CONCLUSION

Two important rules of law emerging from *Lieggi* are that deportation is punishment, and that deportation for a marijuana conviction can be cruel and unusual punishment.

When coupled with the accelerated pace of statutory reform regarding marijuana,[65] as well as with several recent Supreme Court decisions expanding the constitutional rights of aliens in other areas,[66] the *Lieggi* decision hopefully will be applied liberally. At the very least, *Lieggi*'s value lies in its break with previous judicial refusal to treat deportation as a form of punishment. Those judges whose sole reason for rejecting eighth amendment arguments in a deportation context had been the absence of precedent may now be more comfortable in recognizing what has long been common sense: the alien deported from the country in which he resides has been punished, and such punishment, at least with respect to marijuana convictions, can be cruel and unusual. The *Lieggi* decision is welcome and long overdue.

STEPHEN H. LEGOMSKY

FOURTH AMENDMENT CHALLENGE TO AN INTERNAL REVENUE CODE SECTION 7602 SUMMONS: *United States v. Sun First National Bank of Orlando*, 510 F.2d 1107 (5th Cir. 1975)

United States v. Sun: THE DECISION BY THE FIFTH CIRCUIT

In 1973, the Internal Revenue Service undertook an investigation of the consolidated income tax return of the First at Orlando,

65. *See* note 41 *supra*.
66. *In re* Griffiths, 413 U.S. 717 (1973) (state bar cannot exclude aliens); Sugarman v. Dougall, 413 U.S. 634 (1973) (state cannot exclude aliens from civil service employment); Graham v. Richardson, 403 U.S. 365 (1971) (state cannot exclude aliens from welfare benefits).

a large holding company controlling thirty-seven banks.[1] The IRS directed the audit of Sun First National, the lead bank, as part of this investigation. Sun was cooperative at first, providing free access to most of its files. Then the IRS decided to examine the common trust fund to determine Sun's tax reporting performance concerning various trusts it managed.[2]

The revenue agent in charge secured the names of approximately 150 individual trusts and randomly selected thirty-two accounts for a closer examination. The bank was requested to furnish:

> As to each of the trusts set forth on the attached list for which the bank has fiduciary responsibilities, the retained copy of Form 1041 [Fiduciary Income Tax Return] filed by the bank as trustee for the years 1970 and 1971; the trust declaration or instrument establishing or creating the trust; all records of income and disbursements of each trust; records in connection with the investment of trust funds; records of assets contributed to the trust; and the Employer Identification Number of each of the trusts.[3]

The bank's trust officer offered to provide the copies with names of the trusts blanked out to protect the privacy of the bank's customers. This made the agent suspicious of the accuracy of the returns and he decided to examine the trusts more closely.[4] He served the trust officer with a summons directing him to appear to testify regarding the trusts, and to bring requested documents.[5]

The bank refused to comply with the summons on two grounds. First, the requested materials were not relevant to the ongoing audit of First at Orlando.[6] Second, enforcement of the summons would subject the trust and its beneficiaries to an IRS "fishing

1. United States v. Sun First National Bank of Orlando, 510 F.2d 1107 (5th Cir.), *cert. denied*, 96 S. Ct. 273 (1975).

2. The IRS agent testified that only the performance of the bank as trustee was being investigated, and that the tax returns of the beneficiaries would not be investigated at that time. *Id.* at 1110.

3. *Id.* at 1107-08. Form 1041 for fiduciaries is the counterpart of the form 1040 individual income tax form. It covers income inclusions, exemptions, and deductions of the trust itself. In *Sun*, the IRS desired to examine the common trust fund and audit the interest equalization taxes reported by Sun. Interest equalization basically was an attempt to stem foreign investment, where interest rates were higher, by taxing such investments to "equalize" them with investments in the United States. *See* INT. REV. CODE OF 1954, §§ 4911-20.

4. There may have been some ill will between the agent and the bank. When the bank sought to protect its rights, the agent retaliated quickly with the summons. The Fifth Circuit quoted the remarks of the district court which suggested the possibility that suspicion of improper returns was not the reason for the agent's desire for the information and that enforcement of the summons might be denied for lack of good faith on his part. 510 F.2d at 1110.

