ORIGINAL

In the

# Supreme Court of the United States

UNITED STATES, et al.,

Petitioner,

--vs--

HARVEY F. EUGE,

Respondent.

Number: 78-1453



Washington, D. C.
November 26, 1979

Pages 1 thru 36

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IN THE SUPREME COURT OF THE UNITED STATES

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| UNITED STATES ET AL., Petitioners, | |
| v. | No. 78-1453 |
| HARVEY F. EUGE, Respondent. | |

Washington, D. C.,

Monday, November 26, 1979

The above-entitled matter came on for oral argument at 2:04 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

STUART A. SMITH, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Petitioners

JAMES W. ERWIN, ESQ., Thompson & Mitchell, One Mercantile Center, St. Louis, Missouri 63101; on behalf of the Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in United States v. Euge.

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

ORAL ARGUMENT OF STUART A. SMITH, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case comes here on a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. The question presented involves the enforceability of an Internal Revenue Service summons. The question before the Court is whether the Internal Revenue Service has the statutory authority to issue a summons requiring a person to appear and execute handwriting exemplars in aid of an administrative investigation to determine his correct tax liability.

The facts are relatively simple and undisputed and I can summarize them quickly, as follows: In October 1977, Special Agent Patrick Finnessey was assigned to investigate respondent Euge's tax liability for the period 1973 through 1976. This period came to the attention of the Internal Revenue Service because the respondent had filed no tax returns for any of these years and he had sought no extensions for the filing of these returns.

The case had been referred to the Intelligence Division

by the Audit and Collection Division after it had been determined that no tax returns were filed. The special agent determined to compute the respondent's tax liability by means of the bank deposits method. So the scrutiny focused on respondent's bank accounts.

Now, respondent had two bank accounts in his own name but the investigation revealed that there were 20 other bank accounts, the bank statements of which were sent to post office boxes in respondent's names. These bank accounts were in other names and there were signature cards on file with these 20 different bank accounts that bore addresses of properties owned by the respondent. Moreover, there were frequent transfers between these bank accounts. These facts suggested to the agent that respondent was maintaining bank accounts under aliases to conceal taxable income.

The amounts were substantial. For 1975, these 20 different bank accounts had an aggregate balance of approximately $50,000 and for '76, it was something like $30,000. Special agent served a summons on respondent requiring him to appear and execute handwriting exemplars of the various signatures on these bank accounts, so that he could take these handwriting exemplars and submit them for handwriting analysis by an Internal Revenue Service handwriting laboratory.

Respondent stated --

QUESTION: Mr. Smith, Mr. Euge is here on an informa

pomptoris basis, isn't he?

MR. SMITH: That seems to be correct, yes, because the briefs, I think, were printed at the expense of the Court.

After respondent told the agent at the time that he wouldn't comply with the summons, so the United States and the special agent commenced this summons enforcement proceeding in the District Court. The District Court held a hearing, the transcript of which is set forth in the appendix, and briefly, the special agent testified as to the nature of the investigation, the purpose of the investigation, the necessity, the relevancy and the necessity for the handwriting exemplars, and he also testified that he had made no recommendation with respect to any criminal prosecution of respondent.

There is no question in this case that the handwriting exemplars are relevant and necessary to completion of the Service's investigation. The District Court then ordered the summons enforced and ordered respondent to provide exemplars of eight different signatures, eight different signatures written out ten times each. In fact, there's a particular form that the Service has for this purpose.

On appeal, the Court of Appeals heard the case en bloc and reconsidered and thereafter overruled its prior decision in United States v. Campbell, that was a two to one panel decision which it upheld the Service's statutory right to, statutory authority to require the execution of these

handwriting exemplars.

The opinions below are brief because the majority simply said, "We overrule Campbell and adopt the dissenting opinion in Campbell," and the dissent simply says I would follow Campbell. The dissenting opinion of Campbell, in Campbell, is itself brief. Briefly, what it says is that it views the handwriting, process of requiring a handwriting exemplar as a search and seizure within the meaning of the Fourth Amendment and the dissenting judge went on in that case to say that those charged with investigation and prosecutorial duties should not be the sole judges of when to utilize what he called constitutionally sensitive means in pursuing their tasks.

