonable seeking of corporate records and, of course, this Court suggested in the California Bankers case, a corporate entity does not have an absolute right, an unqualified right to conduct its affairs in secrecy or privacy but that it does have some privileges in that regard and perhaps if the Court gets into the constitutional question, it will have to decide what those limits are.

QUESTION: Your client has no stake here except

an obligation you feel to protect the privacy of your own customer's transaction?

MR. WATSON: Yes, sir, the confidentiality of the records.

QUESTION: Was the decision below pre or post this Court's bank cases last term?

MR. WATSON: It was before, I believe.

QUESTION: It was before. And was there a petition for rehearing that came after or not?

MR. WATSON: Yes, the petition for rehearing I think came also before the California Banker's case.

QUESTION: Before. And it was disposed of before.

MR. WATSON: I believe I am correct on that. I may be -- this Sixth Circuit decision was decided October 18, 1973.

QUESTION: Mr. Watson, the record indicates the petition for rehearing was denied November 16, '73.

MR. WATSON: Yes, sir, I think that is correct.

QUESTION: So that would be before the Bank cases, too.

MR. WATSON: Yes, sir.

QUESTION: So there was no further petition for rehearing.

MR. WATSON: If this Court has no further questions I'll close.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Watson.

Mr. Smith.

REBUTTAL ARGUMENT OF STUART A. SMITH, ESQ.

MR. SMITH: I just want to -- I think the Court is clear on this point and that is this form TCR-1. I just want to clarify it.

QUESTION: Oh, I misunderstood you. I thought --

MR. SMITH: This was -- in other words, the Commercial Bank of Middlesboro did not comply with the requirement of the then-existing provisions of the Code of Federal Regulations so that when the moldy money hit the Federal Reserve Bank, the Federal Reserve Bank, in effect, filled out the form that the bank should have to comply.

QUESTION: And, I gather, sent it to IRS, didn't it?

MR. SMITH: Exactly.

QUESTION: Sent a copy of it.

MR. SMITH: Exactly. Now, of course, under the Bank Secrecy Act there are criminal sanctions for failure to report, presumably.

QUESTION: What do you think if we disagree with the Sixth Circuit on the statutory construction. What should we do about the Constitution?

MR. SMITH: Well, we have made reference to the fact that we think the Fourth Amendment claim is

insubstantial here because of the District Court's narrowing of the summons which we think removes any claim that we think it is unreasonable or overbroad. Of course --

QUESTION: That was never decided by the Sixth Circuit, was it?

MR. SMITH: Right, it was never decided. Of course, the Court has discretion to consider it as an alternative basis to affirm, but we think that if the Court does consider it, that there is no basis for it, but discretion --

QUESTION: But what about --

MR. SMITH: -- in handling it. We think that would be a perfectly reasonable disposition of the case since it is a factual matter and, while the District Court considered the facts of the case, the Court of Appeals did not have an opportunity to face the issue in the way it disposed of the case.

QUESTION: You began to say something about sanctions on the bank for not filing this form.

MR. SMITH: I think that under the Bank Secrecy Act there are criminal fines.

QUESTION: That is under the new act.

MR. SMITH: Under the new act.

QUESTION: But at the time --

MR. SMITH: At the time, there were no sanctions

whatsoever. It was a voluntary -- you know, it was an alleged -- you know, theoretically a voluntary thing but the Federal Reserve Bank expected member banks and banks that used the Federal Reserve facilities to make these submissions.

Indeed, it is because of the kind of failure in this case that Congress finally addressed the problem and put some teeth in the law with respect to the reporting requirements.

I have no further --

MR. CHIEF JUSTICE BURGER: Very well, thank you, gentlemen, the case is submitted.

[Whereupon, at 10:44 o'clock a.m., the case was submitted.]