5. INT. REV. CODE OF 1954, § 7602(3).

6. *See* United States v. Powell, 379 U.S. 48, 57 (1964).

expedition" in violation of the search and seizure provisions of the fourth amendment.[7]

The Fifth Circuit Court of Appeals ordered enforcement of the summons. It found that the IRS had no ulterior purpose in seeking the requested information. In the court's opinion, a good faith investigation was being conducted, and the materials were relevant to the investigation.[8]

The fourth amendment objection was disposed of in a conclusory manner.[9] The court admitted that its opinion did not squarely address the issues raised because the facts in the record did not disclose "arbitrariness."[10]

Despite the court's avoidance of the fourth amendment issue, *Sun* is a correct application of present authorities on standing and intervention.[11] However, this article will attempt to demonstrate that those authorities are unsound and unjustifiably preclude taxpayers and third parties from raising fourth amendment objections in cases like *Sun*, where the summoned parties possess an arguably protectable privacy right.

STATUTORY FRAMEWORK

The Internal Revenue Code grants the Secretary of the Treasury and his delegates broad investigatory powers.[12] Section 7602(2) provides for a summons power to require production of materials relevant to an investigation. The summons can be served upon the potential taxpayer or, more importantly, third parties having possession of relevant data. Section 7602(3) provides for the taking of sworn testimony of the taxpayer or third parties.[13] If the

7. United States v. Dauphin Deposit & Trust Co., 385 F.2d 129, 131 (3d Cir. 1967), *cert. denied*, 390 U.S. 921 (1968).
8. 510 F.2d at 1109-10.
9. The court merely cited United States v. Roundtree, 420 F.2d 845 (5th Cir. 1969), in which a fourth amendment objection was raised by the taxpayer and extensive analysis given to the issue by the court.
10. 510 F.2d at 1108. What the court means by "arbitrariness" is uncertain. The fourth amendment proscription concerns "unreasonable" searches. Arbitrariness would certainly be unreasonable, but such a high standard does not have to be met by the taxpayer.
11. *See* text accompanying notes 63-66 *infra*.
12. INT. REV. CODE OF 1954, § 7601.
13. *Id.* § 7602(3).

taxpayer or third party refuses to comply, the IRS can seek enforcement under either section 7402(B) or section 7604(A), granting jurisdiction to United States District Courts to compel compliance.[14] Refusal to comply with an order granting enforcement may result in a conviction for contempt. Wilful failure to comply can lead to criminal penalties under section 7210,[15] although this has rarely been invoked.[16]

Standard for Enforceability

In *United States v. Powell*,[17] the Supreme Court held that the IRS need not prove probable cause to obtain enforcement of a section 7602 summons; the IRS does not have to show probable cause to believe that the taxpayer under investigation has unpaid taxes. *Powell* announced a four-pronged test for enforceability of the summons:

> He [the Commissioner] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed.[18]

The Supreme Court in *Powell* indicated that even when the Commissioner satisfies the four-pronged test, the taxpayer can still challenge the summons "on any appropriate ground."[19] Though the language of the *Powell* decision is broad,[20] subsequent case law has sharply restricted those grounds.

Nonfourth Amendment Challenges

There are five basic, nonfourth amendment challenges to an IRS summons. To discuss each extensively would be beyond the scope of this Recent Development. However, the five basic challenges will be mentioned briefly to delimit the distinctive fourth amendment challenge.[21]

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14. *Id.* §§ 7604(A), 7402(B).
15. *Id.* § 7210.
16. *Compare* United States v. Becker, 259 F.2d 869 (2d Cir. 1958) *with* Reisman v. Caplin, 375 U.S. 440, 447 (1964).
17. 379 U.S. 48 (1964).
18. *Id.* at 57-58. It is important to note that relevancy under this test is not subject to the rigid evidence rules, but has been held to be data which would throw light on the matter in issue. *See* United States v. Ruggeiro, 425 F.2d 1069 (9th Cir. 1970).
19. 379 U.S. at 58.
20. *Id.* Reisman v. Caplin, 375 U.S. 440, 449 (1964).
21. This is particularly important when considering that the standard for fourth amendment purposes is reasonableness and all five of the chal-

