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PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

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WASHINGTON, D.C. 20543

**CAPTION:** JAMES M. WHITE, ETC., Petitioner V. UNITED STATES, ET AL.

**CASE NO:** 88-928

**PLACE:** WASHINGTON, D.C.

**DATE:** October 3, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES M. WHITE, ETC., :  
Petitioner :  
v. : No. 88-928  
UNITED STATES, ET AL. :

-----x  
Washington, D.C.  
Tuesday, October 3, 1989

The above-entitled matter came on for oral argument  
before the Supreme Court of the United States at 10:57 a.m.

APPEARANCES:

KENNETH A. PAYMENT, ESQ., Rochester, New York; on behalf of  
the Petitioner.  
ALAN I. HOROWITZ, ESQ., Assistant to the Solicitor General,  
Department of Justice, Washington, D.C.; on behalf of the  
Respondent.

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1 PROCEEDINGS

2 (10:57 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument next  
4 in No. 88-928, James M. White versus the United States.

5 We'll wait, just a minute, Mr. Payment, until the  
6 Court clears.

7 Very well, Mr. Payment, you may proceed.

8 ORAL ARGUMENT OF KENNETH A. PAYMENT

9 ON BEHALF OF THE PETITIONER

10 MR. PAYMENT: Thank you, Mr. Chief Justice, and may  
11 it please the Court:

12 This is a case about federalism and the right of the  
13 Internal Revenue Service to second-guess the determination of  
14 state trial courts, as has been held by the court below, the  
15 Second Circuit.

16 The case grew out of a recent campaign by the  
17 Internal Revenue Service of disallowing the estate tax  
18 deductions for attorney's fees on estate tax returns. This  
19 campaign, over the recent years, has consisted of collateral  
20 attacks as to state probate decrees.

21 QUESTION: Mr. Payment, has this so-called attack  
22 occurred only in one area of the country, or is this a  
23 nationwide effort?

24 MR. PAYMENT: It started in the western district of  
25 New York; it has spread to other parts of New York and

1       apparently could be expected to spread nationwide, depending  
2       on the --

3               QUESTION: But, thus far, just in New York?

4               MR. PAYMENT: That -- that is true.

5               QUESTION: What is there, an -- an ambitious revenue  
6       agent up there, who wants to make a quota or something?

7               MR. PAYMENT: So it would seem, Your Honor.

8               QUESTION: In competition with the income tax  
9       people, who would pick it up on the other side of the coin?

10              MR. PAYMENT: I -- that is our position, indeed,  
11       that as the Second Circuit mentioned, one would well wonder  
12       why the Internal Revenue Service would deploy its forces in  
13       this manner.

14              But, in any event, these attacks have persisted, and  
15       they have been made notwithstanding that orders of -- of the  
16       probate courts have become final and binding on the estate,  
17       notwithstanding --

18              QUESTION: Not only allowable, but allowed?

19              MR. PAYMENT: That's correct. Notwithstanding --

20              QUESTION: I will say, in my day, when I practiced a  
21       little tax law, this thing was just completely unheard of.

22              MR. PAYMENT: It was unheard of until three or four  
23       years ago, Your Honor.

24              Justice Blackmun, I don't think, other than a few  
25       isolated cases you would find under 2053, in different areas,

1 not attorney's fee issues, that you would see a lot of cases,  
2 even after the Bosch case.

3 These attacks are made notwithstanding --

4 QUESTION: Mr. Payment, when you -- you use the term  
5 "collateral attack," that isn't strictly correct, is it?  
6 Because the government wasn't a party to the case in which the  
7 attorney's fees were -- were -- were allowed.

8 MR. PAYMENT: As a matter of fact, the government  
9 does not have to appear in such cases, and, as a matter of  
10 policy, never does appear. But it could have chosen to appear  
11 in the state court proceeding --

12 QUESTION: Well, I think of a collateral attack as  
13 being a challenge to a final judgment by someone who -- who is  
14 bound by the judgment, by someone who is a party to it.

15 MR. PAYMENT: I understand there is a difference,  
16 Your Honor, but -- and -- and of course, we do not assert res  
17 judicata principles apply here.

18 But what's happening is that the dispute is moving  
19 out of the state court into the federal courts. When you have  
20 a determination that is binding on all the parties to the  
21 estate, who, in most cases, have already consented to the  
22 result, the surrogate court or the probate court has made an  
23 order, it's final, the amount that has been assessed is --  
24 routine and the fact is that the amount has been paid, and the  
25 beneficiaries of the estate are stuck with the result.

1                   They have no way --

2                   QUESTION: Well, I guess this comes up in the  
3 context of a summons enforcement proceeding, right?

4                   MR. PAYMENT: That's correct, it does come up in  
5 that context.

6                   QUESTION: Which complicates it somewhat, because  
7 the Court has been careful not to trench upon the summons  
8 enforcement power of the IRS.

9                   MR. PAYMENT: That is very true. You had two cases  
10 in the last year.

11                  QUESTION: That's right.

12                  MR. PAYMENT: And there -- have had many in the last  
13 24 or 5 years since the Powell case, and the government almost  
14 always wins, and the policy comes --

15                  QUESTION: Right.

16                  MR. PAYMENT: -- out the same way every time. The  
17 literal policy is in favor of enforcement. But I think you  
18 have --

19                  QUESTION: So, presumably, the IRS could  
20 legitimately seek information by -- by way of the summons  
21 enforcement technique?

22                  MR. PAYMENT: Well, that depends on whether our  
23 position is correct or not on Bosch and on 2053. If we're  
24 right --

25                  QUESTION: So, for you to win, you have to persuade

1 us that Bosch was perhaps -- went too far, or we need to cut  
2 back on it or something?

3 MR. PAYMENT: Well --

4 QUESTION: For you to win?

5 MR. PAYMENT: First of all, we're dealing with a  
6 different statute than was involved in the Bosch case. So  
7 we're not seeking to overrule or really touch upon Bosch. But  
8 we have commented and alerted the court to the fact, at least  
9 through one law review article that summarizes this very well,  
10 that the decisions since Bosch have been all over the lot;  
11 that the federal courts have had a very difficult time in  
12 dealing with a proper purpose test, and simply haven't been  
13 able to consistently apply it.

14 You have cases in which proper purpose is read to  
15 mean -- or rather, excuse me -- the concept of proper regard  
16 is read to mean no regard. You have cases in which -- that go  
17 180 degrees the other way and give preclusive effect to the  
18 determination of the state court.

19 QUESTION: You don't rely on any argument that the  
20 IRS has acted in bad faith, I gather?

21 MR. PAYMENT: In -- in the sense that if you do not  
22 have a proper purpose for a summons enforcement proceeding,  
23 that is bad faith. That is the antithesis of good faith.  
24 Because, if we are right about our construction of 2053 and of  
25 the Bosch case, that means that the state court's



1 determination is preclusive. It should end the inquiry. And  
2 if it ends the inquiry, then you can't have a proper purpose.

3 And if they come into court --

4 QUESTION: What if there were fraud or the state  
5 court had applied state law erroneously in allowing the fee?

6 MR. PAYMENT: Well, to treat those subjects one at a  
7 time. The government has made much of the district court's  
8 imposing of prima facie tests, a prima facie showing of fraud  
9 test. The district court in this case didn't have to go that  
10 far. It didn't really have a case in which the Internal  
11 Revenue Service asserted that there was fraud involved.

