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Amanda A. Cochran

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COMMENTS

EVIDENCE HANDED TO THE IRS CRIMINAL DIVISION ON A "CIVIL" PLATTER: CONSTITUTIONAL INFRINGEMENTS ON TAXPAYERS

AMANDA A. COCHRAN, CPA*

INTRODUCTION

Fear of being audited by the Internal Revenue Service (IRS) pervades the lives of American taxpayers.¹ Taxpayers anxiously fear that the IRS may discover some evidence of taxpayer mis-reporting, and seek retribution. But while the threat of a hefty monetary penalty in conjunction with a routine civil tax audit may devastate a tax-avoiding citizen, the peril of criminal punishment imposes draconian consequences by comparison.² Accordingly, taxpayers, if audited, may justifiably fear that the true purpose of an IRS investigation is to garner evidence to support a criminal prosecution. Often, this fear is realized.³ Al-

* J.D. candidate, Northwestern University School of Law, 2002. The author is also a certified public accountant.

¹ BORIS KOSTELANETZ & LOUIS BENDER, CRIMINAL ASPECTS OF TAX FRAUD CASES 59 (3d ed. 1980).

² *Id.*

³ See *United States v. Serlin*, 707 F.2d 953, 957 (7th Cir. 1983) ("The typical deceit case involves a taxpayer who claims that his volubility was induced by assurances that the investigation was 'routine' and only civil rather than criminal."); see also *United States v. McKee*, 192 F.3d 535 (6th Cir. 1999) (taxpayer asserted that the IRS failed to adhere to its own rules when it conducted a criminal investigation under the guise of a civil audit); *United States v. Peters*, 153 F.3d 445, 447 (7th Cir. 1998) (taxpayer claimed that the IRS obtained evidence in violation of her constitutional rights by telling her that they were conducting a routine civil tax audit when in fact they were carrying out a covert criminal tax investigation), *cert. denied*, 525 U.S. 1070 (1999); *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977) (suppressing evidence obtained in violation of taxpayer's constitutional rights when the IRS agent deceived taxpayer

though an IRS examination may commence as a civil audit, IRS agents frequently use information garnered during a civil investigation to instigate criminal proceedings against unsuspecting citizens.⁴

The IRS divides the responsibility of enforcing the nation's tax laws between its civil and criminal divisions.⁵ During a typical *civil* tax investigation, an IRS agent's primary responsibility is to determine the correctness of a tax return as filed.⁶ In comparison, the IRS agent's main objective during a *criminal* tax investigation is to determine whether the taxpayer has engaged in fraudulent tax reporting.⁷ Interestingly, the most frequent catalyst of a criminal investigation is the civil audit itself.⁸ However, the juncture where a civil examination turns criminal is not always clear.⁹

Because the American legal system invokes strict constitutional safeguards to protect individuals subject to criminal investigations,¹⁰ it is critical that IRS regulations prohibit civil agents from circumventing these safeguards by using the civil audit to garner evidence for a criminal prosecution. The situation that most taxpayers fear is that they will permit an IRS agent to examine their private books and records during the course of a routine audit, and the agent will subsequently use this information for criminal prosecution. Accordingly, the IRS has explicitly enacted regulations that prohibit an IRS agent from

into providing evidence for criminal conviction during a civil audit); Craig D. Budner, Note, *The Exclusionary Rule's Application in Tax Proceedings: Reconciling the Rule's Purpose for Tax Defendants*, 68 TEX. L. REV. 789, 801 (March 1990) ("The [IRS's] implied veto power enables the IRS agent to commit 'abusive and arbitrary acts' at the expense of the taxpayer's constitutional liberties." (citing DAVID BURNHAM, *A LAW UNTO ITSELF: POWER, POLITICS AND THE IRS* 64-66 (1989))).

⁴ See, e.g., *McKee*, 192 F.3d at 544 (admitting that civil revenue agents sometimes perform the same function as their criminal division counterparts, and this evidence is often admissible at criminal trial); BURNHAM, *supra* note 3, at 46-47 (noting that "revenue agents sometimes use their special status as investigators of civil cases to camouflage the gathering of evidence for the far more serious business of pursuing indictment on criminal charges").

⁵ *Peters*, 153 F.3d at 447.

⁶ *Id.*

⁷ 1 IAN M. COMISKEY ET AL., *TAX FRAUD AND EVASION* ¶¶ 4.03, 4.04 (6th ed. 1995).

⁸ MICHAEL L. SALTZMAN, *IRS PRACTICE AND PROCEDURE* ¶¶ 4.02[1][a], 12.03[1] (1981).

⁹ *McKee*, 192 F.3d at 535 (conceding that the "substantive distinction between an IRS civil audit and a criminal tax investigation is not always clear").

¹⁰ These include the right to remain silent, U.S. CONST. amend. V, and the right to obtain representation from counsel, U.S. CONST. amend. VI.

developing a criminal case against a taxpayer under the guise of a civil investigation.¹¹ If the agent uncovers evidence of criminal wrongdoing during the course of a civil audit, the agent must then refer the case to the criminal division for prosecution.¹² Nonetheless, the stark reality is that revenue agents often gather the same evidence as their criminal division counterparts and effectively offer this evidence to the criminal division on a silver platter.¹³

These transgressions severely threaten the American voluntary tax reporting system.¹⁴ The present revenue collection system centers on the self-reporting and voluntary compliance of taxpayers.¹⁵ However, if taxpayers are uncertain as to whether tax investigations are criminal or civil in nature, they will not submit to routine tax examinations and the system of voluntary compliance will collapse.¹⁶ While the IRS properly requests permission to examine books and records of taxpayers to collect tax revenue, use of such information to secure evidence for criminal prosecution poses a danger to the entire system.¹⁷

What is worse, taxpayers frequently have little recourse against agent misconduct based on the current state of the law.¹⁸ Legislation fails to specify a remedy for violations of taxpayers' constitutional rights,¹⁹ although these infringements clearly violate IRS regulations. Furthermore, judicial action insufficiently redresses these wrongs. Courts defer tremendous judgment to

¹¹ Internal Revenue Manual [hereinafter IRM] §§ 4565.21 (1999).

¹² IRM § 4565.21 (1999); see discussion *infra* Section I.C.

¹³ *McKee*, 192 F.3d at 544.

¹⁴ *United States v. Flora*, 362 U.S. 145 (1958) (noting that the American "system of taxation is based on voluntary assessment and payment, not upon distraint"); COMISKEY ET AL., *supra* note 7, ¶ 1.03 n.74 (recognizing that "voluntary compliance" has long been a favorite slogan of generations of politicians and IRS officials, and is the basis of our tax system); KOSTELANETZ, *supra* note 1, at 72.

¹⁵ COMISKEY ET AL., *supra* note 7, ¶ 1.03; KOSTELANETZ, *supra* note 1, at 72.

¹⁶ COMISKEY ET AL., *supra* note 7, ¶ 1.03;

¹⁷ *Id.*

¹⁸ See *United States v. Caceres*, 440 U.S. 741, 761 (1979) (Marshall, J., dissenting) (noting concern about the IRS's failure to detect or disapprove of violations of its own internal rules).

¹⁹ See Budner, *supra* note 3, at 790 (Taxpayer Bill of Rights "fails to specify any remedy for violations of taxpayers' constitutional rights" (citing PRENTICE HALL INFORMATION SERVICES, A COMPLETE GUIDE TO THE TECHNICAL AND MISCELLANEOUS REVENUE ACT OF 1988, ¶ 901 at 233 (1988))).

the individual IRS agents, and generally do not enforce vulnerable taxpayers' rights against the IRS.²⁰

This Comment proposes that when the IRS fails to conduct a criminal investigation in accordance with its own internal regulations, the IRS violates a taxpayer's constitutional rights. This Comment has five parts. Section I discusses the silent transition of an IRS civil audit to a criminal investigation, and the regulations set forth in the Internal Revenue Manual (IRM) that forbid the IRS from conducting a criminal investigation under the guise of a civil audit. Section II argues that the IRM confers legal rights on taxpayers, at the very least, where such provisions safeguard a taxpayer's constitutional rights. Section III argues that the IRM provision that forbids an IRS agent from conducting a criminal investigation under the guise of a civil audit safeguards a taxpayer's Fourth and Fifth Amendment rights, and thus confers substantive rights on a taxpayer such that the taxpayer can challenge violations of the Manual. Section IV contends that regardless of IRS regulations, taxpayers bear a heavy burden in demonstrating that the IRS has violated its Manual because the tests employed by the courts favor the IRS. Finally, Section V concludes that the attention of Congress and the Supreme Court is imperative to declare that IRS regulations have the effect of law, and to provide for a clearer indication of when the IRS violates its own rules. Furthermore, attention of the IRS is necessary to enforce adherence to its own regulations.

I. DUAL CIVIL AND CRIMINAL DIVISIONS OF THE IRS

The Internal Revenue Service (IRS)²¹ divides the responsibility for enforcing the nation's tax laws between two investiga-

²⁰ See *United States v. Michaud*, 860 F.2d 495, 498-99 (1st Cir. 1988) (noting that courts must give considerable weight to the IRS' interpretation of their own regulations); *United States v. Caldwell*, 820 F.2d 1395, 1402 (4th Cir. 1987); *Groder v. United States*, 816 F.2d 139, 143-144 (4th Cir. 1987) (stating that second-guessing a revenue agent's judgment should not become a routine chore for judges because the administration of the revenue laws is a function which, by congressional directive and by expertise, belongs to the IRS (quoting *United States v. Matis*, 476 F. Supp. 1287, 1292-93 (S.D.N.Y.)); *Liberty Financial Services v. United States*, 778 F.2d 1390, 1392 (9th Cir. 1985) (stating that courts hesitate second-guessing a revenue agent's judgment); see also *United States v. McKee*, 192 F.3d 535, 544 (6th Cir. 1999) ("Given the deference that IRS agents must be afforded to carry out their official duties, we cannot say that [the agent] abused her discretion in continuing the investigation . . .").