The first challenge is based on the criminal purpose doctrine. In *Donaldson v. United States*,[22] the Supreme Court held that a summons may not be used to aid an investigation which may culminate in a recommendation for criminal prosecution of the taxpayer. However, the taxpayer must prove that the IRS's *sole* purpose is to obtain the data for criminal prosecution or that the inquiry has "dominant criminal overtones."[23] The likelihood that the taxpayer will sustain the burden is obviously slim.[24]

The second nonfourth amendment challenge alleges that the IRS is conducting an impermissible, general research project. In *United States v. Humble Oil & Refining Co.*,[25] the IRS sought enforcement of a summons ordering Humble Oil to reveal names of many of its lessors. The IRS was researching to determine whether any of the lessors might have underpaid taxes.[26] The Fifth Circuit held that the IRS lacked authority to issue a research summons when no specific individuals are under investigation. In effect, the court created a research-investigation dichotomy; while the IRS may investigate specific taxpayers, it may not engage in general research.[27]

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lenges could add or detract as factors in the determination of reasonableness. *See* Oklahoma Press Publ. Co. v. Walling, 327 U.S. 186, 208 (1946).

22. 400 U.S. 517 (1971).

23. United States v. Roundtree, 420 F.2d 845, 852 (5th Cir. 1969). The fact that the evidence *may* be used in a later prosecution does not invalidate the summons. Venn v. United States, 400 F.2d 207, 210 (5th Cir. 1968).

24. However, it has been accomplished. *See* United States v. Zack, 375 F. Supp. 825 (D. Nev. 1974).

25. 488 F.2d 952 (5th Cir. 1974), *cert. granted, vacated, and remanded*, 421 U.S. 943 (1975). The court vacated in light of *Bisceglia*. Whether a different result will occur remains uncertain at this time.

26. *Id.* at 955.

27. The court, characterized the difference as follows:

> Section 7601 empowers the Secretary of the Treasury or his delegate *to make inquiries* concerning all persons who may be liable to pay any internal revenue tax. Section 7602, on the other hand, authorizes the IRS to *examine* books and records for the purpose of ascertaining the correctness of any return and the making of a return where none has been filed. The distinction between a section 7601 inquiry and a section 7602 examination, though perhaps elusive, . . . becomes more salient when one considers first, that the inquiries are to be conducted of "all persons" while the examinations are to be of "any person," and second, that the inquiries may occur to the extent the Secretary deems it practicable and from time to time while the examination may occur for the purpose of ascertaining the correctness of any return. *Id.* at 960.

A third attack is that the IRS is harassing the taxpayer. An IRS summons may not be used "to harass the taxpayer or to put pressure on him to settle a collateral dispute."[28] A court will not allow a summons to be abused,[29] but again the burden of proving such abuse is on the taxpayer.[30]

Next, the taxpayer can attack the summons on fifth amendment grounds. The fifth amendment privilege against self-incrimination has historically been the taxpayer's foremost protection against an IRS summons. This protection, however, is meager. No fifth amendment challenge is available to the taxpayer if the requested materials are in the hands of a third party.[31] Also, an incorporated organization, such as a bank, may not assert the "personal" fifth amendment privilege.[32]

Finally, the taxpayer can challenge overbroad, John Doe summonses. John Doe summonses are utilized by the IRS to secure disclosure of names of unknown taxpayers, suspected of tax liability, from third parties who have had financial dealings with that taxpayer.