12 You will recall that in the Powell case, there were  
13 explicit allegations to the effect that the revenue agent  
14 expected -- or suspected fraud. But this case came in on a  
15 record where the Internal Revenue Service simply said, in  
16 effect, reiterated the statutory rubric, said that we're  
17 interested in making a correct determination of the tax  
18 liability, and to determine the estate's liability for tax,  
19 and didn't explicitly state that they were suspecting fraud.

20 And, indeed, in the lower court, the transcript of  
21 the hearing can be read from end to end and you will not find  
22 a claim by the Internal Revenue Service that there might be  
23 fraud involved. In fact, they specifically disclaimed that  
24 notion in their --

25 QUESTION: Mr. Payment, may I interrupt? Because I

1 -- I have some trouble with this argument, because in lots of  
2 tax enforcement, the Internal Revenue doesn't have any  
3 suspicion of fraud, but they'll just make random -- take one  
4 out of every 100 returns and -- and investigate them very  
5 thoroughly, and sometimes they'll stumble on fraud.

6 MR. PAYMENT: I understand.

7 QUESTION: Could they do this in the attorney fee  
8 area -- just not necessarily have to allege fraud, but just  
9 say as our routine enforcement, we check up on every 15th fee  
10 -- fee award?

11 MR. PAYMENT: Let's say that were the case, not --  
12 not what is actually happening, but that -- hypothetical were  
13 the case. The fact of the matter is that if, as a first  
14 instance, the decree is binding, you can see that there ought  
15 to be something more in this kind of a case, because it's so  
16 different.

17 In the Powell setting and almost every other setting  
18 that this Court has ever dealt with, you have an individual  
19 tax payer who has an ability to hide the records, who has an  
20 -- has a -- a purpose in hiding the records.

21 QUESTION: Well, but the other side of the coin here  
22 is it's -- it's not all that burdensome to turn over your time  
23 sheets, either.

24 MR. PAYMENT: That's true, unless you don't have to  
25 do it. And the fact of the matter is, it was Mr. White's

1 position that he didn't have to do it.

2 QUESTION: Well, he has to do --

3 MR. PAYMENT: That the state court decree should  
4 have been given --

5 QUESTION: But whatever records are -- are  
6 sufficient to justify the fee for the probate court, or  
7 whatever you call the judge, you used to have to turn over  
8 those same records to the -- to the IRS.

9 MR. PAYMENT: They weren't satisfied with those  
10 records. They could see those records. They went to the  
11 surrogates court and they could see what the surrogate had  
12 looked at. They --

13 QUESTION: Were the time sheets in the records?

14 QUESTION: But if the surrogate had --

15 MR. PAYMENT: The time sheets were not in the  
16 records.

17 QUESTION: But, if the surrogate had -- if the  
18 surrogate had said to you, I'd like to take a look at your  
19 time sheets, you wouldn't have any doubt that you'd have to  
20 turn them over to him, would you?

21 MR. PAYMENT: That's correct, Your Honor. If -- if  
22 he was focusing on that --

23 QUESTION: And he wouldn't have to say, I suspect  
24 you of fraud, I just think, every now and then, I ought to --  
25 ought to find out just how much time goes into these for --

1 for general information.

2 MR. PAYMENT: That would be -- that -- if we were in  
3 surrogates court and that inquiry was made of Mr. White, I am  
4 sure he would have turned them over. He would have had no  
5 choice, because the court had an obligation to the  
6 beneficiaries of the estate and -- and to cover its own  
7 obligations, as a court, to look into such matters, if it felt  
8 they were important.

9 But the New York Court of Appeals, as we have made  
10 very clear, has listed nine factors that the courts look to.  
11 And those nine factors are largely subjective. Other than  
12 time required for the project, they are very subjective  
13 factors, and local custom, local practice is an appropriate  
14 consideration under the Freeman case, and so the Freeman case  
15 held.

16 And the Freeman case, in fact, involved, in effect,  
17 a minimum bar fee schedule sometime before the Goldfarb case  
18 was in this Court. And the court held that, so long as the  
19 surrogate made -- this is in Freeman -- so long as the  
20 surrogate made an independent judgment, it could use those bar  
21 schedules, and they, in effect, provided for a percentage.

22 QUESTION: But, really, what you're saying is that  
23 if you turn over the records and the IRS challenged them, that  
24 a fee is not being a -- allowable as a matter of New York law,  
25 you would win? That's really what you're saying, I think, in

1 final analysis?

2 MR. PAYMENT: I'm -- I'm saying that the Internal  
3 Revenue Service can look at the same material that the  
4 surrogate looks at. And if the surrogate makes -- is willing  
5 to make an eyeball judgment, and -- and -- and apparently he  
6 did, as -- as the record reveals, if he is willing to make  
7 that kind of an assessment, based on his long-term experience,  
8 in office, knowing what's required, looking at the accounting,  
9 for example, and knowing that the accounting required a  
10 certain amount of work, then that ought to be binding --

11 QUESTION: Then IRS --

12 MR. PAYMENT: -- because it's binding --

13 QUESTION: Then IRS must make an eyeball judgment,  
14 too.

15 MR. PAYMENT: The IRS wants to make an eyeball  
16 judgment, but an eyeball judgment with a microscope. They  
17 wish to examine time records. And they are focused on the  
18 time records, and that's all they're focused on. They're --  
19 in fact, what is so impressive about the record in this case  
20 is that only in this Court did they ever mention any possible  
21 fraud issue; only in this Court for the first time.

22 QUESTION: Are there any cases in which you've  
23 litigated out the merits of a fee award in your -- your  
24 county?

25 MR. PAYMENT: Oh, certainly.

1 QUESTION: With the IRS, I mean?

2 MR. PAYMENT: Not with the IRS in -- in -- you mean  
3 in connection with the federal case --

4 QUESTION: I understand you probably settle them;  
5 it's a lot easier to settle -- to take -- knock a thousand  
6 dollars off the fee and save the expense. But have you ever  
7 had a test case on whether they have actually overreached in  
8 trying to disallow deductions for a fee?

9 MR. PAYMENT: Mr. White paid -- or rather the estate  
10 paid, apparently, a -- because the Internal Revenue Service  
11 disallowed the entire fee, paid a deficiency, and has brought  
12 a companion action, a refund action in the federal district  
13 court, in which, of all things, the Internal Revenue Service  
14 has demanded a jury trial to have this entire matter  
15 relitigated.

16 So that case is pending down there -- really  
17 awaiting the outcome of this case --

18 QUESTION: Yes, but the government disallowed the  
19 entire attorney's fee in the --

20 MR. PAYMENT: Didn't -- didn't disallow a portion,  
21 disallowed the entire attorney's fee.

22 QUESTION: Was any reason given for that?

23 MR. PAYMENT: None that's in the record, Your Honor.  
24 I am not sure I understand --

25 QUESTION: Well, as a standard reason, the failure

1 to obey the subpoena.

2 MR. PAYMENT: I'm sure that that was their position.  
3 The subpoena -- the summons had not been obeyed, and  
4 therefore, as sort of a punitive measure, the entire deduction  
5 was disallowed.

6 QUESTION: I'm -- I'm still not sure how you  
7 answered Justice Stevens' question that I was interested in.  
8 Which is, suppose the IRS just says we're going to have a -- a  
9 routine audit of every hundredth return. And we're going to  
10 go into it from top to bottom. What -- what is the rule that  
11 you wish us to promulgate that says they can't do that?