²¹ The Department of Treasury administers and enforces IRS law. SALTZMAN, *supra* note 8, ¶1.02[1] (1981). The IRS is one of the eleven bureaus of the Department of Treasury. *Id.*

tive divisions: the civil Examination Division and the Criminal Investigation Division (CID).²² This section provides an overview of these two divisions, describes the processes by which the IRS conducts investigations of taxpayers, and concludes by describing the interaction between these two divisions and the typical scenario where a civil audit evolves into a criminal investigation.

A. DUAL FUNCTIONS OF THE EXAMINATION DIVISION AND THE CRIMINAL INVESTIGATION DIVISION (CID)

The Examination Division and the CID represent two distinct vehicles for an IRS investigation of a taxpayer.²³ The Examination Division is the civil arm of the government's tax collecting scheme that is responsible for conducting routine civil tax audits.²⁴ An Examination Division investigator, known as a "revenue agent," is assigned a tax return to investigate

²² *United States v. Peters*, 153 F.3d 445, 447 (7th Cir. 1998), *cert. denied*, 525 U.S. 1070 (1999). The IRS is partially organized by "specialized function." SALTZMAN, *supra* note 8, ¶ 1.02[2]. Personnel organized by specialized function perform one of two types of roles: operations/compliance functions and support functions. *Id.* Operations/compliance functions include: assessment and collection of taxes, determination of the amount of taxes due, investigation of tax fraud, and hearing and deciding taxpayer appeals. *Id.* Comparatively, support functions include technical advisory services, internal auditing and security, personnel management, employee training, facilities operation, fiscal management, planning and research, and public information. *Id.* Note that the Collection Division is the operation/compliance function responsible for collecting rather than enforcing.

²³ *Peters*, 153 F.3d at 447. The Criminal Investigation Division (CID) was previously known as the Intelligence Division (ID). COMISKEY ET AL., *supra* note 7, ¶ 1.01[5].

²⁴ *Peters*, 153 F.3d at 477. The Examination Division is responsible for closing the nation's tax gap, which is the difference between income taxes owed and voluntarily paid. The tax gap has increased dramatically despite the fact that Congress has enacted legislation since the early 1980s specifically designed to reduce it. COMISKEY ET AL., *supra* note 7, ¶ 1.03. "The IRS estimates that in recent years a bit more than 85% of the taxes owed by American taxpayers were actually paid—83% voluntarily and 3.5% as a result of a range of IRS actions designed to improve compliance with the law." The Transactional Records Access Clearinghouse [hereinafter TRAC], *IRS at Work: The IRS and Its Responsibilities*, available at <http://www.trac.syr.edu/tracirs/findings/aboutIRS/irsResponsibilities.html> (last visited Nov. 2, 2001) (TRAC, located at Syracuse University (N.Y.), is a not-for-profit data gathering, research, and distribution organization that provides comprehensive information about the operation of various federal enforcement and regulatory agencies. <http://www.trac.syr.edu/aboutTRACgeneral.html> (last visited Nov. 2, 2001)). "While the tax gap cannot be closed entirely, it is clear that a substantial portion of the tax gap is attributable to individual and corporate nonfilers and evaders from whom unpaid taxes can and should be collected." COMISKEY ET AL., *supra* note 7, ¶ 1.03.

whether the taxpayer has reported the correct income and tax.²⁵ The revenue agent performs numerical calculations, undertakes complex matching programs, and, if necessary, selects the taxpayer for a face-to-face audit.²⁶ In the last scenario, the revenue agent conducts a field examination to determine the correct tax and penalties, and claims for refund or credit.²⁷

A revenue agent begins a typical field examination by telephoning the taxpayer, and informing the taxpayer that he or she is under internal investigation.²⁸ The revenue agent enjoys the broad authority to compel production of information that may be relevant or material to the examination of a return.²⁹ If the taxpayer fails or refuses to furnish the agent with the information requested, the agent may serve a summons to the taxpayer, ordering the taxpayer or the taxpayer's record keeper to

²⁵ SALTZMAN, *supra* note 8, ¶ 8.06. The IRS uses sophisticated computer technology and the accumulated experience of its personnel in the classification and selection of returns for examination. *Id.* ¶ 8.01. Returns are classified as having audit potential by computer analysis which numerically scores tax returns according to a mathematically determined probability of error. Returns with the highest scores—that is, the highest probability of error—are then reviewed manually by experienced agents to confirm audit potential before selection for examination. *Id.* Other circumstances also lead to the selection of a return for examination. Returns with adjusted gross incomes above certain levels and those with respect to which refund or credit claims have been filed are reviewed, and those with audit potential are selected for examination. *Id.*

²⁶ SALTZMAN, *supra* note 8, at ¶ 8.01. After the initial selection, returns are examined via correspondence, office interviews or field examinations. *Id.* Returns selected for field examination by revenue agents present intricate issues requiring more advanced accounting skills and knowledge of the internal revenue laws than auditors performing office examinations must exhibit. *Id.* ¶ 8.06; *see also* TRAC, *IRS at Work: The IRS and Its Responsibilities*, available at <http://www.trac.syr.edu/tracirs/findings/aboutIRS/irsResponsibilities.html> (last visited Nov. 2, 2001) (noting that typically only a relatively small number of taxpayers are examined via field examination).

²⁷ SALTZMAN, *supra* note 8, ¶ 8.02[2]. Revenue agents also conduct field examinations of offers in compromise—based on either doubt as to liability or inability to pay—and even play the role of special field agents when requested, conducting joint examinations with special agents of the CID where tax evasion may exist. *Id.*

²⁸ *Id.* ¶ 8.06[1][d]. Although the revenue agent must inform the taxpayer, not his representative, the IRS expects that frequently the agent will be referred to the taxpayer's accountant or attorney to set a date. *Id.* The revenue agent will telephone the taxpayer's representative for an appointment, but may make an unannounced visit with the approval of his group manager. *Id.* When making the appointment for the examination, the agent is advised to tell the taxpayer or the representative what books and records should be made available. *Id.*

²⁹ I.R.C. § 7602 (2001); SALTZMAN, *supra* note 8, ¶ 8.06[3][b].

produce the requested information.³⁰ The revenue agent then examines the taxpayer's records, customarily on the taxpayer's premises,³¹ and determines if the taxpayer has paid the correct income tax.³² Revenue agents do not carry firearms, nor are they required to provide taxpayers with a *Miranda*-like warning.³³ If the revenue agent discovers discrepancies as a result of various examination procedures, the agent dispatches a notice,³⁴ which includes the tax amount assessed and usually a civil penalty including interest.³⁵

Although an Examination Division audit typically concludes with a civil pecuniary settlement between the IRS and the taxpayer,³⁶ the audit may unearth evidence that causes the revenue agent to refer the case to its criminal division counterpart for investigation.³⁷ Specifically, if a revenue agent uncovers a "firm indication of fraud" during the civil audit—that is, if the revenue agent suspects that the taxpayer knowingly violated the tax laws³⁸—the agent must immediately suspend the civil audit and

³⁰ SALTZMAN, *supra* note 8, ¶ 8.06[3][b]. Although requests for production are typically complied with without resort to a summons, the IRS has broad authority to require production of records. *Id.* The matter may end up before a federal district court, which ultimately decides whether or not to order production. *Id.*

³¹ *Id.* ¶ 8.06[1][d]; see also I.R.C. § 7625(a) (2001).

³² See SALTZMAN, *supra* note 8, ¶ 8.06 ("All examinations require a revenue agent: (1) to identify items that indicate adjustment may be proper, (2) to verify items on the return by gathering appropriate evidence, and (3) to apply the provisions of the Code, as interpreted.").

³³ *United States v. Peters*, 153 F.3d 445, 447 (7th Cir. 1998), *cert. denied*, 525 U.S. 1070 (1999); see *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (explaining that warnings of taxpayers' constitutional rights are required only when a suspect is subjected to custodial interrogation).

³⁴ TRAC, *IRS at Work: The IRS and Its Responsibilities*, available at <http://www.trac.syr.edu/tracirs/findings/aboutIRS/irsResponsibilities.html> (last visited Nov. 2, 2001).

³⁵ *Id.*

³⁶ SALTZMAN, *supra* note 8, ¶ 8.01. At the conclusion of the examination, the examiner may accept the return as filed or assert a deficiency. *Id.* When a deficiency has been asserted, the taxpayer has the option of agreeing or disagreeing with the examiner's findings. *Id.* But, if the taxpayer agrees with the findings, a form is completed setting forth the adjustments and the taxpayer's agreement to the immediate assessment of the resulting deficiency. *Id.* If the taxpayer does not agree with the examiner's adjustments, the examiner will prepare a report which is subject to review, and the taxpayer may eventually obtain judicial review of the assessment. *Id.*

³⁷ *Peters*, 153 F.3d at 447 (revenue agents are told that audit techniques are designed to disclose not only errors in accounting and application of the tax laws, but also irregularities indicating the possibilities of fraud).

³⁸ *Id.* at 447 ("[I]t is the taxpayer's intent to evade taxes that distinguishes a criminal violation from a civil case."); see *United States v. McKee*, 192 F.3d 535, 543 (6th

refer the case to the CID via a fraud referral report.³⁹ IRS criminal referrals may be brought under specific tax violations such as the knowing failure to file a return or the knowing filing of a fraudulent return,⁴⁰ and increasingly involve money laundering schemes, and drug or currency violations.⁴¹ The CID then accepts the case and concentrates on possible criminal prosecution.⁴²

The CID is primarily responsible for the investigation of alleged criminal violations under the Internal Revenue Code, and related federal statutes, including Title 18 of the United States Code.⁴³ Criminal tax investigations serve two purposes: to ensure public confidence by enforcing criminal tax statutes and to foster voluntary compliance.⁴⁴ Administratively, the IRS "uses the

Cir. 1999) ("Intent to evade tax occurs when a taxpayer knows that the misrepresentation is false. Intent is a mental process; a state of mind."); SALTZMAN, *supra* note 8, ¶ 7A.02[3] (stating that a taxpayer's willfulness to evade distinguishes a criminal proceeding from a civil proceeding).