There are two statutes involved in this case. We submit that the Court of Appeals erred in that there is statutory authority to require the execution of this handwriting exemplar. The statutes are set forth in our appendix to our brief at page 1A and 2A, in the back of our brief. Section 7601 is the so-called canvass power of the Internal Revenue Service which the Court has explored in many, many different decisions, most recently in the LaSalle National Bank and also in the Joe Doe summons case of several terms ago, United States v. Bisceglia. And this sort of charges the Secretary of the Treasury and his delegate, the Commissioner, to cause officers to proceed throughout each district and inquire after and concerning all persons therein who may be liable to pay

any internal revenues tax.

Section 7602, the immediately succeeding section, is the summons authority. I would direct the Court's attention to Subparagraph 2 of that, which gives the Secretary or his delegate the authority to summon the person liable for a tax, and if I can just move over to page 2A, to appear before the Secretary or his delegate at a time and place named in the summons and to product such books, papers, records and other data, and to give such testimony under oath as may be relevant or material to such inquiry. And the third subparagraph empowers the officer of the Internal Revenue Service to take such testimony of the person concerned.

We believe that the compulsory process authority set forth in the statute to require a person to appear and to give such testimony as may be relevant reasonably carries with it the statutory authority to compel a witness to exhibit certain specific physical characteristics, such as handwriting or voice exemplars. This proposition we think has been well established, not only by decisions of this Court but by the pertinent authorities.

QUESTION: Well, what you're arguing is basically a statutory question, isn't it?

MR. SMITH: Yes.

QUESTION: Certainly Mara and Dionisio establish that if Congress says so, there is no constitutional objection.

MR. SMITH: Exactly. And I think that Mara and Dionisio to the extent are relevant here, really refute the dissenting judge in Campbell's view that there was some kind of constitutionally sensitive thing, either from the Fifth Amendment point of view or the Fourth Amendment point of view. I mean, I think it's established that this is not testimonial compulsion, and that it's also established that exhibiting, you know, that requiring someone to give a voice exemplar, show his face, give fingerprints or whatever, is not a search and seizure within the meaning of the Fourth Amendment. So I don't think there's any really constitutional question.

QUESTION: Mr. Smith, is your argument then, you are not arguing that the handwriting exemplar is testimony. In fact, I guess it's not testimony under this --

MR. SMITH: No, well, we're arguing --

QUESTION: -- given the power to take testimony --

MR. SMITH: Testimony; right, exactly. Given the statutory power to take testimony of a non-privileged nature, since these non-testimonial acts are non-privileged as established by decisions of this Court, that that statutory authority is reasonably inherent in the authority to compel somebody to appear. Because if you -- in other words, if you can compel somebody to appear before a revenue agent and let's say the Revenue agent, let's say in this particular case -- or take the case of Bisceglia, where somebody had made a large deposit to

to a bank, the Service had a teller who thought he could identify the person, and there was a suspicion that it was the person under investigation, if he were brought in, quote, "to appear," the Revenue agent could say to the teller, "Is this the fellow who deposited the 400 one hundred dollar bills," or whatever. It's that, exhibition of his face, which is inherent in the statutory authority to compel somebody to appear.

QUESTION: You don't really claim, then, that the literal wording of the statute covers this case?

MR. SMITH: No. I don't think there's any question that the literal wording doesn't cover this case, but we think that given the recent decision of law construing the statutory authority in a broad way to enhance the Service's power to find out information and to discharge its canvass duty, to go around and to find out who owes tax, that this is a reasonable construction of the statute, and it doesn't offend any constitutional concerns, and there really is no policy reason to construe the statute in any other way.

For example, I think one of the things that I think is germane is, the Court observed in Bisceglia that had the taxpayer or the bank official in that case been called before a grand jury, there wouldn't be any question that the grand jury could compel the bank official to answer questions. And the court analogized the Service summons authority to the grand jury authority to seek information.

We don't think that there really is -- we think that analogy coupled with the statutory language which we think is hospitable to our construction more or less carries the day and demonstrates the error of the court below. Because here again, had the respondent been called before a grand jury, there's no question that he would have to make these handwriting exemplars, and the protections, one of the arguments that is made is well, you know, he doesn't have any protections in this case. Somehow there is a -- this is being decided by an Internal Revenue officer that he has to do this, and that he doesn't have any protections of the neutral officer. But I think it's well established that the whole summons enforcement mechanism is replete with protections, not only of a statutory nature, but the protections established by the decisions of this Court, decisions like Donaldson and Powell, which more or less indicate that, you know, that more or less say, without any question, that a summons from the Internal Revenue Service is not self-executing, that person can object to its enforcement, as indeed respondent did in this case, and that you have the interposition of the Federal judiciary to determine whether the summons is over-broad and a variety of questions which courts determine every day. In fact, you have the full adversary proceeding which enables a person to object to particular questions. In fact, you have the right to appear with counsel when you go to comply with the summons, which you don't have

in the grand jury.