The recent Supreme Court decision of *United States v. Bisceglia*[33] has given the IRS greater power to use John Doe summonses. In *Bisceglia*, a bank received a deposit of a large sum of "paper thin" $100 bills showing "severe deterioration." The IRS suspected the depositor had not reported the money. To determine that depositor's name, the IRS issued a scatter-shot John Doe summons covering all the bank's depositors of large sums of money in the relevant time period.[34] The Supreme Court enforced the summons even though there was no ongoing audit of a particular return.[35]

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28. United States v. Powell, 379 U.S. 48, 58 (1964).
29. *Id.*
30. *See* Venn v. United States, 400 F.2d 207, 210 (5th Cir. 1968). However, the taxpayer has substantial prehearing discovery rights to investigate the Government's purpose where such purpose is in issue and may affect the legality of the summons. The IRS is afforded protection from abuse of these discovery rights. *See* United States v. Roundtree, 420 F.2d 845, 852 (5th Cir. 1969); FED. R. CIV. P. 26(b), 30(d).
31. Couch v. United States, 409 U.S. 322 (1973); United States v. White, 477 F.2d 757, *aff'd en banc on rehearing*, 487 F.2d 1335 (5th Cir. 1973) (per curiam), *cert. denied*, 419 U.S. 872 (1974). However, a very narrow attorney-client privilege does exist. *See* Comment, *The Attorney-Client Privilege*, 2 HOFSTRA L. REV. 185 (1974).
32. United States v. White, 322 U.S. 694, 699 (1944).
33. 420 U.S. 141 (1975).
34. *Id.* at 142. *See* note 67 *infra* concerning "scattershot" summonses.
35. *Compare* Mr. Justice Stewart's dissent at 420 U.S. 141, 159 (1975)

FOURTH AMENDMENT CHALLENGE TO AN IRS SUMMONS

It is interesting to note that in all the leading cases concerning the five nonfourth amendment challenges, a fourth amendment challenge was raised.[36] Yet none of the foregoing cases reached the merits of the question as to whether the summons constituted an unreasonable search violating the fourth amendment.[37]

The privacy right protected by the fourth amendment[38] extends to the taking of records under compulsory process. Thus the service of a summons compelling production of records constitutes a search.[39] Except in certain carefully defined exceptions,[40] a search without proper consent must be authorized by a search warrant.[41]

However, because the IRS must seek judicial enforcement of a summons,[42] it has been held that a summons is equivalent to a

with United States v. Theodore, 479 F.2d 749 (4th Cir. 1973). The Supreme Court's failure to cite and disapprove *Theodore*, and Mr. Justice Blackmun's limited concurrance (Powell, J., joining), may indicate the continuing vitality of *Theodore's* limitations on John Doe summonses. *Theodore* held that the use of "open-ended" John Doe summonses was unauthorized by section 7602. The court did not explain what it meant by "open-ended." This ambiguity has led to some criticism of the decision. *See* Comment, 31 WASH. & LEE L. REV. 165, 180 (1974). However, the meaning of the term *can* be clarified. A *non*"open-ended" summons is one in which the unnamed taxpayer can be sufficiently identified. Investigations of unknown members of a class to disclose possible tax liability of unknown persons within the class are therefore "open-ended." *Compare* United States v. Humble Oil, 488 F.2d 952 (5th Cir. 1974) *with* United States v. Bisceglia, 420 U.S. 141 (1975).

36. United States v. Bisceglia, 420 U.S. 141, 148 n.2 (1975); Couch v. United States, 409 U.S. 322, 325 n.6 (1973); United States v. Powell, 379 U.S. 48, 52-53 (1964); United States v. Humble Oil, 488 F.2d 952, 955 n.6 (5th Cir. 1974); United States v. Roundtree, 420 F.2d 845, 851 (5th Cir. 1969). The fourth amendment issue was not as prominent in Donaldson v. United States, 400 U.S. 517 (1971), which expounded the criminal purpose doctrine, but it is definitely unreasonable for the IRS to use summonses to obtain information for criminal prosecution.

37. The closest a court has been to deciding the merits of a fourth amendment issue was in United States v. Roundtree, 420 F.2d 845 (5th Cir. 1969), but the reasoning employed in that case is suspect because the court seemed to be confusing the *Powell* relevancy test with the reasonableness test.

38. Katz v. United States, 389 U.S. 347 (1967).

39. Boyd v. United States, 116 U.S. 616, 632 (1886).

40. *See* Chimel v. California, 395 U.S. 752 (1969).