³⁹ IRM § 4565.21 (1999). If the revenue agent uncovers a "firm indication of fraud on the part of the taxpayer," he or she must suspend the audit for referral to the CID for investigation. The revenue agent then prepares a fraud referral report, and presents it to the CID. SALTZMAN, *supra* note 8, ¶ 8.06[7]. A Form 2797 indicates what the revenue agent is supposed to look for in making the referral:

This report includes information that, in the agent's opinion, will enable the CID to evaluate the criminal potential of the case and determine whether or not a joint investigation shall be initiated. In general, the agent will identify the fraudulent transaction and make a narrative outline of the facts to show that (1) there has been a substantial understatement of income and (2) the taxpayer cannot explain the understatement or the explanation is not plausible.

Id. Note that upon receipt of a referral, the CID screens the referral for case potential. COMISKEY ET AL., *supra* note 7, ¶¶ 4.02[1][a], 4.03[6]. If the case is accepted by the CID, the referring revenue agent may continue to work on the case under the direction of the assigned CID special agent. *Id.* This is termed a "joint investigation." *Id.* Typically, here, the revenue agent would stay on to review the taxpayer's books and records, determine accounting entries, and perform other functions generally related to the examination features of the investigation. *Id.*

⁴⁰ TRAC, *IRS at Work: The IRS and Its Responsibilities*, available at <http://www.trac.syr.edu/tracirs/findings/aboutIRS/irsResponsibilities.html> (last visited Nov. 2, 2001).

⁴¹ *Id.*

⁴² *Id.*; SALTZMAN, *supra* note 8, ¶ 12.03[1][a].

⁴³ COMISKEY ET AL., *supra* note 7, ¶¶ 4.03, 4.04. The extent to which the IRS criminal enforcement program plays a significant role in the reduction of the tax gap remains unclear. *Id.* Undoubtedly, the CID can affect the tax gap because its general enforcement program deals with legal source income. Unfortunately, however, the IRS does not possess data on how the CID's general enforcement program affects the tax gap. *Id.*

⁴⁴ *Id.* ¶ 1.03; see also Walter T. Henderson, Jr., Comment, *Criminal Liability Under the Internal Revenue Code: A Proposal to Make the "Voluntary" Compliance System a Little Less*

threat of criminal sanctions, fines, and imprisonment to deter noncompliance with the tax laws."⁴⁵

The CID receives information about potential tax evaders from many sources inside and outside the IRS.⁴⁶ For example, cases may originate from information received by a civilian informant,⁴⁷ a federal or state non-tax law enforcement agency, or a foreign country cooperating with law enforcement authorities.⁴⁸ Cases may also originate from information-gathering and other projects begun by special agents at the regional or district level.⁴⁹ Undoubtedly, however, the most important source for criminal prosecution is referral from other IRS divisions.⁵⁰ In many cases, a routine civil audit of a taxpayer's return, performed by the Examination Division, is the catalyst of a criminal investigation.⁵¹

B. INTERNAL PROCESS OF THE CID

In the usual non-tax criminal case, the government has knowledge of the alleged crime, and seeks to identify the perpe-

"Voluntary," 140 U. PA. L. REV. 1429, 1434-37 (1992) (indicating studies that suggest that the possibility of criminal sanctions serves as a strong incentive for tax compliance among members of the general population).

⁴⁵ SALTZMAN, *supra* note 8, ¶ 12.01.

⁴⁶ COMISKEY ET AL., *supra* note 7, ¶ 4.02[1].

⁴⁷ *Id.* ¶ 4.02[1][b]. Interestingly, "information items referred to the CID are often received from disgruntled persons" such as ex-employees, revenge-bound relatives such as ex-spouses, or reward-minded citizens. *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*; see SALTZMAN, *supra* note 8, ¶ 12.03[1].

⁵¹ COMISKEY ET AL., *supra* note 7, ¶ 4.02[1][a]. Cases are frequently referred to the CID by the Examination Division, the Collection Division and the Employee Plans and Exempt Organizations (EP/EO) Divisions of the IRS. *Id.* "Referral is deemed appropriate when a substantial liability exists that a taxpayer refuses to pay, a pattern of delinquency exists . . . or a delinquency in filing or payment relates to income from illegal sources." *Id.* The CID then proceeds with the case selection process. *Id.* "During the 1990s, the CID attempted to improve its case selection process . . . [by] choosing cases that possessed the greatest deterrent effect." *Id.* ¶ 1.01[7]. These cases generally involved "sophisticated criminal schemes and high-dollar financial transactions." *Id.* The IRS "may be more likely to press a case involving a . . . prominent taxpayer than a relatively obscure person." Lee G. Knight & Ray A. Knight, *Criminal Tax Fraud: An Analytical Review*, 57 MO. L. REV. 175, 178 (1992). But see TRAC, *IRS at Work: Enforcement Trends Over Time*, available at <http://www.trac.syr.edu/tracirs/findings/national/ratesTab3.html> (last visited Nov. 2, 2001) (reporting that in recent years, the number of IRS audits for high income taxpayers continues its precipitous decline).

trator.⁵² In tax cases, however, the government knows the identity of the alleged perpetrator and seeks to amass incriminating information.⁵³ The most damaging evidence in these tax proceedings typically comes from sources close to the taxpayer such as accountants, bankers, or most worrisome, from the taxpayer himself.⁵⁴

To understand both the potential transgressions of IRS agents and the vulnerability of the tax defendant in a criminal tax case, it is important to examine the process that IRS agents follow in such criminal cases. The CID operates through its investigators, who are known as "special agents".⁵⁵ Their functions include detecting criminal violations and determining whether they should recommend a criminal prosecution.⁵⁶ A special agent is a highly trained criminal investigator who seeks to unearth evidence to establish elements of tax offenses such as failure to file, filing of a false return, tax evasion, or money-laundering.⁵⁷ Special agents, like other criminal law enforcement agents but unlike their civil division counterparts, carry firearms and badges.⁵⁸

When a special agent receives a matter that potentially warrants criminal prosecution or further inquiry,⁵⁹ he or she con-

⁵² Scott Sandstrom, *Tax Fraud Investigations: An Overview for Accountants, Attorneys, and Other Professional Tax Advisors*, 64 TAXES 718, 719 (1986).

⁵³ *Id.* at 719.

⁵⁴ *Id.* American taxpayers are required to comply with IRS investigations that deal with the correctness of any return as filed, or investigations that focus on transactions which may have potential tax exposure. *Id.* The Internal Revenue Code provides the IRS with broad authority to discover information that is "relevant" to a tax investigation. *Id.* Upon a surprise visit by a special agent, taxpayers "sometimes make damaging post-offense admissions or independently prosecutable false statements." SALTZMAN, *supra* note 8, ¶ 4.04[2]. See also KOSTELANETZ, *supra* note 1, at 115 ("Every special agent knows that the surest way to cement his case is to get the taxpayer to talk.").

⁵⁵ COMISKEY ET AL., *supra* note 7, ¶ 4.02[2].

⁵⁶ *Id.* ¶¶ 4.02[2], 4.03 ("Through the CID, the IRS recommends criminal prosecution in cases where there is adequate evidence to indicate sufficient intent and proof of guilt beyond a reasonable doubt.").

⁵⁷ *Id.* ¶ 4.02[2]; see also SALTZMAN, *supra* note 8, ¶ 12.01 ("Unlike an Examination Division revenue agent and a Collection Division revenue officer, the CID special agent neither determines the correct tax owed by a taxpayer nor collects that tax"; rather, his primary purpose is to gather evidence for later use in a successful prosecution.).

⁵⁸ *United States v. Peters*, 153 F.3d 445, 447 (7th Cir. 1998), *cert. denied*, 525 U.S. 1070 (1999).

⁵⁹ COMISKEY ET AL., *supra* note 7, ¶ 4.02 (determining whether a case is acceptable for investigation by the CID (commonly referred to as jacketing or numbering) and

ducts a full-scale administrative investigation to gather all pertinent evidence to prove or disprove the existence of a violation.⁶⁰ In a criminal investigation, standard procedure includes a surprise visit to the taxpayer's residence or business by the investigating special agent.⁶¹ The surprise interrogation is often the moment at which the taxpayer first learns of the criminal inquiry.⁶² The principal purpose of this initial interview is for the special agent to obtain information—including oral testimony, documents and records—usually available only from the taxpayer.⁶³

Upon the initial non-custodial contact with the taxpayer, the investigator must identify himself as a special agent of the IRS and advise the taxpayer that the taxpayer is under criminal investigation.⁶⁴ While not constitutionally required,⁶⁵ IRM guidelines mandate that special agents recite an administrative, *Miranda*-like warning⁶⁶ to the taxpayer during this initial non-custodial contact, prior to soliciting information from taxpayers.⁶⁷ This warning informs the taxpayer of his or her constitu-

whether prosecution is ultimately recommended, is almost entirely the prerogative of a special agent).

⁶⁰ KOSTELANETZ, *supra* note 1, at 61; *see also* COMISKEY ET AL., *supra* note 7, ¶ 4.04. The CID gathers information to show: (1) net worth or expenditures by a taxpayer are inconsistent with reported income suggesting unreported income or money laundering; (2) overstatement of deductions or expenses on a filed return; (3) failure to file a required return; (4) improper preparation of a tax return; (5) violations in the operation of a tax-exempt organization or employee plan or trust; (6) overt action indicating an intent to violate laws under the jurisdiction of the IRS; and (7) illegal activity having potential tax or money-laundering consequences. *Id.*

⁶¹ DARRELL, MCGOWEN ET AL., 1 CRIMINAL AND CIVIL TAX FRAUD § 4.01 (1986).

⁶² COMISKEY ET AL., *supra* note 7, at ¶ 8.03.

⁶³ IRM § 9323.1 (1999).

⁶⁴ IRM CI Handbook [9.4] 1.6 (June 30, 1998) (*cited in* COMISKEY ET AL., *supra* note 7, ¶ 4.04[2]) (At the beginning of the meeting, the agent must advise the taxpayer of the following: "As a special agent, one of my functions is to investigate the possibility of criminal violations of the Internal Revenue laws and related offenses.").

⁶⁵ *See Beckwith v. United States*, 425 U.S. 341, 345-46 (1976) (holding that *Miranda* warnings are not required when interviewing taxpayer under investigation if questioning does not deprive person of his freedom of action in any significant way); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (explaining that warnings of taxpayers' constitutional rights are required only when any suspect is subjected to custodial interrogation).

⁶⁶ *Miranda*, 384 U.S. 436.