12 MR. PAYMENT: The rule is, to start with, that once  
13 the state court has spoken, as it -- as it did in this case,  
14 that's -- that's preclusive, that the Internal Revenue Service  
15 can go no further. They would have to have something else in  
16 order to proceed.

17 I mean, it's true that Powell comes down on a very  
18 clear policy line of cases where enforcement takes place --

19 QUESTION: Oh, so it's looking for something else.

20 MR. PAYMENT: -- again and again.

21 QUESTION: It's looking for something else. That's  
22 -- that -- that's why it checks one out of every hundred. In  
23 one out of every hundred it might uncover an enormous  
24 discrepancy between the amount of the fee allowed and the --  
25 and the -- the hours actually expended, as shown by the time

1 sheets.

2 MR. PAYMENT: There are --

3 QUESTION: In which case, it would investigate  
4 further to see if there is evidence of fraud --

5 MR. PAYMENT: But there are no mysteries here.  
6 There's nothing that the Internal Revenue -- Revenue Service  
7 can't figure out from looking at the probate decree. And if  
8 the -- and particularly in this case, and they certainly know  
9 what the practice is in western New York, for example. If the  
10 judge says, I keep the attorney's fee just short of an  
11 executor's commission, that's my local practice, that's my  
12 custom, well, he isn't spending time on time. He's not  
13 concerned about time at all.

14 QUESTION: It's your --

15 MR. PAYMENT: He's making the other judgments that  
16 Freeman him to make.

17 QUESTION: It's your position, then, that if -- if  
18 the practice in the surrogate in Monroe County is to just  
19 barely give a nod to time, that the -- and that's supported by  
20 the New York Court of Appeals decision --

21 MR. PAYMENT: Right.

22 QUESTION: -- that the Internal Revenue Service must  
23 analyze in the same way?

24 MR. PAYMENT: Exactly so. In other words, if this  
25 appears to be within his own guidelines, he knows -- you know



1 what his guidelines are, fine. If it was 90 percent of the  
2 estate, for example, now we might have a case where they have  
3 to look further.

4 QUESTION: Well, I would hope so, yeah.

5 MR. PAYMENT: Just peer below the surface and ask  
6 the question, what's going on here?

7 QUESTION: But under your rule, could they do it if  
8 it was 90 percent of the estate?

9 MR. PAYMENT: Certainly.

10 QUESTION: What --

11 MR. PAYMENT: Because they would have grounds to  
12 suspect. Let's say that it was 90 percent of the estate, and  
13 we didn't have anything unusual; it was just a routine  
14 administration, and that's clear --

15 QUESTION: Well, supposing you had findings by the  
16 trial judge that this was a complicated estate, and I know  
17 from similar complicated estates it takes a great deal of time  
18 and effort, and I think it's an awful lot of money, but in  
19 this particular case, it's perfectly reasonable to give them  
20 90 percent of the estate?

21 MR. PAYMENT: If you have that kind of a finding,  
22 then they haven't got any reason to suspect fraud. But if you  
23 didn't have that kind of a finding --

24 QUESTION: So --

25 MR. PAYMENT: -- and you had a routine sort of -- of

1 a case --

2 QUESTION: I would suspect you can never go behind a  
3 state court judgment. Then that's really what you're saying,  
4 then?

5 MR. PAYMENT: Not at all. I think -- I think there  
6 are instances where, looking at the record that he has in  
7 front of him, there is something unique and something  
8 troublesome. But in the normal case -- I mean this concept of  
9 doing sort of random audits now and again -- that doesn't fly  
10 in an instance where a -- you have a court, a state court,  
11 acting on a subject like this, where the determinations are  
12 presumed to be correct and presumed, especially --

13 QUESTION: Yes, but don't we also have to presume  
14 that if you turned over the records and they disallowed the  
15 fee, you'd say I'm going to stick to my guns because I've got  
16 a court order approving it, and if we litigate it out, you're  
17 going to lose?

18 MR. PAYMENT: If we litigate it out --

19 QUESTION: Don't we have to presume you would win  
20 the lawsuit on the validity of the deduction?

21 MR. PAYMENT: If we go into the refund case.

22 QUESTION: Yeah. Maybe not this one, because this  
23 is kind of peculiar. He didn't comply with the subpoena.

24 MR. PAYMENT: But -- but --

25 QUESTION: But -- but in the normal case where you

1 comply with the subpoena and you've got a court order  
2 approving your fee, aren't you going to win 99 percent of  
3 those cases?

4 MR. PAYMENT: Well, the Internal Revenue Service  
5 says no.

6 QUESTION: No they don't.

7 MR. PAYMENT: The Internal Revenue Service's  
8 position is they're entitled to jury trials in such cases,  
9 they're entitled to drag the surrogate in, I guess, and have  
10 him testify under oath as to what he did. They -- they say  
11 the Bosch case requires that you give proper regard to state  
12 decrees. Well, if you're going to give them any kind of  
13 regard, isn't it so that you'll have to have him come in as a  
14 witness? The surrogate has to come in and explain exactly how  
15 he arrived at this, notwithstanding that he didn't look at the  
16 time, notwithstanding he used the Freeman factors besides  
17 time.

18 QUESTION: But -- I -- I grant all that, but don't  
19 you think that if you assume an neutral tribunal in which the  
20 issue is litigated out, you think there's a danger of losing  
21 these cases?

22 MR. PAYMENT: We're in federal court; that's the  
23 neutral tribunal.

24 QUESTION: Well, isn't that -- you think the -- the  
25 federal court is not a neutral tribunal?

1 MR. PAYMENT: I -- I don't -- I don't think that  
2 there should be a loss in a case like that, but I don't think  
3 the Internal Revenue Service ought to be coming in with these  
4 summonses, either, and causing this sort of disruption. This,  
5 obviously, exerts a subtle pressure in the estate audit. In  
6 the examination of the entire return, this can result in a  
7 collateral of -- of possibly getting concessions along the  
8 line on other matters.

9 QUESTION: Well, I understand that.

10 MR. PAYMENT: Because you're asking -- you're  
11 putting the negotiator in a -- in a very touchy position.

12 QUESTION: Mr. Pay -- Payment, the deficiency has  
13 been paid, hasn't it?

14 MR. PAYMENT: That is correct.

15 QUESTION: Are you taking the position that this  
16 aspect of this case, the summons aspect, is moot?

17 MR. PAYMENT: No, not at all, Your Honor.

18 QUESTION: Why isn't it?

19 MR. PAYMENT: Because he hasn't complied.

20 QUESTION: Why isn't it moot?

21 MR. PAYMENT: Because he has not complied with the  
22 summons. He has refused to comply with the summons. And even  
23 though there is a refund case out there, that refund case is a  
24 separate matter entirely. And, by virtue of the fact that he  
25 has not complied with the summons, this will dog him in -- in

1 the rest of -- of the matter. It's a separate case, in fact.  
2 So there is no mootness as a result of this. In fact, his  
3 obligation, pending this determination, is -- is simply been  
4 stayed.

5 QUESTION: Wouldn't you welcome --

6 MR. PAYMENT: But, if the result is that you affirm  
7 --

8 QUESTION: Wouldn't you welcome a holding to  
9 mootness here?

10 MR. PAYMENT: I -- I don't think so, Your Honor. I  
11 think that we need to come to grips with the issue of the  
12 preclusive effect of state court decrees.