I think, you know, it more or less demonstrates to us the truth of the court's observation in Bisceglia that Congress has provided protection from arbitrary or capricious action by placing the federal courts between the government and the person summoned. So that the analogy between the Internal Revenue Service summons and the grand jury subpoena we think is sound and provides all the necessary, and the decisions of this court provide all the necessary protections in this case.

We don't see really that there's any real problem either from a constitutional or a statutory nature with construing the statute in a way to provide giving these handwriting exemplars.

I simply say, and I simply address another point of objection which we think is really without force, is the fact that the court below felt somehow that the Service has no authority to force somebody to create things; in other words, that somehow you can get a piece of paper or, you know, books and records, but you can't say to somebody. "Okay, come in and create something for us." But, I mean, it seems to us there are really two answers to that. You are not really asking anybody to create something when you ask them to provide handwriting exemplars. All you're really doing is asking them to display a physical characteristic, much the same way that when you take someone's photograph, you're not creating their face,

or if you record their fingerprints, you're not creating their fingerprints. All you're doing is recording a physical characteristic.

QUESTION: Mr. Smith, does this statute authorize taking fingerprints?

MR. SMITH: I would think it would, Mr. Justice Stevens.

QUESTION: Blood samples?

MR. SMITH: What?

QUESTION: What about blood samples, voice exemplars?

MR. SMITH: I would think it would, also.

QUESTION: All of those things.

MR. SMITH: I would think it would -- you know, the whole gamut of non-testimonial disclosures, like asking somebody to put on a hat, or you know, these things are normally not done in tax investigation.

QUESTION: Is this power used in connection with preparation of criminal cases or just civil cases?

MR. SMITH: The summons authority power?

QUESTION: Yes.

MR. SMITH: Well, I think that, you know, at this stage, I think the decisions of this Court indicate that the civil and criminal aspects of the case are intertwined. So I mean, I don't think that I can answer that question and say that a criminal case is being prepared here. I think that what -- in effect it may be nothing.

In other words, just like the 400 $100 bills in Bisceglia might have turned out to be an innocent thing, and in fact, to go --

QUESTION: If these exemplars showed that it was the same person who signed his name on all these accounts, it would be pretty clear criminal liability, wouldn't there?

MR. SMITH: Assuming that the balances that went into the accounts were, represented unreported taxable income. They all could have been inheritances from his grandmother. Again, this is really an attempt to ferret out information in order to determine what the scope of the liability is here.

QUESTION: And if that was his signature, the only thing left for him to do was plead guilty.

MR. SMITH: Well, that would --

QUESTION: It would be a real waste of time to try him, wouldn't it?

MR. SMITH: Well, it's possible that he could then say that an elderly aunt left him all of this money. I think the question would be fairly put, you know, as to where this money came from. But the point is again, you're right, Mr. Justice Marshall, that if there were demonstrated to be his signatures, I think that he would have an obligation to explain why he felt the need to maintain 20 different bank accounts with false names. That's not the normal kind of thing that people do.

QUESTION: Is there any federal statute or -- well,

we'll start with federal. Is there any federal statute that prevents you or me or anyone from having 10 bank accounts in 10 different names, trade names --

MR. SMITH: Oh, I don't think there's any federal prohibition, but I suspect that he probably ran the gamut here and used false social security numbers, and you know, I suspect at that point, there probably -- because you do have an obligation, I think, to give your bank an appropriate, you know, the correct social security number so they could report --

QUESTION: Is that by federal statute?

QUESTION: Well, most people only have one social security number.

MR. SMITH: Right, that's right. Exactly. And in fact, if I may just pursue this for a moment, that really goes to one of the things that we mentioned in our brief, as one of the really prime necessities for this kind of summons.

Apparently it's become quite common for people to file multiple tax returns asking for refunds, and there is now a program in the Service called the questionable return program which is designed to determine who these people are. Apparently as of 1976, the Service has determined that some 8,900 returns were questionable returns and sought refunds in the aggregate of $12.3 million.

And then of course there's a whole host of -- I mean, the imagination, it's only limited by one's imagination to think of the number of instances in which document authentication

is an important part of an Internal Revenue Service inquiry.