⁶⁷ IRM CI Handbook [9.4] 5.11.3.1.1, [9.4] 5.11.3.1.3 (June 30, 1998) (*cited in* COMISKEY ET AL., *supra* note 7, ¶ 4.04[2]). For an analysis of CID-issued *Miranda* warnings and cases, *see Beckwith v. United States*, 425 U.S. 341 (1976).

tional right to remain silent.⁶⁸ The agent must terminate the interview if the subject indicates the desire to invoke his or her rights.⁶⁹ Notwithstanding these warnings, confronted taxpayers often waive their rights and speak freely, to their detriment, with the special agents.⁷⁰ The reason for this cooperation is that suspect taxpayers often do not understand the danger or significance of their testimony.⁷¹ They do not understand that the agent may later use the taxpayer's testimony during a criminal investigation against him.⁷²

IRS regulations encourage special agents to employ their credentials, rather than summonses, to obtain information from taxpayers.⁷³ Nonetheless, agents routinely issue administrative summonses to obtain a suspect taxpayer's books and records for use in their investigations.⁷⁴ Upon completion of the investigation, if the special agent believes that the matter merits prosecution, the agent must prepare a special agent's report ("SAR") explaining the details and results of the investigation, and the agent's recommendations.⁷⁵ Finally, the special agent must refer the matter to the IRS District Counsel, who refers the case to the Criminal Section of the Department of Justice Tax Division,⁷⁶ or directly to the U.S. Attorney where authorized.⁷⁷

⁶⁸ IRM CI Handbook [9.4] 5.11.3.1.1, [9.4] 5.11.3.1.3 (June 30, 1998) (*cited in* COMISKEY ET AL., *supra* note 7, ¶ 4.04[2]) ("The warnings given are essentially the so-called *Miranda* warnings, except the right to have appointed counsel is not mentioned.")

⁶⁹ *Id.*

⁷⁰ *United States v. Meier*, 607 F.2d 215 (8th Cir. 1979), *cert. denied*, 445 U.S. 966 (1980).

⁷¹ SALTZMAN, *supra* note 8, ¶ 12.03[2][b].

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See I.R.C. § 7602 (1994) (authorizing an IRS agent to examine any books, records or other data and to take such testimony, under oath, as may be relevant or material to such inquiry); COMISKEY ET AL., *supra* note 7, ¶ 4.04[4] (recognizing that the issuance and enforcement of a summons, properly exercised on "official curiosity", need not be supported by probable cause). Note that special agents may also issue administrative summonses to third parties, and the taxpayer will usually receive notice of summonses served on third-party recordkeepers. SALTZMAN, *supra* note 8, ¶ 12.03[2][b].

⁷⁵ COMISKEY ET AL., *supra* note 7, ¶ 4.02[3][a] (not all criminal investigations warrant prosecution; investigations which involve flagrant violations with high prosecution potential and deterrent impact on compliance, are clearly favored); *see also* IRM §§ 9131 (1999).

⁷⁶ The Tax Division of the Justice Department is responsible for authorizing and overseeing almost all criminal tax prosecutions under IRS laws. COMISKEY ET AL., *supra* note 7, ¶ 1.04.

C. SILENT TRANSITION OF A CIVIL AUDIT INTO A CRIMINAL PROCEEDING

While informants, other government agencies, and even the Collection Division of the IRS are regular sources of information about potential tax evaders for the CID, the *civil* audit referral is the most common catalyst for a criminal investigation.⁷⁸ During the course of a routine audit, when an IRS revenue agent examines the books and records of a taxpayer, the agent often unearths evidence of fraudulent reporting by the taxpayer if such evidence exists. IRS regulations mandate, however, that when a revenue agent suspects fraud during the course of a civil audit, he or she must immediately suspend the audit and refer the case to the CID for processing.⁷⁹ Specifically, Section 4565.21 of the IRS Internal Revenue Manual (hereinafter referred to as the "IRM" or "the Manual") states that:

If, during an examination, an examiner [i.e., revenue agent] uncovers a potentially fraudulent situation caused by the taxpayer and or the preparer, the examiner shall discuss the case at the earliest possible convenience with his/her group manager Once there is a firm indication of criminal fraud all examination activity shall be suspended⁸⁰

Because the American legal system invokes strict constitutional safeguards to protect individuals subject to criminal investigations,⁸¹ it is critical that IRS regulations prevent its civil agents from garnering evidence for a criminal prosecution during the course of a civil investigation. IRS agents cannot be

⁷⁸ SALTZMAN, *supra* note 8, ¶ 12.06. The District Counsel's decision is pivotal: If the district CID recommendation is approved, the case is sent to the Criminal Section of the Department of Justice Tax Division, where the Attorney General is responsible for the prosecution of criminal tax cases. *Id.* If prosecution is declined, the case is returned to the district Examination Division or Collection Division as a civil tax case. *Id.*

⁷⁹ *Id.*

⁸⁰ IRM § 4565.21 (1999). It is IRS policy that criminal action in a case takes precedence over its civil aspects and that any civil enforcement action involving the same tax as a criminal case is suspended until the criminal aspects of the case are closed. SALTZMAN, *supra* note 8, ¶ 12.01.

⁸¹ IRM § 4565.21 (1999) (emphasis added). Note that IRM § 4565.21 and IRM § 9311.83 further the same purpose. "Therefore, if a revenue agent continues to conduct a civil audit after developing 'firm indications of fraud,' a court may justifiably conclude that the IRS agent was in fact conducting a criminal investigation under the auspices of a civil audit." *United States v. Peters*, 153 F.3d 445, 452 (7th Cir. 1998), *cert. denied*, 525 U.S. 1070 (1999).

⁸² These include the right to remain silent, U.S. CONST. amend. V, and the right to obtain representation from counsel, U.S. CONST. amend. VI.

permitted to circumvent the constitutional protections granted during the course of a criminal investigation merely by conducting a civil audit. To this end, IRM Section 9311.83 reinforces IRM Section 4565.21, and explicitly prohibits "a revenue agent from developing a criminal case against a taxpayer under the guise of a civil investigation."⁸²

However, determining whether a revenue agent is conducting a criminal investigation under the auspice of a civil audit is complex. Specifically, the revenue agent is cautioned not to discontinue the examination until discovery of a "firm indication of fraud,"⁸³ but, as later discussed, the definition of a "firm indication of fraud" is vague and difficult to understand.⁸⁴ IRS regulations outline typical fraud indicators that the revenue agent can identify during the course of the investigation.⁸⁵ Nonetheless, instructions require the revenue agent to exercise extraordinary judgment as to when an investigation should be discontinued. The agent must discontinue the investigation at "the earliest opportunity" and can do so without disclosing the reason for suspending the audit to the taxpayer.⁸⁶ The "earliest opportunity," however, does not mean "immediately."⁸⁷

The juncture where a civil audit turns criminal is not always clear.⁸⁸ The nebulous "firm indication of fraud" requirement is both problematic for the revenue agent to apply, and particularly dangerous from the perspective of the taxpayer. Revenue agents sometimes perform the same functions of evidence gathering as their criminal division counterparts, and the IRS often offers this evidence in a criminal trial to the detriment of the taxpayer.⁸⁹ The situation that taxpayers fear is that they will

⁸² IRM § 9311.83 (1999).

⁸³ *Id.* § 4565.21.

⁸⁴ See discussion *infra* Section IV.B.1.

⁸⁵ IRM Fraud Handbook [104.2] 2.2 (May 19, 1999) (these "badges of fraud" include: understatement of income; unexplained substantial increase in net worth; fictitious or improper deductions; concealment of bank or brokerage accounts; accounting irregularities; and improper allocation of income); *United States v. McKee*, 192 F.3d 535, 542 (6th Cir. 1999) (citing IRM provisions).

⁸⁶ SALTZMAN, *supra* note 8, ¶ 8.06[7]; see also *United States v. Peters*, 153 F.3d 445, 456 (7th Cir. 1998) ("[a] firm indication of fraud must be distinguished from a first indication of fraud"), *cert. denied*, 525 U.S. 1070 (1999).

⁸⁷ SALTZMAN, *supra* note 8, ¶ 8.06[7].

⁸⁸ *McKee*, 192 F.3d at 535 (noting that "the substantive distinction between an IRS civil audit and a criminal tax investigation is not always clear").

⁸⁹ *Id.* at 544.

permit an IRS agent to examine their books and records during the course of a routine audit, and the civil agent will subsequently use this information in a criminal prosecution.⁹⁰ Cases involving this scenario are numerous.⁹¹

Although a large pecuniary penalty is a severe blow to a taxpayer, the stigma imposed on a taxpayer as a result of a criminal prosecution—even if the taxpayer is found wholly innocent—is a much greater hardship.⁹² Consequently, taxpayers are under-

⁹⁰ The following excerpt, from an affidavit submitted by a taxpayer in *United States v. Marra*, 481 F.2d 1196 (6th Cir. 1973), supporting his motion to suppress evidence that was allegedly obtained by an IRS agent under the auspice of a routine civil tax audit, exemplifies this point:

2. In the latter part of 1967 and the first two months of 1968, Revenue Agent Bruce Norvell was conducting an audit of my 1965 and 1966 tax returns, and for the most part, obtained relevant information from my accountant, Edward Derbabia, C.P.A.
3. I was informed by my accountant at several points in time during this period that the Agent was requesting certain information, and I supplied whatever I had available to my accountant which I believed he would submit to the Revenue Agent.
4. In the latter part of February, 1968, I was made aware through my accountant that the Revenue Agent had submitted a list of proposed adjustments, these being items which I understood he was disagreeing with and planning to change.
5. As a result of this turn of events, I believed that the Agent was in the process of closing the case and that there was no cause for concern that a criminal investigation was taking place or would take place.
6. When I received the two letters from the Internal Revenue Agent in July of 1968, I was completely convinced that no criminal investigation would ensue, because the wording in these letters gave me the impression that the Agent was finally closing the case.
7. As a result of the foregoing, I was *wrongfully deceived, falsely misled by misrepresentation, both active and passive, and surreptitiously induced* to give statements and provide documents and records in contravention of my rights under the Fourth, Fifth and Sixth Amendments to the Constitution.

Marra, 481 F.2d at 1200-01.