41. Katz v. United States, 389 U.S. 347, 350-52 (1967).

42. INT. REV. CODE OF 1954, §§ 7604(A), 7602(B).

search warrant.[43] Thus, the real problem is defining the fourth amendment standard for judicial enforcement of summons. The test of reasonableness is the standard for reviewing investigatory searches by administrative agencies.[44] The Supreme Court in *Camara v. Municipal Court*[45] relaxed the probable cause standard in noncriminal investigatory searches. Under *Camara*, the reasonableness of the summons is determined by balancing the Government's need to know against the invasion of individual privacy.[46]

At first glance, this balancing test appears to be a workable accommodation of the competing interests. In practice, the courts have consistently balanced in the Government's favor, diminishing the privacy rights of citizens.[47]

Fourth amendment challenges by taxpayers and summoned third parties have been largely unsuccessful. As a matter of tactics, the IRS prefers to wait until the taxpayer transfers his records to a third party.[48] The IRS thereby avoids any fifth amendment self-incrimination objection and lessens the possibility of a successful fourth amendment challenge by the taxpayer.[49] The taxpayer's opportunity to intervene in an action by the IRS to enforce a summons against a third party is permissive only.[50]

A recent court decision illustrates the taxpayer's limited ability to intervene. In *Garrett v. United States*,[51] a group of taxpayers sought to intervene in an action by the IRS to enforce a summons against their bank. The Ninth Circuit, in denying intervention,

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43. United States v. Roundtree, 420 F.2d 845, 849 (5th Cir. 1969).
44. *Id.*
45. 387 U.S. 523 (1967).
46. The Supreme Court explained the relaxation of the probable cause standard to the more general standard of reasonableness as follows:

> The warrant procedure is designed to guarantee that decision to search private property is justified by a reasonable government interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. . . . Such an approach neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area. It merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy. *Id.* at 539.

47. Miller, *Privacy in the Corporate State: A Constitutional Value of Dwindling Significance*, 22 J. PUB. L. 1, 3 (1973).
48. Flippen, *The Internal Revenue Service Summons: An Unreasonable Expense Burden on Banks and an Invasion of Depositors' Privacy?*, 12 AM. BUS. J. 249, 259 (1974).
49. *See* Couch v. United States, 409 U.S. 322 (1973).
50. Donaldson v. United States, 400 U.S. 517, 527-31 (1971).
51. 511 F.2d 1037 (9th Cir. 1975).

referred to the ease with which the taxpayer's objections could be made, the inhibiting effect on the investigation of the discovery rights the taxpayer would exercise, and the slim probability of the success of the intervenors' fourth amendment challenge.[52]

Third party challenges to an IRS summons are even more limited than taxpayer challenges. The federal courts profess that they carefully scrutinize an IRS summons directed to a party other than the taxpayer under investigation.[53] Where a summons is directed at a large corporation which has had dealings with large numbers of yet unidentified taxpayers, the reasonableness of the summons should be subject to a closer scrutiny because many more taxpayers' privacy rights are in jeopardy.[54] But Congress has generally granted broad investigatory powers over corporations.[55] A corporate third party has only a limited fourth amendment protection against indefinite or overbroad summonses,[56] and against imposition of an unreasonable burden of producing the summoned material.[57]

United States v. Bisceglia[58] illustrates how unsuccessful corporate third parties have been in their attempt to resist summonses on fourth amendment grounds. In the past, the IRS had to issue a John Doe summons "incident to an ongoing, individualized investigation of an identified party."[59] As Mr. Justice Stewart noted in his dissenting opinion, *Bisceglia* sanctioned greater invasions of the taxpayers' and third party's privacy.