QUESTION: Your answer --

QUESTION: The Service has a real problem --

QUESTION: Go ahead.

QUESTION: The Service has a real problem, doesn't it, in the case of kids going to college and working for the summer whose wages are withheld during the time they work, but they don't work a long enough period to be required to pay any tax, and so they're just literally thousands of legitimate --

MR. SMITH: Yes, but Mr. Justice Rehnquist, my recollection is that several years ago, it certainly came long after I worked for the summer that you could file a particular form and absolve yourself of withholding, if you could demonstrate, on the assertion, on the assurance that you were not going to have taxable income in excess of a certain amount so that you wouldn't have this over-withholding.

QUESTION: My kids have been -- you do an awful lot of paper work --

QUESTION: But it is, I take it from your response to my earlier question that there is no statute which forbids any person from having ten different bank accounts in ten different names?

MR. SMITH: I am not aware of any statutory prohibition, but of course there is a statutory provision against concealing taxable income and not reporting it.

QUESTION: That's not my question. My question is, prompted by Mr. Justice Marshall's point that revealing that you had ten different bank accounts under ten different names is not automatically an admission of any guilt of any crime?

MR. SMITH: Absolutely not; absolutely not. But --

QUESTION: You might do that so that your children --

MR. SMITH: Well, no, no. Well, all it does in this case is to -- I think that all I am saying in this case is that these facts reasonably suggested to the Internal Revenue Service that there might be a problem here with this respondent. All that goes to is the legitimacy of this investigation. This is not, this wasn't a research project, but --

QUESTION: -- wasn't a plea of guilty, but at least was a prima facie net worth case, wasn't it?

MR. SMITH: It certainly would enhance, it would bring the Service, Mr. Justice Blackmun, sir, to first base.

QUESTION: Let's settle with "enhance." Let's settle with that.

MR. SMITH: Okay.

QUESTION: Perhaps he might come in and explain that he just didn't want his wife and his children to know how much money he had in the bank.

MR. SMITH: Yes, indeed, but of course he hadn't filed any tax returns at all, so it's possible he didn't want the Internal Revenue Service to know how much money he had

earned. He was a tax return preparer, so --

(Laughter.)

MR. SMITH: -- he's not the kind of person who is innocent of learning in these matters.

QUESTION: And he's here IFP?

MR. SMITH: He's here IFP. I cannot explain that.

But getting back to this business about creating the materials, even apart from the question, I don't think that, you know, displaying a physical characteristic is a creation of any evidence but rather recordation of something that really exists.

There also is settled authority that Section 7602, the summons enforcement authority, includes the right to have the Service summon client lists of tax return preparers. Without regard to whether they were in existence or not, those cases are firmly established in the circuits, and in fact, were cited with approval by this Court in Bisceglia at page 148 of the opinion.

So here, I think that the concerns of the court, the constitutional concerns are groundless and the statutory concerns, I think from a matter of sort of textural analysis of the statute as well as policy concerns are groundless. The respondent here has sufficient protections to be able to narrow the scope of the summons or a respondent as --

QUESTION: Mr. Smith, I know you discuss in your

brief but I just don't remember, how old is this problem? How long has this problem been a matter of debate between --

MR. SMITH: Well, the problem in the litigation, apparently, just began to surface about four or five years ago when people began to object. There has been some voluntary compliance. And I asked the Internal Revenue Service how long they had been getting handwriting exemplars and they have a standard form, and I was told that the Treasury Department had been requiring this information as early as 1921. From 1921 until 1973, the handwriting analysis was done by the Alcohol, Tobacco, and Tax Branch of the IRS which I think now has been moved to the Justice Department. But the service --

QUESTION: Practiced since 1921, suddenly they're requiring or just requesting, do you know?

MR. SMITH: No, they've been requesting where cases make it appropriate to request.

QUESTION: Have there been enforcement proceedings, do you know?

MR. SMITH: I'm not aware of any litigation or enforcement proceedings until the mid-1970's when this started to become a problem. In fact, the only cases of appellate rank are Campbell, this case, Rosinsky, and I think there's one other Fourth Circuit case that sort of created the conflict. But we don't really, we think that the decisions of this Court lend support to our submission that the statute embraces these

non-testimonial disclosures since there's no constitutional or policy reason to read the statute in a way which is inhospitable with this, with these purposes. We submit that the judgment of the Court of Appeals is wrong and should be reversed.