⁹¹ See, e.g., *United States v. McKee*, 192 F.3d 535 (6th Cir. 1999); *United States v. Peters*, 153 F.3d 445 (7th Cir. 1998), *cert. denied*, 525 U.S. 1070 (1999); *United States v. Wadena*, 152 F.2d 831 (8th Cir. 1998), *cert. denied*, 526 U.S. 1050 (1999); *United States v. Grunewald*, 987 F.2d 531 (8th Cir. 1993); *United States v. Michaud*, 860 F.2d 495 (1st Cir. 1988); *United States v. Powell*, 835 F.2d 1095 (5th Cir. 1988); *Groder v. United States*, 816 F.2d 139 (4th Cir. 1987); *United States v. Serlin*, 707 F.2d 953 (7th Cir. 1983); *United States v. Meier*, 607 F.2d 215 (8th Cir. 1979), *cert. denied*, 445 U.S. 966 (1980); *United States v. Nuth*, 605 F.2d 229 (6th Cir. 1979); *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977); *United States v. Allen*, 522 F.2d 1229 (6th Cir. 1975); *United States v. Marra*, 481 F.2d 1196 (6th Cir. 1973); *United States v. Lehman*, 468 F.2d 93 (7th Cir. 1972); *United States v. Prudden*, 424 F.2d 1021 (5th Cir. 1970), *cert. denied* 400 U.S. 831 (1970); *United States v. Tonahill*, 430 F.2d 1042 (5th Cir. 1970), *cert. denied*, 400 U.S. 943 (1970); *United States v. Sclafani*, 265 F.2d 408 (2d Cir. 1959); *United States v. Piper*, 681 F. Supp. 833 (M.D. Ga. 1988).

⁹² For example, the tax evasion statute, I.R.C. § 7201 (2001) imposes the heaviest penalty of any tax offense described in the Code. SALTZMAN, *supra* note 8, ¶ 7.02[4]. A person convicted of tax evasion is subject to imprisonment of up to five years, a fine

standably fearful of the true nature of an examination.⁹³ If an IRS agent violates IRM Section 4565.21 by conducting a criminal investigation under the auspice of a civil audit, potential constitutional violations may arise.⁹⁴ To prevail in asserting such violations, however, the taxpayer must be allowed to base a challenge to a tax conviction on the IRS's alleged noncompliance with its procedures.

II. LEGAL EFFECT OF IRS REGULATIONS

To determine whether an IRS agent's noncompliance with IRS agency regulations results in a constitutional infringement on a taxpayer, it is imperative to discern whether these IRS regulations safeguard taxpayers' constitutional rights. Thus, the courts must first examine whether the IRM guarantees substantive rights of taxpayers, or comparatively, whether the IRM is merely a set of internal administrative procedures which govern the affairs of the IRS.⁹⁵ If the IRM safeguards a taxpayer's substantive rights, then a taxpayer may challenge a conviction on an IRS agent's noncompliance with its procedures.⁹⁶ This section begins by examining the IRM and the current split of authority regarding its legal effect. The section concludes that if a provision of the Manual affects a taxpayer's substantive rights, any violation of that provision is a *per se* constitutional infringement.

A. THE INTERNAL REVENUE MANUAL (IRM)

The IRM is an internal document of the IRS, which details procedures that an IRS agent must follow while conducting a civil tax audit or criminal investigation.⁹⁷ The IRM serves as the single official compilation of policies, procedures, instructions and guidelines relating to the organization, function, admini-

of up to \$10,000 or both, together with the costs of prosecutions. *Id.* Apart from the sentence, as a convicted felon, the taxpayer may suffer such disabilities as loss of the right to vote, hold public office, obtain certain jobs, retain professional licenses, etc. *Id.*

⁹³ KOSTELANETZ, *supra* note 1, at 72.

⁹⁴ See discussion *infra* Section III.B.

⁹⁵ *McKee*, 192 F.3d at 540 (stating that courts "must initially address whether a taxpayer may properly base a challenge to a tax conviction on the IRS's alleged non-compliance with the procedures of its Manual").

⁹⁶ See *id.*, at 540-41.

⁹⁷ SALTZMAN, *supra* note 8, ¶ 3.04[6].

stration and operation of the IRS.⁹⁸ Not only does it contain all policies and instructions that the IRS issues to its employees, but it also functions as an important tool for taxpayers and practitioners alike.⁹⁹ The Manual allows taxpayers and tax practitioners to know what they can expect from the IRS during investigations, including the procedures that they can expect IRS agents to follow while examining tax returns, and the process a taxpayer must follow to file an appeal.¹⁰⁰ Most importantly, the IRM instructs taxpayers and practitioners to recognize when the IRS is not following its procedures.¹⁰¹

While it is clear that the IRM details procedures that an IRS agent must follow in conducting a civil or criminal tax investigation, whether the Manual constitutionally safeguards a taxpayer's rights is unclear. The Supreme Court first addressed the legal effect of IRM provisions in the landmark case, *United States v. Caceres*.¹⁰² Due to conflicting interpretations of *Caceres*, however, appellate courts are currently split as to the legal status of the IRM. Some courts have held that the provisions of the Manual only govern the internal affairs of the IRS, and therefore do not have the force or effect of law.¹⁰³ According to these courts, a taxpayer may not properly base a challenge to a tax conviction on the IRS's alleged noncompliance with the procedures of its Manual.¹⁰⁴ Other courts, however, have held that the rules of the IRS, like the rules of every other government agency, have the effect of law and bind agents to adhere to these laws when they involve taxpayers' constitutional rights.¹⁰⁵ A violation of these Manual provisions is therefore a per se constitutional infringement on a taxpayer's rights.

⁹⁸ *Id.* ¶ 3.04[6].

⁹⁹ *Id.* ¶ 8.06[1]. The IRS has also developed basic and detailed techniques in the IRM to ensure that the revenue agent has considered all areas necessary for a proper determination of tax liability. *Id.* Techniques discussed in the IRM apply in all field examinations. *Id.*; see Bryan E. Gates, *The Internal Revenue Manual—the Practitioner's Tool*, 82 Tax Notes, 358, Jan. 18, 1999. The Manual includes various handbooks for personnel, such as the Handbook for Revenue Officers and the Handbook for Special Agents. SALTZMAN, *supra* note 8, ¶ 3.04[6].

¹⁰⁰ SALTZMAN, *supra* note 8, ¶ 3.04[6].

¹⁰¹ *Id.*

¹⁰² 440 U.S. 741 (1979). See discussion *infra* Section II.B.

¹⁰³ See cases cited *infra* note 119.

¹⁰⁴ See cases cited *infra* note 119.

¹⁰⁵ See cases cited *infra* note 128.

B. AUTHORITATIVE SUPREME COURT CASE: UNITED STATES V. CACERES

In *Caceres*, a disgruntled taxpayer challenged the legal impact of IRM provisions.¹⁰⁶ The taxpayer claimed that an IRS agent recorded statements of the taxpayer alleged bribing the agent, via a concealed radio-transmitter.¹⁰⁷ He moved to suppress these tape recordings from subsequent criminal investigation proceedings on the grounds that the evidence was obtained in violation of IRM regulations.¹⁰⁸ Specifically, the taxpayer alleged that the IRS agent failed to obtain requisite authorizations from the Department of Justice, allowing tape recordings without the taxpayer's consent.¹⁰⁹

Although in blatant violation of the IRM provisions, the *Caceres* Court nonetheless held that the tape recordings of the alleged bribery of an IRS agent by a taxpayer were admissible in the subsequent criminal investigation.¹¹⁰ In admitting the tapes, the Court distinguished internal rules of agency procedure from regulations promulgated pursuant to a statutory directive for a taxpayer's benefit.¹¹¹ The Court thus rejected a per se rule that every violation of the IRM was tantamount to a constitutional due process violation.¹¹² The Court relied on the notion that the particular IRM provision at bar was not promulgated for the benefit of taxpayers, and neither the Constitution nor any Act of Congress required that official governmental approval be secured before conversations are recorded by government agents.¹¹³

¹⁰⁶ 440 U.S. 741 (1979).

¹⁰⁷ *Id.* at 743 (taxpayer moved to suppress these recordings on the ground that the authorizations required by the IRS regulations had not been secured by the Department of Justice, as required in the IRM).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 757; *see also* United States v. Irvine, 699 F.2d 43, 46 (1st Cir. 1983) (following *Caceres* in finding that agent's violation of IRS regulations did not warrant suppression of evidence obtained at interview).

¹¹¹ *Caceres*, 440 U.S. at 748-50.

¹¹² *Id.* at 750-57.

¹¹³ *Id.* at 744. The *Caceres* Court also noted that no federal statutes require "that official approval be secured before conversations are overheard or recorded by Government agents with the consent of one of the conversants." *Id.* (citing United States v. White, 401 U.S. 745, 752 (1971) (plurality opinion)). Furthermore, the Constitution does not protect the privacy of the individuals in respondent's situation because if an agent can write down his conversations with a defendant, for official use, and testify regarding their contents without a warrant authorizing his encounters, no dif-

By holding that evidence obtained in patent violation of agency procedures was admissible in a criminal prosecution, the *Caceres* opinion sparked heated debate.¹¹⁴ Justice Marshall, in his dissenting opinion joined by Justice Brennan, declared that lax enforcement of IRS rules would lead to increased IRS agent misconduct, because taxpayers cannot reasonably rely on rules that are ignored.¹¹⁵ He was concerned that with such unawareness, mandatory regulations prescribed by the IRS may become nothing more than "hortatory policies."¹¹⁶ Recently, the disparate viewpoints among the circuit courts have begun to mirror the incongruity among the majority and dissenters in *Caceres*.

C. SEVERAL CIRCUITS VIEW THE IRM MERELY AS A SET OF OPERATING PROCEDURES

Several circuits have broadly held that IRM provisions govern only the internal affairs and proceedings of the IRS, and consequently, lack the force and effect of law. In the early case of *United States v. Mapp*, the Seventh Circuit first stated that IRS manuals are generally adopted for the internal administration of the IRS, and not for the protection of taxpayers.¹¹⁷ The court held that internal IRS regulations confer no substantive rights on taxpayers. Accordingly, the *Mapp* court denied the taxpayer's motion for suppression of evidence.¹¹⁸

Several courts have since adopted the perspective of *Mapp*, interpreting the *Caceres* opinion, once issued, as reinforcement for the broad proposition that the IRM does not constitute agency regulations promulgated for the benefit of taxpayers.¹¹⁹

ferent result is required if the agent, instead of reporting and transcribing his conversations, simultaneously records them. *Id.* at 750.