> Today's decision shatters this long line of precedent. For this summons there was no investigatory predicate. The sole indica-

52. *Id.* at 1038-39.
53. United States v. Humble Oil, 488 F.2d 952, 963 (5th Cir. 1974); Venn v. United States, 400 F.2d 209, 211-12 (5th Cir. 1968); United States v. Harrington, 388 F.2d 520, 523 (2d Cir. 1968).
54. Comment, 31 WASH. & LEE L. REV. 165, 169 (1974).
55. United States v. Dauphin Deposit & Trust Co., 385 F.2d 129, 131 (3d Cir. 1967), *cert. denied*, 390 U.S. 921 (1968); United States v. Harrington, 388 F.2d 520, 523 (2d Cir. 1968).
56. Oklahoma Press Publ. Co. v. Walling, 327 U.S. 186, 208 (1945).
57. Blair v. United States, 250 U.S. 273 (1919); United States v. Dauphin Deposit & Trust Co., 385 F.2d 129, 130 (3d Cir. 1967); Flippen, *The Internal Revenue Service Summons: An Unreasonable Expense Burden on Banks and an Invasion of Depositors' Privacy?*, 12 AM. BUS. J. 249, 259 (1974).
58. 420 U.S. 141 (1975).
59. *Id.* at 156.

> tion of this John Doe's tax liability was the character of the deposit itself. Any private economic transaction is now fair game for forced disclosure, if any IRS agent happens in good faith to want it disclosed.[60]

However, *Bisceglia* may be limited to its facts. Mr. Justice Blackmun's concurring opinion suggests the holding is limited to cases in which there is an "overwhelming probability, if not a certitude, that one individual was responsible for deposits . . . that strongly suggest liability for unpaid taxes."[61] Nevertheless, *Bisceglia* certainly does not bode well for fourth amendment challenges by corporate third parties.

Sun Reconsidered

The threat to privacy is aggravated in cases like *Sun*. The IRS issued the summons incident to an investigation of the *bank*. The *grantors* and *beneficiaries* of the trusts were not under investigation. But the information sought by the IRS would have revealed much about these citizens which they may have reasonably expected to keep private. The bank was willing to provide free access to information concerning taxes owed by the trust. But the bank, as fiduciary, was understandably reluctant to divulge information that might reveal possible tax liability of the grantors or beneficiaries.[62]

The question is whether this invasion of privacy is justified.

At the outset, it must be conceded that *Sun* is a correct application of the prevailing standing and intervention rules. *California Bankers Association v. Shultz*,[63] *Bisceglia*, and *Garrett* lend support. In *California Bankers Association*, the plaintiff bank and depositors challenged the reporting provisions of the Bank Secrecy Act[64] on

60. *Id.* at 159.
61. *Id.* at 151.
62. The banks in Florida have been held to a duty of nondisclosure concerning records in their possession relating to parties with whom they have financial dealings. *See* Milohnich v. First Nat'l Bank, 224 So. 2d 759 (Fla. App. 1969). Of course, the bank must disclose facts when *properly ordered* by the IRS. *See* De Masters v. Arend, 313 F.2d 79, 86 (9th Cir.), *appeal dismissed*, 375 U.S. 936 (1963). But a summons in violation of the fourth amendment would not be proper, and the bank would be in violation of its duty if it did not raise the fourth amendment objection to protect its clients.
63. 416 U.S. 21 (1974).
64. 12 U.S.C. §§ 1730d, 1829b, 1951-59 (1970). The act requires banks to file a report with the Treasury Department whenever a customer engages in a deposit of over $10,000, and all citizens to file a report whenever a foreign transaction involving American currency is in excess of $5000.

first, fourth and fifth amendment grounds. The Supreme Court held the provisions constitutional, but did not reach the fourth amendment objection. The plaintiff depositors did not allege that they were subject to the reporting provisions and, hence, lacked standing.[65] The more difficult issue of whether the bank could vicariously assert the privacy rights of the depositors was not reached as no injury was alleged.[66]

Bisceglia enforced a "scatter-shot" John Doe summons[67] issued by the IRS to a third party bank, despite the incidental exposure of nonsummoned depositors and the lack of an on-going investigation.

Garrett denied intervention by taxpayers to a third party summons because of the inhibiting effect on the IRS's investigation.[68]

In principle, *California Bankers Association*, *Bisceglia*, and *Garrett* seem to value privacy rights too lightly. A commentator on *California Bankers Association* correctly pointed out:

> If the individual reporting of an individual's banking transactions is not an infringement of privacy, the incidental exposure of non-summoned depositors' records during an IRS investigation seems less worthy of consideration.[69]

The current standing and intervention rules place the taxpayer and third party in an untenable position. The third party, usually a corporation, has a very limited fourth amendment protection[70] and lacks standing to assert the privacy rights of the taxpayer.[71] The taxpayer will rarely be granted intervention to challenge a third party summons on fourth amendment grounds, though he may possess arguably protectable privacy rights.[72] The net result is that the taxpayer's privacy rights receive inadequate protection when the IRS serves its summons on the third party.