If there are no further questions --

QUESTION: I have a question, Mr. Smith. I take it from your argument that you are making neither pro nor con out of the change in the one word, "data," to the one word, "memorandum," or vice versa in the 39 to the present code?

MR. SMITH: We think that the words "other data" further support our submission that the statute covers these kinds of exemplars. But I think that the stronger argument is that --

QUESTION: Is the one you make.

MR. SMITH: The Service has the authority to make someone come and appear. I think that the 6th Circuit in Brown misread the legislative history in two different ways, which we discuss in our brief. They, it misread it by suggesting that the word "other data" was added to a transferee liability provision and in fact it was not, and then it also we think narrowly focused on simply one of the three legs of the antecedents of Section 7602 and made something about the fact that, you know, "memoranda" became "other data," so that "other data" must necessarily mean "memoranda." But it seems

to us that the words books, papers, et cetera, more or less would cover memoranda and that other data is a word of general import that would cover information of any kind.

QUESTION: It would be harder to say that exemplars are memoranda than it is to say that they are data?

MR. SMITH: Exactly. Exactly. I think that's right. We set it forth in our brief, it's detailed information of any kind or material for an investigation. Certainly I think it would fit any kind of constitutionally admissible, permissible evidence, like handwriting exemplars or voice, and so forth.

May I simply say one thing in pursuing your -- may I make a correction in our brief which I have just discovered this morning, that footnote on page 36, Footnote 7, which cites a Senate report, in the second paragraph, Senate Report No. 558, 73rd Congress, 2nd Sess., it says 623 and that should be 48-49.

QUESTION: That isn't much of a mistake, is it?

QUESTION: No.

QUESTION: Fairly minor.

MR. SMITH: But it would be hard to find.

I have nothing further to add, if there are no questions. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Erwin.

ORAL ARGUMENT BY JAMES W. ERWIN, ESQ.,

ON BEHALF OF RESPONDENT

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

My name is James Erwin, counsel for the respondent Harvey F. Euge.

The issue in this case is whether the Congress has authorized the use of an administrative summons to compel the creation of physical or real evidence, in this particular case handwriting exemplars, in the administrative investigation of tax liability.

We submit that there is nothing in the text of the statute, in its legislative history or in the antecedents of the statute to which the legislative history makes reference which supports that view.

The government relies upon two words or phrases that appear in the statute, the first of which is "appear." The power to compel a person to appear and give testimony, or compel a person to appear and produce books, papers, records, and other data. We believe that the word "appear" merely has reference to compelling a person to respond to the summons. This is in accord with the purpose of the statute. The agent who issues a summons is conducting a tax investigation. Therefore there is no such thing as a default in the ordinary case of where monetary or equitable relief, he needs to have a response. A person must either comply with the summons or he must appear and make whatever good faith defense he may have

to it.

The statutory structure is likewise set up in this way. Section 7604(b), to which this Court had reference in the Kaplan case in 1964, noted that it was only for the use of a person wholly defaulted or contumaciously refused to comply with the summons. In fact, this was a procedure that was followed in this case in the District Court. Mr. Euge initially failed to appear before the revenue agent in response to the summons and he initially failed to appear before the District Court in response to an order to show cause, and an attachment for his arrest was issued under section 7604(b) and he was brought before the court and the case eventually proceeded to a hearing.

Incidentally, at the time that he was brought before the court, there was a hearing held on his financial ability to retain counsel.

QUESTION: You say there was a hearing?

MR. ERWIN: Yes, there was. It is not included in the appendix, but there is a transcript of it that was included in the record in the Court of Appeals.

QUESTION: How much was involved in these side accounts?

MR. ERWIN: Pardon me?

QUESTION: How much money is in the side accounts?

MR. ERWIN: The agent testified at the hearing that

he had determined that in the year 1975 $30,000 had passed through the account, and in 1976 $50,000.

QUESTION: And he couldn't afford counsel?

MR. ERWIN: Well, Your Honor, this was at a time two years, about two years before the time of the hearing on his financial condition.

QUESTION: Well, maybe there is $60,000 in there now.

MR. ERWIN: I don't know.

QUESTION: That is just as inferable as there is nothing in there at this point.

QUESTION: What was his testimony as to his net worth at the time?

MR. ERWIN: He did not testify.

QUESTION: And the court nonetheless allowed him to proceed IFP?