¹¹⁴ See *Caceres*, 440 U.S. at 757-70 (Marshall, J., dissenting).

¹¹⁵ *Id.* at 762 (Marshall, J., dissenting).

¹¹⁶ *Id.*

¹¹⁷ *United States v. Mapp*, 561 F.2d 685, 690 (7th Cir. 1977) (citing *United States v. Lockyer*, 448 F.2d 417, 420-21 (10th Cir. 1971)).

¹¹⁸ *Id.*

¹¹⁹ See, e.g., *Crystal v. United States*, 172 F.3d 1141, 1148 (9th Cir. 1999) (noting that courts are of the view that internal rules of agency procedure confer no substantive rights on taxpayers); *United States v. Michaud*, 860 F.2d 495, 499 (1st Cir. 1988); *Groder v. United States*, 816 F.2d 139, 142 (4th Cir. 1987) (holding that the IRM is merely a set of operating procedures); *United States v. Horne*, 714 F.2d 206, 207 (1st Cir. 1983) (noting that provisions in the IRS Manual are not codified in the Code of Federal Regulations; they govern the internal affairs of the IRS and do not have the force or effect of law); *United States v. Kaatz*, 705 F.2d 1237, 1243 (10th Cir. 1983) (stating that violation of IRS audit handbook rules on fraud referral does not prove a

The Fourth Circuit, in *United States v. Groder*,¹²⁰ stated that the IRM, as an internal operating manual, governs only the internal affairs of the IRS and its provisions confer "no substantive rights or privileges upon taxpayers."¹²¹ Adhering strictly to the *Caceres* decision, the court relied on the general notion that internal operating manuals neither bind an agency, nor confer rights upon the respective regulated entity.¹²² The effect of the IRM provisions, the court stated, is "to regulate the flow of business between different units of the IRS and not to provide a legal cause of action or means of redress for individual taxpayers."¹²³ Consequently, an alleged violation of a regulation by an IRS agent would neither prevent prosecution or conviction of a defendant, nor confer substantive constitutional rights on the taxpayer.¹²⁴

D. BETTER VIEW: IRM PROVISIONS CONFER SUBSTANTIVE RIGHTS ON TAXPAYERS IF THEY CONCERN TAXPAYERS' CONSTITUTIONAL RIGHTS

According to the circuits following the reasoning of *Mapp*, *Groder*, and their progeny, a taxpayer may not properly base a challenge to a tax conviction on an IRS agent's alleged non-compliance with the procedures of the IRM.¹²⁵ However, by holding that the IRS may admit evidence obtained in patent violation of all agency procedures in a criminal prosecution, these circuits were misguided. Moreover, post-*Caceres* courts relying on the *Caceres* opinion read its holding too broadly. The better view is that the IRM confers substantive rights on taxpayers, at the very least, where those provisions concern taxpayers' consti-

violation of taxpayers' constitutional rights); *United States v. Lockyer*, 448 F.2d 417, 420-21 (10th Cir. 1971).

¹²⁰ 816 F.2d 139 (4th Cir. 1987).

¹²¹ *Id.* at 142.

¹²² *Id.*; see also *Reich v. Manganas*, 70 F.3d 434, 437 (6th Cir. 1995) (OSHA Field Operation Manual, as an internal operating manual, "do[es] not carry the force of law, bind the agency, or confer rights upon the regulated entity"); *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981) (Social Security Claims Manual is an internal handbook for internal use only for Social Security Act employees, and therefore has no legal effect, nor does it bind the agency).

¹²³ *Id.* at 142. The *Groder* court also noted that "[t]here are many such rules and procedures in government which agencies must remain free to adopt without fear of creating a litigable point on the part of every person with whom the agency comes in contact." *Id.*

¹²⁴ See cases cited *supra* note 119.

¹²⁵ See cases cited *supra* note 119.

tutional rights. Together, the language in the majority opinion of *Caceres*, the reasoning of the Sixth, Seventh and Eighth Circuits, and the persuasive arguments espoused by Justice Marshall in the *Caceres* dissenting opinion, support this standpoint.

In *Caceres*, Judge Stevens stated in his majority opinion that a "court's duty to enforce an agency regulation is most evident when compliance with the regulation is mandated by the Constitution or federal law."¹²⁶ The Court thereby acknowledged the possibility that a federal court might enforce an agency regulation when that provision protects a constitutional or federally protected right.¹²⁷ Consequently, a taxpayer may properly challenge a tax conviction where an IRS agent violates a provision of its Manual designed to protect the constitutional rights of taxpayers.

The Sixth, Seventh and Eighth Circuits adopted this interpretation of *Caceres*.¹²⁸ Most recently, in *United States v. McKee*,¹²⁹ the Sixth Circuit, joining the viewpoint of several other circuits¹³⁰ and reversing its own line of precedent,¹³¹ held that a

¹²⁶ *United States v. Caceres*, 440 U.S. 741, 749 (1979).

¹²⁷ *Id.*

¹²⁸ See, e.g., *United States v. McKee*, 192 F.3d 535, 541 (6th Cir. 1999) (affording substantive consideration to the provisions of the Manual where they protect taxpayers' constitutional rights); *United States v. Meier*, 607 F.2d 215, 217 (8th Cir. 1979), cert. denied, 445 U.S. 966 (1980). Moreover, other courts have opined that a taxpayer may challenge a conviction by relying on the Manual's provisions so long as the taxpayer's challenge was based on an alleged violation of a constitutional right. See *United States v. Peters*, 153 F.3d 445, 451-52 (7th Cir. 1998), cert. denied 525 U.S. 1070 (1999); *United States v. Grunewald*, 987 F.2d 531, 534 (8th Cir. 1993). The Sixth, Seventh and Eighth Circuits are not alone in their viewpoint. See *United States v. Knight*, 898 F.2d 436, 438 (5th Cir. 1990); *United States v. Caldwell*, 820 F.2d 1395, 1399 (5th Cir. 1987); *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977); *United States v. Leahey*, 434 F.2d 7, 10-11 (1st Cir. 1970) (allowing due process claim where the special agent failed to give taxpayer certain warnings as provided in the Manual that he was the subject of criminal investigation).

¹²⁹ 192 F.3d 535 (6th Cir. 1999).

¹³⁰ *Id.* The *McKee* court noted that although this relevant portion of the *Horne* opinion was only dicta in the opinion, then-Judge Breyer was a member of the *Horne* panel, and deferred to his views. *Id.* at 535. Moreover, the *McKee* court noted that since the Seventh and Eighth Circuits held that a taxpayer may challenge a conviction by relying on the Manual's provisions if the taxpayer's challenge was based on an alleged violation of a constitutional right, "we will proceed accordingly." *Id.*; see cases cited *supra* note 128.

¹³¹ *Valen Mfg. Co. v. United States*, 90 F.3d 1190 (6th Cir. 1996). In *Valen Mfg. Co.*, the taxpayer argued that the assessments levied against him for delinquent filings were invalid because the Manual suggested that his conduct was excused. *Id.* at 1191. The Court rejected this argument as meritless, noting that the "provisions of the

court may overturn a tax-related conviction if the IRS violates a provision in its Manual designed to protect the constitutional rights of taxpayers.¹³² Using the aperture in the *Caceres* decision, the *McKee* court recognized that the IRM confers substantive rights to taxpayers if such regulations concern individual rights protected by the Constitution.¹³³ Thus, where a taxpayer challenges a tax conviction obtained in violation of an IRS regulation that is mandated by the Constitution or federal law, a federal court may enforce those IRS provisions.¹³⁴

Justice Marshall, in his dissenting opinion in *Caceres*, also supports the proposition that IRM provisions confer substantive rights on taxpayers, at least where those provisions safeguard taxpayers' constitutional rights. Justice Marshall insisted that in a long line of cases beginning with *Bridges v. Wixon*,¹³⁵ the Supreme Court has held that a citizen under investigation "is legally entitled to insist upon the observance of rules" promulgated by an executive or legislative body.¹³⁶ Underlying this decision and the line of cases which follows, is the due process tenet that rules of law bind the government no less than private citizens.¹³⁷ That an agency must abide by its own policies and regulations is not limited to rules attaining the status of formal regulations.¹³⁸ Indeed, an agency is not required to fol-

[IRS's] manual . . . only govern the internal affairs of the Internal Revenue Service. They do not have the force and effect of law." *Id.* at 1194.

¹³² *McKee*, 192 F.3d at 541-42.

¹³³ *Id.*

¹³⁴ *Id.* at 540-41 (stating that "the Manual's provisions are, at the very least, relevant in determining whether a taxpayer's constitutional rights have been offended").

¹³⁵ 326 U.S. 135, 152-53 (1945).

¹³⁶ *United States v. Caceres*, 440 U.S. 741, 757 (1979) (Marshall, J., dissenting) (citing *Bridges*, 326 U.S. 135 (holding invalid a deportation ordered on the basis of statements which did not comply with the Immigration Service's rules requiring oaths and signatures, finding that the rules were designed to "afford [the alien] due process of law" by providing "safeguards against essentially unfair procedures"); *United States v. Nixon*, 418 U.S. 683, 695-96 (1974); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required."); *Yellin v. United States*, 374 U.S. 109, 144 (1963) (agency "may not by its rules ignore constitutional restraints or violate fundamental rights . . ."); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)).

¹³⁷ *Caceres*, 440 U.S. at 757 (Marshall, J., dissenting) ("Where individual interests are implicated, the Due Process Clause requires that an executive agency adhere to the standards by which it professes its action to be judged.").