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65. 416 U.S. 21, 51 (1974).
66. *Id.* *See* text accompanying note 75 *infra.*
67. The summons was "scattershot" in that it was aimed at a large number of depositors over a long period of time in order to discover the identity of just one of those depositors.
68. *See* text accompanying notes 51-52 *supra.*
69. Flippen, *The Internal Revenue Service Summons: An Unreasonable Expense Burden on Banks and an Invasion of Depositors' Privacy?*, 12 AM. BUS. J. 249, 259 (1974).
70. *See* Oklahoma Press Publ. Co. v. Walling, 327 U.S. 186, 208 (1945).
71. California Bankers Ass'n v. Shultz, 416 U.S. 21, 51 (1974); Moose Lodge v. Irvis, 407 U.S. 163, 166 (1972).
72. Garrett v. United States, 511 F.2d 1037, 1039 (9th Cir. 1975).

There are two directions the courts, or Congress, could take to protect taxpayer and third party rights. Intervention of right could be granted to nonsummoned citizens. This was the law prior to 1971.[73] But the prospect of large numbers of intervenors challenging IRS actions to enforce third party summonses led the Supreme Court to retreat from this position and declare intervention to be permissive only.[74] The practical result is that few taxpayers ever get into court to assert their rights.

The other direction would be to grant the summoned third party standing to vicariously assert the nonsummoned parties' rights, as the bank was attempting to do in *Sun.* There is authority for granting standing to a noninjured party to vindicate the rights of an injured party. The Supreme Court noted in *California Bankers Association*:

> It is true in a limited class of cases this Court has permitted a party who suffered injury as a result of the operation of a law to assert his rights even though the sanction of the law was born by another, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and conversely, the Court has allowed a party upon whom the sanction falls to rely on the wrong done to a third party in obtaining relief, *Barrows v. Jackson*, 346 U.S. 249 (1953); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Whether the bank might in other circumstances rely on an injury to its depositors, or whether, instead, this case is governed by the general rule that one has standing only to vindicate his own rights, e.g., *Moose Lodge v. Irvis*, 407 U.S. 163, 166 (1972), need not now be decided, since, in any event, the claim is premature.[75]

Granting standing to the financial institution seems the more logical course. It is consistent with the duty of nondisclosure imposed on the banks,[76] and the confidentiality of citizen transactions with large financial institutions. In addition, tax investigations will not be inhibited by attempted intervention of large numbers of taxpayers and the discovery rights they will employ. More importantly, unreasonable disclosure of nonsummoned citizens' private financial arrangements can be eliminated.

If either of these courses is adopted, the courts will have to reach the merits of the fourth amendment objection. The *Camara* balancing test for reasonableness should be utilized to determine whether enforcement will violate the fourth amendment.[77] *Powell*

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73. Reisman v. Caplin, 375 U.S. 440 (2d Cir. 1959).
74. Donaldson v. United States, 400 U.S. 517 (1971).
75. 416 U.S. 21, 51 (1974).
76. *See* note 62 *supra.*
77. United States v. Roundtree, 420 F.2d 845, 852 (5th Cir. 1969), is the only decision reaching the fourth amendment objection on the merits, and purported to use the *Camara* reasonableness test.

set only minimum requirements the IRS must always satisfy.[78] *Powell* disposed of the probable cause requirement, but not the requirement that the invasion of privacy be reasonable.[79]

Under the *Camara* test, the Government's need to know is balanced against the invasion of privacy of the individual. Supporting the Government's position are such considerations as the public interest in enforcing the tax system; the principle of self-assessment and voluntary compliance with the code; the fact that the IRS must place reliance on the taxpayer's own records; and the recognition that a search of papers is less onerous than a search of person or property.[80]