MR. ERWIN: Well, he testified that his assets were tied up in real estate which were subject to foreclosure in proceedings by the redevelopment authority in St. Louis for failure to pay city taxes.

QUESTION: Are you as a member of the bar satisfied that he fulfills the IFP standard?

MR. ERWIN: Yes, I am, sir.

I think it is further significant that the statute does not use the broadest possible language that it could in

setting forth the scope of the summons. For example, it does not say that a person could be compelled to appear and give evidence of any kind. Evidence, of course, includes not only testimony and oral statements under oath but the production of documentary evidence, books, papers, and records, but also real and physical evidence, handwriting exemplars, fingerprints, summaries, charts, many things that can be used as evidence in a trial.

QUESTION: Would you agree, as suggested by your brother, that he could be summoned to appear for the purpose of having his picture taken?

MR. ERWIN: No, Your Honor.

QUESTION: You don't?

MR. ERWIN: I do not agree.

QUESTION: He could be summoned to appear and bring with him an existing picture, couldn't he?

MR. ERWIN: Yes.

QUESTION: You do concede that?

MR. ERWIN: I believe that the point on which the statute addresses itself, he could be compelled to produce documents or evidence of a documentary nature that does exist. A picture would be an example of that.

QUESTION: Your response to that is in the framework of the Tax Code, I take it?

MR. ERWIN: Yes.

QUESTION: Not generally.

MR. ERWIN: No, not generally. I think that a grand jury or a court has inherent power to compel production of evidence which the Internal Revenue Service does not have. The Internal Revenue Service power is statutory and it has only that power which --

QUESTION: If he is ordered to produce an exemplar in the proceeding by the District Court, where does the compulsion originate? Is not the court acting?

MR. ERWIN: Yes, the court is acting but it is acting pursuant to the statute. There is a jurisdictional statute that is worded in the same words as the scope of the summons power, section 7402(b) and also section 7604(a), conferred jurisdiction upon the District Court to enforce a summons for the production of books, papers, records, and other data.

QUESTION: But the District Court would have no more power to enforce the summons than the service had to issue the summons.

MR. ERWIN: That's correct.

QUESTION: Then why do you say that the District Court could do something that the service could not do?

MR. ERWIN: The District Court in a pending criminal case pursuant to a motion of the government could order the execution of the handwriting exemplar or it could order the enforcement of a grand jury subpoena for handwriting exemplar.

QUESTION: But that doesn't depend on the Internal Revenue Code.

MR. ERWIN: No, it does not, but its power in this particular type of case does depend upon the Internal Revenue Code.

QUESTION: And we are dealing here specifically with the provisions of 7602, are we not?

MR. ERWIN: Yes, sir.

QUESTION: Do I understand that you that if Congress had provided in that section that the Internal Revenue Service could require the production of handwriting exemplars, you would not be here?

MR. ERWIN: That's correct.

QUESTION: Mr. Erwin, I know the government doesn't argue this, but have you considered whether the analogy of the New York Telephone case, whether the all writs act would give the court the power to aid the jurisdiction to order production of this kind of material?

MR. ERWIN: No, sir, I have not considered that. The other portion of the statute which the government makes reference to in their brief is that part which states that the Internal Revenue Service has the power to summon books, papers, records and other data. The legislative history of the statute is very simple. It is just one sentence, and it states that the section was not intended -- it was intended to enact no

material change from existing law. Existing law in 1964, of course, was the 1939 Internal Revenue Code which was itself a codification of previous internal revenue acts.

The three statutes which set forth the scope of the summons in the 1939 code are section 3614, section 3615 and section 3654. Section 3614(a) refers to the examination of books, papers, records, or memorandum; section 3615(a) refers to summons for production of books; and section 3654(a) refers to examination of books, papers, accounts and premises in the summoning of books and papers.

QUESTION: Mr. Erwin, supposing that under section 7602 the last sentence of it, and to give such testimony under oath before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records or other data and to give such testimony under oath as may be relevant or material to such inquiry. And the Secretary's delegate decides it would be very helpful to us and material and relevant for us to have a statement from you of your net worth on January 1st and your net worth on December 31st, and the man responds "I don't have any such thing in existence." Do you think the Secretary could say, well, give us your best estimate?

MR. ERWIN: I believe in that situation the person would have the Fifth Amendment privilege to refuse to respond.

QUESTION: I don't doubt it for a minute if he

came within the Fifth Amendment. But do you think it is not authorized by statute?