¹³⁸ *Montilla v. INS*, 926 F.2d 162, 167 (2d Cir. 1991); *Morton*, 415 U.S. at 235 ("Where the rights of individuals are affected, it is incumbent upon agencies to follow

low an internal rule if it only concerns the internal administration of the agency.¹³⁹ However, Justice Marshall urged that where an individual right is affected by agency deviation from established rule, the agency must follow that rule even if it concerns only internal agency procedure.¹⁴⁰

It is understandable that courts may be unwilling to hold that every violation of an IRM provision should be litigated. However, taxpayers must be able to challenge a tax conviction where an IRS agent failed to comply with IRM procedures that safeguard taxpayers' constitutional rights. To deny a taxpayer liberties protected by the United States Constitution would be intolerable.¹⁴¹

III. IRM SECTION 4565.21 IS DESIGNED TO PROTECT THE CONSTITUTIONAL RIGHTS OF TAXPAYERS

IRS regulations explicitly prohibit a revenue agent from developing a criminal case against a taxpayer under the guise of a civil audit.¹⁴² To this end, IRM Section 4565.21 directs a revenue agent to suspend his or her civil investigation upon discovery of a "firm indication of fraud," and turn the matter over to the CID for criminal investigation.¹⁴³ Whether a taxpayer may properly challenge a tax conviction based on an IRS agent's alleged non-compliance with this IRM provision, however, depends upon

their own procedures."); *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 422 (1942) (stating that agency regulations on which individuals are "entitled to rely" bind the agency and are therefore ripe for judicial review).

¹³⁹ See, e.g., *United States v. Lockyer*, 448 F.2d 417, 420-21 (10th Cir. 1971):

We do not say that agencies always violate due process when they fail to adhere to their procedures. It is important here that the procedure set forth in the news release was an agency wide directive designed to protect taxpayers by setting a clear and uniform standard governing the first contact between a Special Agent and a tax fraud suspect. Our result would have been different if the I.R.S. had violated a procedure designed to promote some other agency goal.

¹⁴⁰ See cases cited *supra* note 136.

¹⁴¹ *Caceres*, 440 U.S. at 758 (Marshall, J., dissenting) ("Where individual interests are implicated, the Due Process Clause requires that an executive agency adhere to the standards by which it professes its action to be judged.").

¹⁴² IRM § 4565.21 should be read in conjunction with IRM § 9311.83, which prohibits a "revenue agent from developing a criminal case against a taxpayer under the guise of a civil investigation," because both provisions further the same purpose of ensuring that an IRS revenue agent turns the case over to the CID upon a "firm indication of fraud."

¹⁴³ IRM § 4565.21 (1999).

whether this particular IRM provision is designed to protect taxpayers' constitutional rights. If IRM Section 4565.21 safeguards taxpayers' constitutional rights, then a taxpayer may challenge a tax conviction based on alleged noncompliance with its rules.¹⁴⁴ The circuits, however, have not unanimously resolved the legal status of this provision.

This section begins by discussing the current split of authority over the legal affect of IRM Section 4565.21. The section argues that IRM Section 4565.21 safeguards a taxpayer's Fourth and Fifth Amendment rights such that a taxpayer may challenge a tax conviction where an IRS agent conducts a criminal investigation under the guise of a civil audit.

A. SOME COURTS HOLD THAT IRM SECTION 4565.21 IS ONLY A PROCEDURAL RULE

Some courts have held that IRM Section 4565.21 confers no substantive rights or privileges upon taxpayers. The Fourth Circuit in *Groder v. United States*,¹⁴⁵ adhered to this viewpoint. In *Groder*, the taxpayer alleged that the IRS agent "mousetrapped" the taxpayer into providing information that he would not have provided if he had known that a future criminal investigation was pending.¹⁴⁶ The taxpayer asserted that the IRS agent therefore failed to follow internal procedures under IRM Section 4565.21 by effectively conducting a criminal investigation under the guise of a civil audit.¹⁴⁷

The *Groder* court, however, held that Section 4565.21 of the Manual was only a procedural rule of the IRS and therefore conferred no substantive rights or privileges upon the taxpayer.¹⁴⁸ The court stated that a violation of an IRS guideline, by itself, was without legal effect.¹⁴⁹ In order to prevail, a taxpayer

¹⁴⁴ *Id.*

¹⁴⁵ 816 F.2d 139, 142 (4th Cir. 1987). The Fourth Circuit is not alone in its viewpoint. See *United States v. Michaud*, 860 F.2d 495, 499 (1st Cir. 1988) (holding that an agent's violation of IRM §4565.21 "does not prevent prosecution and conviction of a defendant, nor does it require suppression of evidence."); *United States v. Kaatz*, 705 F.2d 1237, 1243 (10th Cir. 1983) (stating that a violation of IRS audit handbook rules on fraud referral does not prove a violation of taxpayers' constitutional rights).

¹⁴⁶ *Groder*, 816 F.2d at 141.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 142 (stating that a "violation of a guideline such as this one is . . . by itself, without legal effect to suppress evidence at a criminal trial").

¹⁴⁹ *Id.* (attempting to distinguish internal rules of agency procedure from regulations promulgated pursuant to statutory directive for a taxpayer's benefit).

must prove more than a mere violation of the IRM.¹⁵⁰ The taxpayer must demonstrate that the government proceeded in bad faith¹⁵¹—typically involving fraud or deceit on behalf of the government¹⁵²—not simply an agent acting unreasonably or unsatisfactorily. Here, the court found that the taxpayer failed to prove bad faith on the part of the IRS agent and, accordingly, denied the taxpayer's claim.¹⁵³

By holding bad faith as the standard that a taxpayer must establish in order to claim that the revenue agent has violated the taxpayer's constitutional rights, however, the *Groder* court and its progeny were misguided. Bad faith on the part of an IRS agent could be viewed as a direct constitutional infringement on a taxpayer in and of itself. Critically, the court overemphasized the importance of any "intentional" misconduct on the part of the revenue agent. Rather, whether the revenue agent acted "intentionally" is irrelevant, since the effect on the taxpayer is the same—the taxpayer is injured. Intent of the revenue agent would be pertinent if the revenue agent himself could be liable,¹⁵⁴ but not here, where the agent is a representative of the government.

B. BETTER VIEW: IRM SECTION 4565.21 SAFEGUARDS TAXPAYERS' FOURTH AND FIFTH AMENDMENT RIGHTS

IRM Section 4565.21 certainly performs the function of an internal operating rule by detailing the procedures that an IRS agent must follow after developing a firm indication of fraud on

¹⁵⁰ *Id.* ("There are many such rules and procedures in government which agencies must remain free to adopt without fear of creating a litigable point on the part of every person with whom the agency comes in contact."); see *United States v. Powell*, 379 U.S. 48, 58 (1964); *Donaldson v. United States*, 400 U.S. 517, 536 (1971); *United States v. LaSalle National Bank*, 437 U.S. 298, 313-14 (1978).

¹⁵¹ *Groder*, 816 F.2d at 144 (noting that even if assumedly, the IRS violated its Manual, the district court found that the taxpayer failed to prove that the government proceeded against him in bad faith).

¹⁵² *Id.* (citing *United States v. Kaatz*, 705 F.2d 1237, 1243 (10th Cir. 1983)). In this situation, "bad faith would arise if a revenue agent misrepresented to the taxpayer the possibility of referral in order to elicit information for use in a fraud investigation." *Id.* However, the IRS's violation of its own regulations "is not proof by itself of bad faith in a tax investigation. *Id.* (citing *United States v. Equitable Trust Co.*, 611 F.2d 492, 500 (4th Cir. 1979)).

¹⁵³ *Id.* at 144.

¹⁵⁴ This is without consideration of the Federal Torts Claims Act, 28 U.S.C. 2672 (1994).

behalf of a taxpayer.¹⁵⁵ However, IRM Section 4565.21 inherently performs another role as well. By mandating that a civil revenue agent suspend his audit upon a discovery of fraud and refer the case to the agent's criminal division counterpart for prosecution, IRM Section 4565.21 recognizes that significantly different rights, responsibilities, and expectations apply to civil audits compared to criminal tax investigations. Referral of a tax investigation to the CID ensures that taxpayers receive special constitutional safeguards, such as notification of the right to remain silent and the right to counsel, by CID special agents.¹⁵⁶ Thus, IRM Section 4565.21 effects the important function of safeguarding these rights as well.

For these reasons, the Sixth Circuit, in *United States v. McKee*,¹⁵⁷ recently held that IRM Section 4565.21 recognizes that the IRS must protect the individual and constitutional rights of taxpayers.¹⁵⁸ "It would be a flagrant disregard of individuals' rights to deliberately deceive, or even lull, taxpayers into incriminating themselves during an audit when activities of an obviously criminal nature are under investigation."¹⁵⁹ In holding that the IRM confers substantive rights on taxpayers, the *McKee* court noted that several other courts have urged that a tax conviction "may be overturned if the IRS is found to have violated a provision in its Manual 'designed to protect the constitutional rights of taxpayers.'"¹⁶⁰ These courts have alluded to the notion that an IRS agent's failure to adhere to IRM Section 4565.21, by

¹⁵⁵ IRM § 4565.21 (1999).

¹⁵⁶ See *supra* note 66 and accompanying text.

¹⁵⁷ 192 F.3d 535 (6th Cir. 1999).

¹⁵⁸ *Id.* at 541. In *McKee*, the taxpayer appealed her conviction for tax fraud on the grounds that the evidence against her should be suppressed because the IRS failed to comply with its own regulations during the course of its investigation, and therefore violated her constitutional rights. *Id.* The taxpayer specifically alleged that the IRS violated IRM § 4565.21 because it developed its criminal case under the guise of a civil investigation, by failing to turn the investigation over to the CID sooner than it did. *Id.* at 538-40. The Court acknowledged that *Caceres* left open the possibility that a federal court may enforce the Manual's provisions when compliance with it is mandated by the Constitution or federal law and thus determined that IRM § 4565.21 safeguards individual rights. *Id.*

¹⁵⁹ *United States v. McKee*, 192 F.3d 535, 542 (6th Cir. 1999) (quoting *United States v. Grunewald*, 987 F.2d 531, 534 (8th Cir. 1993)).

¹⁶⁰ *Id.* at 541. (quoting *United States v. Horne*, 714 F.2d 206, 207 (1st Cir. 1983) (per curiam)); accord *United States v. Leahey*, 434 F.2d 7, 10-11 (1st Cir. 1970)); see *United States v. Peters*, 153 F.3d 445, 451-52 n.9 (7th Cir. 1998), *cert. denied*, 525 U.S. 1070 (1999); *United States v. Grunewald*, 987 F.2d 531, 534 & n.3 (8th Cir. 1993).

conducting a criminal investigation under the guise of a civil audit, impacts taxpayers' constitutional rights.