The invasion of privacy element is difficult to evaluate. Much depends on the facts. In *Sun*, there were many considerations supporting protection of trust records. The IRS was investigating the bank, not the grantors or beneficiaries. The audit was of the large financial institution, controlling thirty-seven banks, of which the incidental trust department audit of *Sun* was insignificant in comparison. The IRS's purpose in seeking this information was suspect.[81] The information sought by the IRS in auditing the tax reporting performance of the bank as trustee revealed data in which the beneficiaries arguably would have a reasonable expectation of privacy. If the bank had been granted standing to vicariously assert the nonsummoned citizen's privacy rights, the court would have been forced to reach the merits of the fourth amendment challenge; and in light of the numerous circumstances supporting the trust records' protection, the court might well have concluded that the summons violated *Camara*'s reasonableness test.[82]

In the final analysis, the courts should reach the merits and balance the *extent of privacy invasion* of the nonsummoned citizens

78. *See* text accompanying note 19 *supra.*

79. The courts seem to be confusing the *Powell* relevancy test with the *Camara* reasonableness test. *See* United States v. Roundtree, 420 F.2d 845, 851-52 (5th Cir. 1969), where the court, in effect, made the two tests identical.

80. *See* United States v. Roundtree, 420 F.2d at 852.

81. *See* note 4 *supra.*

82. This is especially true considering the fact that the courts profess to more carefully scrutinize a third party summons. United States v. Humble Oil, 488 F.2d 952, 963 (5th Cir. 1974); Venn v. United States, 400 F.2d 209, 211-12 (5th Cir. 1968).

and the financial institution against the IRS's *degree of need* for the summoned material. Under this test, relevancy is only a factor for reasonableness. This test is consistent with *Powell*, as relevancy is the minimum standard the IRS must always meet. Because particular information is relevant does not mean that it is reasonable to produce it. And citizens should have an opportunity to challenge even relevant materials in an investigation which will affect their private financial transactions.

Conclusion

More and more citizens must use financial institutions to manage their affairs, especially in trust arrangements. But it does not necessarily follow that they should have any less expectation of privacy in their financial transactions.[83] They, or the institution with which they are dealing, should at least have opportunity to assert their fourth amendment rights. The present standing and intervention rules arbitrarily deny them that opportunity.

In addition, many times it is uncertain whether the information secured from an investigation will lead to criminal charges against the taxpayer or third party.[84] Yet the IRS often has such a degree of suspicion that criminal charges *should* have been instituted but they refrain from doing so to evade the criminal purpose doctrine.[85] The invasion of privacy is great when the IRS is investigating a concern like Sun, which handles the financial affairs of a large number of taxpayers. By auditing the larger concern, the IRS obtains much information about *classes* of taxpayers for use in research projects monitoring segments of the economy.[86]

The courts tend to avoid the fourth amendment issue. When directly confronted with the issue, as in *Sun*, the courts have relied on decisions erecting procedural barriers to asserting fourth amendment rights. The courts never reach the merits of the privacy issue. As long as the courts manipulate the standing and intervention rules to evade the issue, as the court did in *Sun*, there will be no fourth amendment rights of nonsummoned citizens. The courts should reconsider the procedural restraints they have placed on protecting substantive fourth amendment rights with Mr. Justice Douglas' words in mind:

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83. Couch v. United States, 409 U.S. 322, 343-44 (1973) (Douglas, J., dissenting).

84. *See* United States v. Roundtree, 420 F.2d 845, 850 (5th Cir. 1969).

85. This argument was raised, but not reached, in Garrett v. United States, 511 F.2d 1037, 1038 (9th Cir. 1975).

86. *See* text accompanying notes 25-27 *supra*.

> One's privacy embraces what the person has in his home, his desk, his files, and his safe as well as what he carries on his person. It also has a very meaningful relationship to what he tells any confidant—his wife, his minister, his lawyer, or his tax accountant. The constitutional fences of law are being broken down by an ever-increasing Government that seeks to reduce every person to a digit.[87]

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87. Couch v. United States, 409 U.S. 322, 343-44 (1973) (Douglas, J., dissenting).