MR. ERWIN: Well, the taking of testimony from the taxpayer is authorized by statute.

QUESTION: So you would say --

MR. ERWIN: The taking of oral statements under oath, the statute specifically authorizes that in subsection 3.

QUESTION: Well, what they are asking for here is to write it out.

MR. ERWIN: I don't believe the statute authorizes them to compel the creation of a document.

QUESTION: You say that he could be asked what his net worth was on January 1st and on December 31st, but he could not be asked to write out what his net worth was on January 1st and December 31st?

MR. ERWIN: That is our position. Howver, they could summon documents which would reflect that.

QUESTION: Let's make it even more simple. Let's forget about net worth. Suppose he came in and put him under oath and asked his name and he said, whatever it is, Euge, and he said let's have you write it out. Would that be proper on the part of the Service?

MR. ERWIN: I think not, Your Honor, if it is for the purpose of a handwriting exemplar. I might point out that in this particular case --

QUESTION: It doesn't speak of oral testimony.

MR. ERWIN: Well, testimony under oath I think refers to oral testimony.

QUESTION: It does?

MR. ERWIN: In the production of evidence, production of documentary type evidence, books, papers and records.

QUESTION: On the same line, supposing they asked him for a list of his receipts by month for the past twelve months and a list of expenditures and a profit and loss statement and a balance sheet, none of which he had prepared. Could they do you think say, well, you could tell us all of this orally but we would like you to prepare it in writing so it is much more manageable for us?

MR. ERWIN: I think not, Your Honor. I think he could not be compelled to produce or create those documents affirmatively by the service. And at least until the mid-1970's I believe the service itself recognized that. We cite it in our briefs and administrative regulations, where they stated that the person was not to be required to produce summaries or lists, that that was a job for the agent based upon the testimony that he may have taken or the documents that have been produced at the hearing.

QUESTION: What if he said in response to the same question that we have been talking about, it is all on a data processing system in my office and I just don't have any

recollection of it, and the people in the service say, well, we have no way of getting into your data processing machine, would you just wrote out the summary of the net worth or name or whatever it is as of January 1st and as of January 31st?

MR. ERWIN: Well, again I do not think they could be compelled to create that document. Now, if it exists on computer tape, the Second Circuit in United States v. Davey has said that a computer tape which contains those types of records is other data under the statute.

QUESTION: So that --

MR. ERWIN: If that is in existence.

QUESTION: He could compel the retrieval of raw data in the computer?

MR. ERWIN: Well, the data case involved the production of the actual tape itself rather than the retrieval of the data. I think most persons would rather retrieve the data voluntarily than turn over the tape if that is the only record they have.

QUESTION: That wasn't my question. I am asking whether he could be compelled to produce the -- or retrieve the raw data.

MR. ERWIN: I think this is a transformation of existing information that is capable, that does exist, is in existing records and cannot be read by human beings, of course, and must be transformed into a printout in order to be

read by persons.

Getting back to the 1939 code, I think it is also significant that the provision in the code relating to the jurisdiction of the District Court to enforce a summons states that the District Court has the power to enforce a summons to produce books, papers or other data. This is the very phrase that occurs in section 7602. This phrase was inserted in the code in the jurisdictional portion of the Tax Code in 1919, the Internal Revenue Act that was enacted then. It was subsequently reenacted several times through 1939, it appears in section 3633(a) of the 1939 code and is presently section 7402(b) of the 1954 code.

I think it is clear from a comparison of the jurisdictional statute with those statutes which set forth the scope of the summons under the 1939 code and prior internal revenue laws that other data is a catch-all term that refers to items of like kind and nature as set forth. It does not specify records or memoranda or accounts which are set forth in the scope of the summons power.

QUESTION: Mr. Erwin, I wanted to ask you about the Bisceglia case. Do you feel there are no implications in that decision that are adverse to your position here? You cite it only twice, once to the dissenting opinion and once to the ensuing curative legislation.

MR. ERWIN: Yes. Well, there is a suggestion that

the grand jury analogy, which Mr. Smith has made reference to, is complete in this type of case, that the Congress intended to give to the internal revenue agent the same power that the grand jury has. I believe that that is not correct, that the grand jury and the internal revenue agent stand on different footing, and while the analogy does have force in certain situations, it does not have force in this particular situation.

First of all, a grand jury, as was pointed out in the dissenting opinion in that case, is a creature of the Constitution. The Internal Revenue Service is a statutory body. It does not have inherent power as a grand jury does to compel the production of all types of evidence.