13 QUESTION: Well, you'll do that --

14 MR. PAYMENT: We didn't come all this way --

15 QUESTION: You'll do that on the case that's pending  
16 out there.

17 MR. PAYMENT: Well, that won't be from the United  
18 States Supreme Court; that'll be from a district court.

19 QUESTION: Well, in that case, cannot the government  
20 subpoena the time records in the refund case?

21 MR. PAYMENT: They would certainly do so in the  
22 normal discovery process.

23 QUESTION: Well, why doesn't that make the case  
24 moot, then? They're going to get the material anyway.

25 MR. PAYMENT: Well, it all depends. If, in the

1 summons enforcement case pending here -- and, in fact, all the  
2 proceedings have been stayed by mutual agreement of the  
3 parties -- in -- in -- in this case, if the court determines  
4 that the material didn't need to be turned over, it doesn't  
5 need to be turned over in connection with discovery in the  
6 refund action, either. That should preclude the matter.

7 QUESTION: Well, I'm not sure why that -- that  
8 follows, if the refund suit is still pending.

9 MR. PAYMENT: I -- I think it's very clear that the  
10 issue in this case is whether there can ever be a proper  
11 purpose for issuing a summons, where the state court decree  
12 has a preclusive effect.

13 This case is so different from the Bosch case. This  
14 case doesn't involve parties running to the state court to get  
15 a determination that would affect tax liability. In fact, the  
16 parties are captives of the state court. It's the only place  
17 where you can resolve this matter, by constitution of the  
18 State of New York and by virtue of the fact that there has  
19 always been a probate exception to diversity jurisdiction,  
20 there is no other place to do this.

21 So, as a matter of getting the matter resolved  
22 properly, the only place to go is in the surrogate court. And  
23 in the surrogate court, when you get a result, it's binding on  
24 the beneficiaries. And when it's binding on the  
25 beneficiaries, the result is that if they don't get the

1 deduction, they're in -- unfairly impacted.

2 And it seems to me that, under the circumstances of  
3 this case, there is no good reason for federal courts to get  
4 involved in this humdrum business of fixing estate attorneys'  
5 fees.

6 All the time, this Court is looking for ways in  
7 which to ensure that, properly, matters that are in state  
8 courts stay in state courts. The abstention doctrines and all  
9 other sorts of doctrines that recognize principles of  
10 federalism, all point the way towards keeping significant  
11 issues in the state courts.

12 QUESTION: What was the size --

13 MR. PAYMENT: This case goes the --

14 QUESTION: What was the size of the estate? What's  
15 the bottom line of the size of the estate?

16 MR. PAYMENT: It was a \$450,000 estate. The  
17 executor's commission was around 17,000, and the attorney's  
18 fee was around 16,000, roughly --

19 QUESTION: Which was in -- which was in line with a  
20 bar schedule for an estate of that size?

21 MR. PAYMENT: It was in line with the judge's own  
22 local custom of -- first of all, you have understand, the  
23 executor's commission is fixed by statute, and so it doesn't  
24 vary. There's a minimum percentage of the estate.

25 QUESTION: Is the executor's commission also

1 questioned here?

2 MR. PAYMENT: No, it is not.

3 QUESTION: Because it's fixed by statute?

4 MR. PAYMENT: Fixed by statute.

5 One of our points is if this case had been in the  
6 State of California, instead of the State of New York, in  
7 California they fix both the attorney's fee, as a statutory  
8 minimum, and the fee of the executor, as a statutory minimum.

9 QUESTION: How did --

10 MR. PAYMENT: And you couldn't have --

11 QUESTION: How did the two fees compare in size?  
12 The attorney's fee was how much?

13 MR. PAYMENT: Was about 16,000, and the executor's  
14 commission was about 17,000 and some odd change.

15 So, in keeping with what the judge declared to be  
16 his -- his normal routine, he was keeping the attorney fee  
17 something less than the fee of the executor. But as I was  
18 saying --

19 QUESTION: Was Mr. White both executor and attorney?

20 MR. PAYMENT: He was in this case, which is  
21 permitted under New York law.

22 And really what the --

23 QUESTION: So he got a double fee, though?

24 MR. PAYMENT: That's -- that's correct. And they  
25 allege that that was the reason why they were especially



1 looking here. But the fact of the matter is that it's  
2 permitted under New York law, and he had an announced -- that  
3 is to say, the surrogate had an announced local practice, and  
4 he followed it in this case, and he wasn't -- he wasn't bound  
5 to look at time as the exclusive determinant of this issue.

6 QUESTION: Well, do you -- do you think that -- do  
7 you think that the IRS may inquire as to whether a surrogate's  
8 decision is consistent with state law?

9 MR. PAYMENT: Only if this Court believes that the  
10 Bosch decision requires that result. But looking at 2053 of  
11 the Internal Revenue Code, looking at the Park decision of the  
12 Sixth Circuit, and the Jenner decision of the Seventh Circuit,  
13 the answer has to be no, that there should be no second  
14 guessing.

15 QUESTION: Well, you shouldn't -- if you know that  
16 the decision is consistent with state law, that may be so, but  
17 does it necessarily follow that every surrogate's decision is  
18 consistent with state law?

19 MR. PAYMENT: It doesn't follow that every one is,  
20 but the fact of the matter is, once it's been done --

21 QUESTION: Well, suppose the Internal Revenue Code  
22 says what the surrogate did is -- is wholly contrary to a -- a  
23 decision of the Court of the Appeals in New York?

24 MR. PAYMENT: That's what they seek to do, but they  
25 --

1 QUESTION: And you say they cannot do that?

2 MR. PAYMENT: They -- they cannot do it, because  
3 2053 of the Internal Revenue Code makes state law binding.  
4 And Freeman tells us --

5 QUESTION: Well, state law is what the court of  
6 appeals say it is, not what a surrogate says it is.

7 MR. PAYMENT: And Freeman -- Freeman -- that's true,  
8 but Freeman governs the exact discussion here, and the  
9 surrogate contended that he followed the Freeman case, and the  
10 Freeman case has mainly subjective factors, not just time.

11 QUESTION: Well, they've -- they've got -- the IRS,  
12 I would think, should be able to inquire as to whether what he  
13 did is consistent with Freeman.

14 MR. PAYMENT: And involve the federal courts in  
15 relitigating this very matter, just as in the refund -- this  
16 case.

17 QUESTION: But I guess if we conclude that under  
18 United States v. Powell, that you didn't make a showing of bad  
19 faith by the IRS, we don't reach any further question?

20 MR. PAYMENT: Bad faith, in our view, is the same as  
21 an improper purpose. And if the purpose is not proper because  
22 you cannot second guess the surrogate's decree, you cannot  
23 relitigate this matter, then there is no proper purpose. And  
24 if there is no proper purpose, then the summons is in bad  
25 faith.

1 QUESTION: My -- my notes show that the executor's  
2 commission was reduced also from \$17,450 to 16,804; is that  
3 incorrect?

4 MR. PAYMENT: Apparently that was through some  
5 negotiations on incorrect mathematical calculation. That was  
6 through negotiations with the Revenue agent. That is correct.

7 QUESTION: So the -- so the agent in this case did  
8 reduce the executor's commission as well?

9 MR. PAYMENT: Well, he -- before this summons  
10 enforcement proceeding, the matter was conceded, yes. Because  
11 it was a mathematical error, in effect.

12 QUESTION: I would like to --

13 QUESTION: (Inaudible.)

14 QUESTION: You mean, you can just allege a  
15 mathematical error -- the IRS can -- and get behind the  
16 surrogate's judgment?

17 MR. PAYMENT: Well, one of the things is that that  
18 wasn't implicated in the summons enforcement end of the thing;  
19 it happened before they brought the summons enforcement  
20 proceeding.

21 QUESTION: Well, could you have a summons  
22 enforcement just to determine there's no mathematical error?

23 MR. PAYMENT: I don't think that the Internal  
24 Revenue Service would come into federal court on a  
25 mathematical error issue ever. But if they did --

1 QUESTION: Well, I -- I suppose they might if they  
2 were in disagreement.

3 MR. PAYMENT: Well, perhaps so. But I don't think  
4 that the matter would get that far if -- if practice is of any  
5 guidance. I would prefer to, if I might, reserve some time  
6 for rebuttal.

7 Thank you.

8 CHIEF JUSTICE REHNQUIST: Very well, Mr. Payment.  
9 Mr. Horowitz.

10 ORAL ARGUMENT OF ALAN I. HOROWITZ

11 ON BEHALF OF THE RESPONDENT

12 MR. HOROWITZ: Mr. Chief Justice, and may it please  
13 the Court:

14 I'd just like to clear up one factual matter before  
15 I begin. The appendix filed in the Court of Appeals does  
16 contain the work papers of the agent when he issued the notice  
17 of deficiency. The notice of deficiency was issued because  
18 the statute of limitations was about to expire any day, and if  
19 no notice had been issued, then the whole matter would have  
20 gone away.

21 The reason for disallowing the attorney's fee is  
22 stated in the work papers. It says, and I quote, "No amount  
23 is allowed as estate tax deduction for claimed attorney's fees  
24 if the estate has failed to provide the Internal Revenue  
25 Service with any time record, estate records or other

1 documents in order to make an independent determination as to  
2 a proper remuneration for attorney services rendered to the  
3 estate."

4 And then it goes on to cite the federal regulation  
5 and the matter of Freeman case in New York court.

6 QUESTION: So the -- the disallowance, then, did  
7 depend on the refusal to obey the summons?

8 MR. HOROWITZ: Absolutely.

9 QUESTION: So, it would be hard to say, though, that  
10 the summons enforcement proceeding was moot, so long as the  
11 entire refund proceeding has been necessitated by that?

12 MR. HOROWITZ: No, the summons enforcement  
13 proceeding is not moot; the refund -- the deficiency is being  
14 litigated. And we still don't have the documents. We have no  
15 court order giving us any right to the documents, and it's  
16 probably going to be hard for us to win the refund case  
17 without any documents.

18 QUESTION: Yes, but you have the tax?

19 MR. HOROWITZ: Well, we have the tax until the  
20 refund suit is litigated, but we don't have it to keep, yet.

21 QUESTION: Well, can you use the discovery  
22 proceedings in the refund suit to get the documents?

23 MR. HOROWITZ: Well, I guess we can ask, but, as far  
24 as I know, the IRS summons power is broader than any discovery  
25 right they would have in district court, so I assume if we

1 can't get it with a summons, we can't get it with discovery,  
2 either.

3 The taxpayer would make the same argument, I  
4 suppose, that we just have no reason to look at these  
5 documents, because we have to follow the surrogate. And they  
6 would be not relevant, just as they were viewed as not  
7 relevant by the district court here.

8 So, I don't -- I mean if -- if -- it's true that if  
9 we had sought to discover these documents and the court had  
10 given them to him, that then the case would be moot, but  
11 there's no reason to believe that we'll be able to do that.

12 QUESTION: Mr. Horowitz, is the Internal Revenue  
13 Service, in fact, starting some effort to review, generally,  
14 claims as allowed by state courts in estates?

15 MR. HOROWITZ: I'm not aware of any IRS policy to  
16 begin to do this. I understand that this is not the first  
17 case in -- in this particular area where -- where the  
18 attorney's fees have been questioned, but there are certainly  
19 no --

20 QUESTION: Well, is there just some particular agent  
21 in New York that's on a roll, so to speak?

22 MR. HOROWITZ: Well, I -- I can't really answer  
23 that. But it may -- apparently, what's happened is that the  
24 office there has determined that there may be a problem with  
25 attorney's fees and is looking at it more seriously than maybe

1 other offices in the country. But they're certainly not  
2 willy-nilly disallowing all attorney's fees or issuing  
3 summonses in all cases. They've been looking at the returns  
4 and seeing whether there is some that -- that -- seem to be  
5 out of line.

6 QUESTION: Well, do you -- do you think that -- that  
7 the statutes, section 2053, generally suggests, anyway, that  
8 the Internal Revenue Service will accept the fees that are  
9 awarded by the state courts?

10 MR. HOROWITZ: Well, I -- I think it's clear enough  
11 what the statute says. The statute says that the  
12 administration expenses that are allowable under state law are  
13 to be allowed as a state deduction. The question -- the  
14 underlying merits question that's -- that the Petitioner has  
15 tried to litigate in this case is what does the term  
16 "allowable under state law" mean? And we've said that we  
17 think it means the same thing that the Court talked about in  
18 Bosch, which is that it depends whether the fee is, in fact,  
19 as allowable under state law set forth by the law of the  
20 highest court.

21 Now, what is prompting these investigations of fees  
22 is a concern that the -- there is not sufficient inquiry being  
23 made at the -- especially in these kind of -- uncontested  
24 cases at the surrogate level as to whether these fees, indeed,  
25 are allowable under state law.

1 Now, Justice --

2 QUESTION: You -- you -- you -- you're -- the IRS'  
3 position is that the surrogate in Monroe County is not  
4 following the Freeman decision?

5 MR. HOROWITZ: That's not our position yet, because  
6 we haven't been permitted to make an investigation. Justice  
7 Stevens asked if there --

8 QUESTION: Well, but I -- I thought you said that  
9 you're investigating to see if -- if --

10 MR. HOROWITZ: Well, yes, there is a concern that --

11 QUESTION: Well, where did the concern come from?

12 MR. HOROWITZ: Well, none of these papers are in the  
13 record; there are some papers that were shown to Mr. White.  
14 His affidavit indicates that there have been some reports in  
15 the newspapers in the Rochester area. It may be that -- I  
16 think part of it just came from looking at the amounts of the  
17 fees.

18 In this case, for example, Mr. White collected  
19 almost 10 percent of the estate, about \$34,000.

20 QUESTION: Well, what -- what --

21 MR. HOROWITZ: And it doesn't seem that he did  
22 anything, as far as we can tell.

23 QUESTION: Well, okay. But what if New York law  
24 says that someone who is both executor and attorney for the  
25 estate shall be entitled to a fee equal to 10 percent of the



1 gross estate? Does --

2 MR. HOROWITZ: Then we probably would have very  
3 little reason to suspect that the -- that this fee was not  
4 allowable under state law, and they probably would not have  
5 issued a summons. But that's not what New York law says.

6 QUESTION: But you -- you feel the New York law is  
7 different, that it requires a certain expenditure of time in  
8 order to warrant any fee?

9 MR. HOROWITZ: Well, what the New York Court of  
10 Appeals said in Freeman was, it listed a whole host of  
11 factors, about nine factors or something, that it goes into.  
12 We've cited several appellate division cases in our brief, in  
13 which fees were -- surrogates' awards of fees were overturned  
14 by the appellate -- appellate division as being excessive.