QUESTION: Do you think that if Congress abolished grand juries, that law would be unconstitutional?

MR. ERWIN: Yes, I think it would.

QUESTION: The Constitution assures every defendant in a federal criminal case that he can't be tried unless he is indicted by a grand jury.

MR. ERWIN: I believe it does in practically those very words, Your Honor, and I believe that therefore it could not be abolished. There may be restrictions placed upon it, but it could not be abolished.

QUESTION: So maybe it wouldn't be constitutional, but nobody could be tried in a federal criminal court.

MR. ERWIN: Right.

The functions of the grand jury are not the same as the special agent's function, as the agent of the Internal Revenue Service. There is a similarity and both of them --

QUESTION: You are saying that somehow the guarantee that Justice Stewart has commented upon, upon the right of every person to be indicted by a grand jury constitutionalizes the right of the grand jury in a way that favors the government over an act of Congress which authorizes the service to do something. Is that what you mean?

MR. ERWIN: Well, what I am saying is that the grand jury has inherent power such as the court does in a pending criminal case to order the production of this type of evidence. As contrasted to the power of the Internal Revenue Service, which is statutory, and if the statute does not provide for that power, no matter how much they would like to have it or might need it, they do not have it, and that is the point I am trying to make.

I would further point out that the grand jury has two functions historically. One is the investigative function which the agent of the Internal Revenue Service also has. The other is to function as a protection of citizens of the prosecutorial arm of the government. This is not something that is shared by the agent of the Internal Revenue Service. True, the Internal Revenue Service does not actually prosecute

the case if it comes to trial, but certainly they are aligned with the prosecution and they investigate, prepare the case and make recommendations. Frequently agents or other employees of the Internal Revenue Service participate in grand jury proceedings for technical assistance and they frequently provide expert witnesses at a criminal trial.

Finally, there is no neutral supervision of the issuance of a summons prior to its issuance except in very limited cases as set forth in section 7609. There is supervision if the taxpayer objects, in which case it goes to the District Court and the matter is reviewed. It appears that this does not occur very often. Taking the government's statistics from their briefs, in an 18-month period ending in December '78, it said that handwriting exemplars were used in 320 cases. Our research has turned up only about 10 cases reported and unreported in which the use of a summons was reviewed. So it is less than five percent of the cases have reviewed the use of summons for handwriting exemplars, and this is in a situation where there is neough doubt about whether the Internal Revenue Service even has the power that is required for resolution by this Court.

It may be that the experience of the Internal Revenue Service is such that it has revealed the need to be able to use administrative summons to obtain hadnwriting exemplars or voice exemplars or perhaps in exceptional cases

fingerprints, I believe even blood samples were mentioned. But it is our position that the present statute does not authorize that. It is an old statute that goes back many years. There was an existing practice at the time that the present statute was enacted, a practice that had been in existence since the 19th Century for the production of documentary evidence, which is the usual type of evidence used in a tax case, whether civil or criminal. It may be that the statute to that extent was obsolete and it needs changing.

QUESTION: But the Second Circuit held that it applied to computer tapes.

MR. ERWIN: Yes, and because they were presently in existence and they made reference to the Brown case and said that it only applied to documents which were presently in existence and agreed with that position of the Brown case which relied primarily on canons of statutory construction which is essentially what we have been arguing in this case. But it did not say that they had the power to compel the production of documents or lists or summaries which did not exist at the time the summons was issued. Indeed, I think this case made that limitation for third party summons which uses the same language as section 7602 when directed towards a third party record-keeper to require them not to just turn over what records they may have to the Internal Revenue Service, but to prepare lists or summaries of analyses and so forth presently

not having to do.

If the service needs the power to compel the execution of handwriting exemplars or to comple the production of other real or physical evidence, we believe that the appropriate forum for addressing that is Congress which, after all, is the body which has enacted the statute and given them power to issue the summons in the first place. It is our position that the summons power should not be enlarged by this Court under the guise of statutory construction to include within its scope that which Congress has excluded, and the judgment of the Court of Appeals should be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Smith, do you have anything further?

MR. SMITH: I have nothing further, if the Court has no questions.

MR. CHIEF JUSTICE BURGER: I think not. Thank you, gentlemen, the case is submitted.

(Whereupon, at 2:55 o'clock p.m., the case in the above-entitled matter was submitted.)

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