15 QUESTION: Mr. Horowitz, what is the government  
16 really after here? Are you biting off your nose to save your  
17 face, so to speak? Might you not get a lot more taxes on the  
18 income tax end of it than on the estate tax end of it in the  
19 long run?

20 MR. HOROWITZ: Justice Blackmun, we don't know if we  
21 would even disallow this deduction.

22 QUESTION: Well, usually, I think that's the case,  
23 is it not?

24 MR. HOROWITZ: That we would disallow --

25 QUESTION: That why I think you have an agent up

1 there working on a quota.

2 MR. HOROWITZ: Well, we have an agent who is trying  
3 to make an investigation. Now, whether this is ultimately  
4 going to end up in a lot of tax for the IRS or not, I don't  
5 know, and he doesn't know either, until he can make the  
6 investigation.

7 Now, it happens the fee in this case is not very  
8 large. For larger estates, there may be larger fees.

9 QUESTION: Exactly. That's why I wonder why you're  
10 making such a fuss over it.

11 MR. HOROWITZ: Well, I don't think we're making such  
12 over it, frankly. I mean, I understand the case is here now,  
13 and that's -- we didn't bring it here. All we did was issue a  
14 summons. I don't know how many summonses are issued over the  
15 course of the year, but there are quite a few.

16 QUESTION: Yes, but you issued -- you issued the  
17 summons?

18 MR. HOROWITZ: Yes, we did issue the summons,  
19 because the agent --

20 QUESTION: And it may well be misguided --

21 MR. HOROWITZ: -- the agent looked at the return and  
22 he thought there was reason to suspect the -- the fee was not  
23 allowable.

24 QUESTION: The IRS may lose a lot more taxes doing  
25 this than they would if they let it go to the income tax

1 aspect.

2 MR. HOROWITZ: I understand that Petitioner has  
3 claimed in his reply brief that we have state tax attorneys  
4 who are sitting around with nothing to do and this isn't what  
5 we should be doing. But I think if there's one thing that  
6 this Court has made clear, and it's a quote from page 56 of  
7 Powell, it is, "Congress did not intend the courts to oversee  
8 the Commissioner's determinations to investigate. It is no  
9 basis for refusing to enforce a summons to say that the  
10 Service ought to be focusing on something else. "

11 And I suppose there are a lot of taxpayers out there  
12 who, let's say, take liberties with certain small items on  
13 their return because they think the Service has got more  
14 important things to do. But I think that's a lot of gall to  
15 turn that, I guess, attempt to get away with something into a  
16 right to actually challenge the service, when the service does  
17 happen to look into one of these smaller matters.

18 QUESTION: Is your next step along the line of  
19 Justice O'Connor's question? Are you going to question claims  
20 that have been allowed in every probate in New York?

21 MR. HOROWITZ: There is no next step, Justice  
22 Blackmun. There is -- the first step here is to try to get  
23 these records. And I don't know what is going to happen after  
24 that, frankly.

25 There have been cases that are cited in our brief

1 where claims allowed by probate courts have been disallowed by  
2 the IRS; there are not many. And as far as I know, there are  
3 not many of these attorney's fee cases.

4 Justice Stevens asked before how many there were,  
5 and as far as I know, there is not a single case in this  
6 district where that has actually been litigated whether the  
7 Service can disallow the fee.

8 But I would really like to emphasize that this is a  
9 summons enforcement proceeding, here and I'm not sure that it  
10 complicates the question. It seems to me that it simplifies  
11 the question that's before the Court.

12 It just presents the usual issue that's presented in  
13 a summons case: whether this -- IRS summonses should be  
14 enforced. And we submit that under Powell, under the usual  
15 rules for summons enforcement established and reaffirmed by  
16 this Court, the answer is clearly yes. It's a very simply  
17 analysis. The summonses were issued to enable the IRS to  
18 investigate the correctness of the estate's return,  
19 specifically, this one item on the return: whether the  
20 deduction for attorney's fees was valid under section 2053 of  
21 the Code, as allowable under state law.

22 That's a proper purpose for issuing a summons.  
23 There's no basis for believing, and no allegation really, that  
24 the investigation is being made in bad faith or for some other  
25 collateral purpose. And therefore we submit that the

1 summonses should have been enforced.

2 Now --

3 QUESTION: And -- and your position is the IRS need  
4 say nothing more in a case like this than it wishes to look  
5 into the propriety of the award of attorney's fees. It  
6 doesn't have to say why it wants to or what it thinks may be  
7 bad about it?

8 MR. HOROWITZ: That's absolutely right. That is  
9 clear from Powell that the service doesn't have to explain its  
10 determination to investigate or make any sort of probable  
11 cause or lesser showing as to why it wants to investigate. It  
12 is entitled to allocate its investigative resources as it sees  
13 fit.

14 Now --

15 QUESTION: And I suppose you would say that -- that  
16 even if the service is wrong about whether it has to accept  
17 the -- the finding of the probate court, even if you're wrong  
18 about that, even if it is ultimately held that you have to  
19 accept it, at least at this point that's not clear, and you're  
20 not in bad faith to assume the contrary?

21 MR. HOROWITZ: Absolutely right. There are at least  
22 -- at least two reasons why -- why that wouldn't make a  
23 difference at this stage. I -- I guess Respondent is trying  
24 to -- if the statute said -- if section 2053 said -- I think  
25 it was Justice Rehnquist's hypothetical that the attorney is

1 entitled to 10 percent of the estate, and we're going to allow  
2 that for a deduction, and he took a 10 percent deduction. Or  
3 if it said that whatever the surrogate says is absolutely  
4 final, no matter whatever happens.

5 If the statute said that on its face, and then the  
6 IRS issued a summons like this, claiming that it wants to  
7 investigate the merits of that deduction, the taxpayer could  
8 reasonably come into the summons enforcement court and say,  
9 look, there's nothing for them to investigate. It's clear as  
10 a bell, it's clear to us, it's clear to you, it's clear to  
11 them that they're not going to be able to disallow this  
12 deduction down the road.

13 Now, that would arguably raise an inference that  
14 there was an improper purpose for the summons, that if the  
15 purpose was something other than what was stated. And that  
16 might -- and that probably would justify denial. But that's  
17 not what's going on here.

18 We can argue about what section 2053 means, whether  
19 Bosch applies, what sort of deference is required to the  
20 surrogate, but nothing -- their argument that Bosch shouldn't  
21 apply does not suggest any bad faith on the part of the agent.  
22 As Justice Scalia said, we don't know what section 2053 means,  
23 and it's not the place to litigate the merits here. It's a  
24 summons enforcement --

25 QUESTION: (Inaudible) as I gather from your brief,

1 you say that the -- the Service doesn't know whether there  
2 might be fraud?

3 MR. HOROWITZ: That -- that's -- that's the second  
4 point that I wanted to get to.

5 QUESTION: And --

6 MR. HOROWITZ: We've talked about fraud a little bit  
7 because --

8 QUESTION: And that might be true even if the  
9 statute said 10 percent?

10 MR. HOROWITZ: Well, that's so, I suppose. There  
11 might be fraud there, too. But let's suppose the statute said  
12 even if there is fraud, that -- that you still have to follow  
13 it. I mean --

14 QUESTION: That may be so.

15 MR. HOROWITZ: The -- the only way in which --  
16 looking down the road to the merits -- could effect the  
17 summons enforcement proceeding, it seems to me, is if it  
18 raised an inference of bad faith on the part of the agent,  
19 that it was clear enough that the stated purpose of  
20 investigating tax liability was not the true purpose, and  
21 that's not the case here.

22 QUESTION: Some -- somewhere in -- somewhere in the  
23 briefs or record, Mr. Horowitz, it seems to me there is  
24 something to the effect that one of the concerns of the I --  
25 IRS was that New York allowed the attorney to -- to also be

1 the executor. Am I right in that?

2 MR. HOROWITZ: Well, that -- that's one of the  
3 things that -- that -- that I think was a contributing factor  
4 in the decision to investigate this return, because it makes  
5 it a little more questionable what the surrogate might have  
6 done. I mean, there --

7 QUESTION: But that -- that -- that's -- that really  
8 seems quite dubious to me. I mean, if New York law allows --

9 MR. HOROWITZ: Well, New York law allows the same  
10 individual to serve as both executor and attorney, but New  
11 York law clearly does not allow him to collect a double fee  
12 for the same services. And there are health division cases  
13 that have interfered with that.

14 So, our concern here was whether he in fact didn't  
15 do any work as attorney that's distinct from what the executor  
16 would do, and whether the attorney's fee was really being paid  
17 for the same services. That's why we asked him to at least  
18 give us an affidavit.

19 Before the summons was ever issued, he was just  
20 asked to give an affidavit of what he did for the estate that  
21 warranted this fee, and he refused to provide that.

22 For all we know, he didn't do more than  
23 half-an-hour's or an hour's worth of attorney's work. And  
24 there would be an issue, I suppose, under New York law,  
25 whether a \$17,000 attorney's fee is valid under New York for



1 an hour's worth of work. But we would probably question that.

2 QUESTION: Well, that's rather --

3 MR. HOROWITZ: And that would be litigated in  
4 another proceeding.

5 QUESTION: That's rather a broad statement, Mr.  
6 Horowitz. You don't probate in an estate of this size in a  
7 half-an-hour's work, do you? Have you ever probated an  
8 estate?

9 MR. HOROWITZ: I've never probated an estate, no.

10 QUESTION: No.

11 MR. HOROWITZ: But there's nothing in the record as  
12 to what the attorney did.

13 In Respondent's brief they -- on page 5 of their  
14 brief, in a statement they list various things that Mr. White  
15 did. And almost all of these, it seems to me, are -- are --  
16 refer to executor's duties.

17 So, I don't think there's anything wrong with the  
18 agent at least wondering whether in fact there was an  
19 independent attorney's work, separate from what the executor  
20 had done, that warranted this kind of fee. But that's -- if  
21 the agent is wrong, the district court will tell him so or in  
22 fact the IRS might never disallow the deduction.

23 The fact is that we're just trying to find out what  
24 he did and whether there's any basis for challenging the  
25 deduction.

1 I think that the entire case here has been confused  
2 by -- by the Petitioner's decision to litigate it by looking  
3 down the road at the outcome of the investigation -- possible  
4 outcome of the investigation, and then trying to reason  
5 backwards and say, since our position is the IRS is probably  
6 not going to win, ultimately, or is not going to be able to  
7 disallow the deduction, then they shouldn't issue the summons  
8 in the first place. That's not the way the summons  
9 enforcement proceedings are supposed to be handled.

10 QUESTION: Mr. Horowitz, don't misunderstand me, I'm  
11 frank to say I've never liked double fees, and I've never  
12 liked double fees that are fixed at the maximum possible. But  
13 I just wonder if the IRS hasn't gone a little too far here.

14 MR. HOROWITZ: Well, Justice Blackmun, as I said  
15 before, I mean, there -- there has yet to be a case where  
16 we've actually been litigating whether the fee should be  
17 disallowed or not. And it's perfectly possible that in this  
18 case we would look at the records of whatever he did and  
19 determine that the fee should not be disallowed. The  
20 surrogate has a certain element of discretion here.

21 QUESTION: Well, I'm sure --

22 MR. HOROWITZ: But I'm sure you recognize that there  
23 can be abuses in this area and we can't find out --

24 QUESTION: I'm sure some fee is allowable in an  
25 estate of this size?

1 MR. HOROWITZ: If he did work for attorney, probably  
2 some fee is allowable.

3 QUESTION: And the --

4 MR. HOROWITZ: And I doubt very much we would have  
5 disallowed the whole fee if we had the records.

6 QUESTION: And the surrogate not only found it  
7 allowable, he allowed it.

8 MR. HOROWITZ: The surrogate did allow it. And that  
9 is the issue. That is the second issue in this case, which is  
10 whether the surrogate's allowance of the fee is something that  
11 we have to defer to.

12 QUESTION: Well, it really relates to the first  
13 issue, though, because if we construe the statute to mean, in  
14 effect, that anything that's been allowed by the state judge  
15 is deductible, then you would not have a proper purpose.

16 MR. HOROWITZ: Well, I disagree with that, Justice  
17 Stevens, on -- on two grounds. First of all --

18 QUESTION: I thought that was your hypothetical  
19 earlier? Isn't that the same --

20 MR. HOROWITZ: No, my hypothetical is not if you  
21 ultimately construe the statute that way; my -- my  
22 hypothetical --

23 QUESTION: You would not have a proper purpose in  
24 the next case if we came out that way in this case?

25 MR. HOROWITZ: Yes, sir.

1 (Laughter)

2 MR. HOROWITZ: Yes, that's --

3 QUESTION: That's -- but you would say that, as far  
4 as this case is concerned, having an arguable position on  
5 this, your -- your purpose is -- is --

6 MR. HOROWITZ: Well, we have more than an arguable  
7 position, we have a decision out of this Court that's directly  
8 on point.

9 QUESTION: Well, no. No, you don't.

10 MR. HOROWITZ: Pretty close.

11 QUESTION: Which one?

12 MR. HOROWITZ: The estate of Bosch.

13 QUESTION: Well, the Bosch is a case where you  
14 basically had a collusive suit; everybody was interested in  
15 reducing taxes there. I mean, there -- there were no  
16 adversary parties that -- that wanted -- here, there at least  
17 are beneficiaries who --

18 MR. HOROWITZ: Who --

19 QUESTION: -- presumably don't want to pay a larger  
20 fee than they have to.

21 MR. HOROWITZ: Who -- well --

22 QUESTION: Bosch is quite different, I think.

23 MR. HOROWITZ: The Court did not -- as I recall, the  
24 Court did not focus on whether it was a collusive suit or not.  
25 And, in fact --

1 QUESTION: But, in fact, that was true. They were  
2 construing, as a matter of state law, whether it was -- I  
3 forget now -- marital deduction or something. But no -- none  
4 of the -- none of the parties stood to -- to gain anything  
5 except tax savings by the decree.

6 MR. HOROWITZ: Well, I -- I mean, I understand that.

7 QUESTION: Well, that's not the case here.

8 MR. HOROWITZ: To try to distinguish it on its  
9 facts, but I think the holding of the Court is that what --  
10 what the code means when it talks about applying state law in  
11 -- in the case of a federal estate tax deduction, what it  
12 means is applying the law as set forth by the highest court of  
13 the state.

14 And the two dissenters in that case, Justice Harlan  
15 and Justice Fortas, wanted to limit the Court's decision just  
16 to the -- to cases where there was no contest in the state  
17 court, where it was, if not collusive, at least consented or  
18 something. And the Court didn't -- the majority did not do  
19 that.

20 So, I think at least the agent certainly has very  
21 strong reason to think here that he -- that he can do it.

22 And, apart from that point, though, I don't want to  
23 let slide the fact that the petitioner and the district court  
24 have conceded that the statute is not as we said in the  
25 hypothetical, that it can be set aside under certain

1 conditions.

2 Now, how likely those conditions are to occur is not  
3 something to be determined before we're allowed to make an  
4 investigation.

5 In fact, I think that's most clearly stated in  
6 Petitioner's reply brief at page -- pages 9 and 10. I -- I  
7 read as a concession that the IRS can issue a summons to the  
8 attorney of the estate as a -- as a means of conducting an  
9 investigation of an attorney's -- of the legitimacy of an  
10 attorney's fee that has been approved by the surrogate.

11 That's exactly what it says here.

12 Now -- because of the possibility that there might  
13 be fraud. Now, what Respondent -- I'm sorry, Petitioner's  
14 defense, that -- that he still maintains, is that that's not  
15 applicable in this case because the IRS agent didn't say that  
16 he was investigating fraud at the time he issued the  
17 summonses.

18 And so, maybe you can do that in another case, but  
19 not in this one.

20 But I think it's clear enough that we don't have to  
21 say at the outset of our investigation where the investigation  
22 is going. In fact, we don't know.

23 And there's no reason to we should be expected to  
24 know. The nature of an investigation is that you start  
25 looking into a particular area. As you develop facts, your

1 attention becomes more focused; then you move along and maybe  
2 you find fraud, maybe you find that the deduction was  
3 perfectly reasonable, or maybe you reach the conclusion that  
4 the surrogate made a mistake of New York law.

5 But we don't know where it's going to go in the  
6 beginning. To -- in order to get an IRS summons enforced, we  
7 have to allege a purpose of investigating tax liability. That  
8 was clearly the purpose here. And that's the end of the case,  
9 I think, from that perspective.

10 Now, the second issue in the case is one that we  
11 have stated in our brief that we don't think the Court needs  
12 to reach because -- for the reasons I've just discussed. I  
13 think the summons has to be enforced in any case, no matter --  
14 whether Bosch applies or not. But the Court could reach it,  
15 and I'd just like to talk about it briefly.

16 We think it is clear, from the language of the  
17 statute, from using the terms allowable under state law, and  
18 from the history of the statute from its beginning, that  
19 section 20 -- 2053 does not set up a test of looking at  
20 whether the surrogate has, as a historical fact, allowed a  
21 particular deduction. The idea is to make an inquiry into  
22 state law.

23 The reasons for that rule are explained by the court  
24 in Bosch, and there is no reason to have a different rule for  
25 this particular estate deduction than there is for the marital

1 deduction that was at issue there.

2 We don't think the taxpayer has any --

3 QUESTION: But you certainly can say there is a  
4 reason, suggested by Justice Stevens' question that, in Bosch,  
5 there was a motive on the part of all the parties to the  
6 litigation to have it come out a particular way, in order to  
7 reduce their tax liability.

8 Here there is a motive on the part of the  
9 beneficiaries not to want to pay any larger estate attorney's  
10 fee or executor's commission than was required by law.

11 MR. HOROWITZ: (Inaudible.)

12 QUESTION: That's certainly a factual difference  
13 from Bosch.

14 MR. HOROWITZ: Yeah, you're suggesting that Bosch  
15 could be restricted to its fact, and that --

16 QUESTION: I don't find the Bosch majority, in  
17 particularly, crystal clear as to what the rule is or why it's  
18 that way.

19 MR. HOROWITZ: All right. Well, what I was  
20 responding to was -- was the argument the Petitioner made that  
21 Bosch applies only to the marital deduction, section 2056, and  
22 shouldn't apply here to section 2053. I think Justice  
23 Stevens' point would be that, even in the marital deduction  
24 context, Bosch should be given an extremely narrow reading.

25 And, as I say, we disagree with that, but that's



1 something that would be litigated down the road, I think, in  
2 -- in a refund suit here. But at least what the Court said in  
3 Bosch, I think, is that state law means the law of the highest  
4 court, and that the IRS should not be bound by mistakes of  
5 state law, of lower courts.

6 Now, I -- I would just like to say that we don't  
7 think this is really opening a great Pandora's box and  
8 federalism concerns and all this. The IRS, for reasons that  
9 the Court seems to be well aware of, is not likely to go out  
10 willy-nilly, disallowing all these fees and bringing them into  
11 court. And certainly the district courts are not likely to be  
12 second guessing the surrogates willy-nilly.

13 I think the problem is possible abuses here. And  
14 the district courts aren't going to want to invite this kind  
15 of litigation; they're only going to step in and disagree with  
16 the surrogate if there's a real problem here.

17 And all we want is to be able to conduct an  
18 investigation and find out if there is a real problem.

19 Unless there are any questions --

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Horowitz.

21 Mr. Payment, you have rebuttal. You have two  
22 minutes remaining.

23 REBUTTAL ARGUMENT OF KENNETH A. PAYMENT

24 ON BEHALF OF THE PETITIONER

25 MR. PAYMENT: I want to respond only to the issue of

1 this so-called inability of the court, under Powell, to look  
2 at the merits in determining whether a proper purpose is had  
3 by the Internal Revenue Service.

4 It seems to me that Powell said that the hearing on  
5 proper purpose ought not to be a meaningless inquiry. And it  
6 is a meaningless inquiry if you can't look at the merits or  
7 you have a state court's determination intervening. Because,  
8 in such an instance, the only way that you can judge whether  
9 the Internal Revenue Service is doing the right thing is by  
10 finding out what they're about.

11 And in this case, they made it very clear. They  
12 said they were entitled under Bosch to make a second inquiry;  
13 that they could look -- as a matter of fact, when they started  
14 the case, they said that it isn't determined under state law  
15 at all -- alone, it's determined under federal standards, as  
16 well.

17 They only abandoned that position, shall we say,  
18 artfully, anyway, in the Second Circuit and in this Court.  
19 But, in fact, what they would have this Court do is impose a  
20 federal standard on the surrogate courts and, in effect, on  
21 the parties.

22 And what happens if you don't find out in the  
23 beginning whether they really are interested in fraud and  
24 whether, as they said in this case, the only thing they  
25 thought they could do is second guess the determination of

1 this surrogate. You are not following the line of the Powell  
2 case, in which the court said that the hearing cannot be  
3 meaningless. And it is meaningless unless you look into the  
4 merits of the controversy.

5 If we pick up on the hypothetical, suppose we had a  
6 California case in which the executor's commission and the  
7 attorney's fee are exactly the same. If the court couldn't  
8 inquire into whether or not a proper purpose was had by virtue  
9 of the Internal Revenue Service issuing a summons in that  
10 case, then the inquiry would, indeed, be a meaningless one.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Payment.

12 MR. PAYMENT: Thank you, Your Honor.

13 CHIEF JUSTICE REHNQUIST: The case is submitted.

14 (Whereupon, at 11:50 a.m., the case in the  
15 above-entitled matter was submitted.)

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CERTIFICATION

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No. 88-928 - JAMES M. WHITE, ETC., Petitioner V. UNITED STATES, ET AL.

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BY

Leona M. May

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