Specifically, if a revenue agent acts unreasonably by conducting a criminal investigation under the auspice of a civil audit, the impact on a taxpayer's Fourth and Fifth Amendment rights is three-fold. First, IRM Section 4565.21 protects a taxpayer from unreasonable search and seizure if consent by a taxpayer to search a taxpayer's documents is fraudulently induced. Second, Section 4565.21 protects a taxpayer from self-incrimination if an IRS agent induces a taxpayer into providing documents or records, which could later incriminate him. Third, IRM Section 4565.21 is designed to protect an individual's liberty from deceit, trickery, or coercion into providing documents for a criminal investigation, which the taxpayer believes is merely a routine audit. As such, the better view is that IRM Section 4565.21 safeguards these constitutional rights.

1. Protection against unreasonable search and seizure under the Fourth Amendment

IRM Section 4565.21 is designed to protect a taxpayer from unreasonable search and seizure. The Fourth Amendment protects "[t]he right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures."¹⁶¹ Its privilege extends equally to taxpayers. The Fourth Amendment not only prohibits searches accomplished by force or by illegal threat amounting to coercion,¹⁶² but also to those accomplished by "stealth, masquerade, or deceit."¹⁶³ Fourth Amendment search and seizure principles thereby prohibit IRS agents from obtaining information from individuals when consent is involuntarily induced by fraud, trickery or deceit.¹⁶⁴ Thus, where the revenue agent misrepresents that in-

¹⁶¹ U.S. CONST. amend. IV.

¹⁶² See *Boyd v. United States*, 116 U.S. 616, 630 (1886) ("It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . .").

¹⁶³ *United States v. Tweel*, 550 F.2d 297, 299 (5th Cir. 1977); *United States v. Prudden*, 424 F.2d 1021 (5th Cir. 1970), *cert. denied*, 400 U.S. 831 (1970); *United States v. Sclafani*, 265 F.2d 408 (2d Cir. 1959); *KOSTELANETZ*, *supra* note 1, at 132; *Saltzman*, *supra* note 8, ¶ 13.09[4].

¹⁶⁴ *Id.* It is a well-established rule that a consent search is unreasonable under the Fourth Amendment if the consent was induced by deceit, trickery or misrepresentation of the IRS revenue agent. See *United States v. McKee*, 192 F.3d 535, 541 (6th Cir.

formation will be used for civil, not criminal, purposes, the taxpayer's consent to an examination or search is violative of these Fourth Amendment rights.

While an IRS agent can lawfully obtain records from a taxpayer with the taxpayer's consent, consent is not free and voluntary if the IRS agent deceives or tricks the taxpayer. This trickery or deceit can take the form of a revenue agent obtaining evidence for use in a criminal tax prosecution during a purported civil audit.¹⁶⁵ Furthermore, a taxpayer's consent to obtain or search through his or her records is not free and voluntary if the taxpayer lacked knowledge of the true purpose for which evidence was sought.¹⁶⁶ Fourth Amendment search and seizure principles thereby prohibit IRS agents from obtaining information from taxpayers when an IRS agent induces involuntary consent from the taxpayer. Consequently, IRS regulations that prohibit an IRS agent from conducting a criminal investigation under the guise of a civil audit protect these Fourth Amendment rights.

2. *Protection against self-incrimination under the Fifth Amendment*

IRM Section 4565.21 also protects a taxpayer against self-incrimination. The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."¹⁶⁷ The Fifth Amendment protects an individual from compelled production of oral testimony as well as his or

1999); *United States v. Peters*, 153 F.3d 445, 451 (7th Cir. 1998), *cert. denied* 525 U.S. 1070 (1999); *Tweel*, 550 F.2d at 299; *United States v. Rothstein*, 530 F.2d 1275 (5th Cir. 1976); *United States v. Ponder*, 444 F.2d 816 (5th Cir. 1971) *cert. denied*, 405 U.S. 918 (1972); *United States v. Tonahill*, 430 F.2d 1042 (5th Cir. 1970), *cert. denied*, 400 U.S. 943 (1970); *Prudden*, 424 F.2d 1021; *Sclafani*, 265 F.2d 408.

¹⁶⁵ See *Schneckcloth v. Bustamonte*, 412 U.S. 218 (1973) (noting that "voluntary consent" may constitute a waiver of the person's constitutional rights under the Fourth Amendment); *Vander Linden v. United States*, 502 F. Supp. 693 (S.D. Iowa 1980) (obtaining records from a taxpayer, although obtained with taxpayer's consent, was not free and voluntary since the taxpayer lacked knowledge that the true purpose of the investigation was criminal rather than civil); SALTZMAN, *supra* note 8, ¶ 13.09[4] (stating that the IRS attempts to justify extraction of this information by claiming that the taxpayer had voluntarily consented, thus waiving his constitutional rights).

¹⁶⁶ See *Vander Linden*, 502 F. Supp. 693 (holding that records obtained from the taxpayer, although obtained with his consent, were not freely and voluntarily obtained since the taxpayer lacked knowledge that the true purpose of the investigation was criminal rather than civil).

¹⁶⁷ U.S. CONST. amend. V.

her personal papers and effects.¹⁶⁸ This Amendment thereby prohibits a revenue agent not only from compelling oral testimony from a taxpayer, but also from inducing a taxpayer to provide documents or records that could later incriminate the taxpayer. IRS regulations that prohibit an IRS agent from masquerading the true purpose for which the IRS agent seeks information protect these Fifth Amendment rights.

If an IRS agent beguiles a taxpayer into providing either oral or written information, which the taxpayer might not have provided had he or she been aware of a forthcoming criminal inquiry,¹⁶⁹ the agent extracts information which compels a taxpayer to become a witness against himself in a criminal case.¹⁷⁰ The routine civil audit may be viewed as an invitation to obtain confessions of guilt from known or suspected delinquent taxpayers. By mandating that a revenue agent turn the case over to the CID upon a "firm indication of fraud," IRS regulations presumably safeguard these rights. It would be a flagrant disregard of a taxpayer's Fifth Amendment rights if an IRS agent deliberately deceived or lulled the taxpayer into incriminating himself during an audit when activities of an obviously criminal nature were under investigation.¹⁷¹ Consequently, IRS regulations, which prohibit an IRS agent from conducting a criminal investigation under the guise of a civil audit, protect these Fifth Amendment rights.

¹⁶⁸ See *Bellis v. United States*, 417 U.S. 85 (1974) (recognizing that the Fifth Amendment privilege against self-incrimination protects an individual from compelled production of his personal papers and effects, as well as compelled oral testimony).

¹⁶⁹ See *United States v. Ponder*, 444 F.2d 816, 819 (5th Cir. 1971) (stating that after the government obtains possession of such information with his consent, it is too late to claim constitutional immunity); *Donaldson v. United States*, 400 U.S. 517 (1971) (expressing no doubt that the government can use information legitimately obtained during a civil audit in the prosecution of a criminal case).

¹⁷⁰ U.S. CONST. amend. V; see *United States v. McKee*, 192 F.3d 535, 541 (6th Cir. 1999) (finding a consensual search unreasonable under the Fifth Amendment if consent was induced by fraud, deceit, trickery or misrepresentation); *United States v. Peters*, 153 F.3d 445, 451 (7th Cir. 1998), *cert. denied*, 525 U.S. 1070 (1999); *Ponder*, 444 F.2d 819 (stating that the Fifth Amendment protects against compulsion and involuntary acts); *Stuart v. United States*, 416 F.2d 459 (5th Cir. 1969) (holding that a taxpayer can successfully resist the production of records on Fifth Amendment grounds when the investigation has become an inquiry with dominant criminal overtones even though the records had previously been examined by the government).

¹⁷¹ *Peters*, 153 F.3d at 452 (7th Cir. 1998); *United States v. Grunewald*, 987 F.2d 531, 534 (8th Cir. 1993).

3. *Protection of individual liberties under the Due Process Clause*

Finally, IRM Section 4565.21 safeguards a taxpayer's liberties protected by the Due Process Clause of the Fifth Amendment. The Fifth Amendment states that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law"¹⁷² This constitutional clause protects an individual's substantive rights, including fundamental liberty and privacy interests,¹⁷³ as well as procedural due process.¹⁷⁴ IRM Section 4565.21 safeguards these interests. Specifically, the provision prevents an IRS agent from infringing on a taxpayer's fundamental rights by conducting a criminal investigation under the pretense of a civil audit. Furthermore, the provision safeguards a taxpayer's procedural due process rights by preventing IRS agents from acting arbitrarily or unfairly.

An agent's misrepresentation or deliberate concealment of the nature of the inquiry, in order to obtain access to the private premises of a taxpayer and his or her books, records, and oral statements, infringes on a taxpayer's liberty interest. "Liberty" has been assumed to include nearly every interest of significance to an individual, including the right of privacy and security.¹⁷⁵ This provision protects a taxpayer from deceit or from being tricked into providing documents for a criminal investigation, which the taxpayer believes is merely a routine audit.¹⁷⁶ Moreover, it protects the taxpayer against unfair treatment. It would be an outrageous disregard of a taxpayer's individual rights if an agent deliberately deceived a taxpayer into incriminating himself during an audit when a criminal investigation was underway.¹⁷⁷

¹⁷² U.S. CONST. amend. V.

¹⁷³ See, e.g., *Roe v. Wade*, 410 U.S. 113, 152 (1973) (recognizing that although the Constitution does not explicitly mention any right to privacy, the Court has long since believed that "a right of personal privacy or a guarantee of certain areas or zones of privacy does exist under the Constitution"); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing that a right of privacy is protected by the Bill of Rights or its penumbras).

¹⁷⁴ See, e.g., *Webster v. Doe*, 486 U.S. 592, 596 (1988) (stating that the Fifth Amendment safeguards procedural due process); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

¹⁷⁵ See *Griswold*, 381 U.S. 479; GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 615-616 (13th ed. 1997).

¹⁷⁶ *United States v. McKee*, 192 F.3d 535, 541 (6th Cir. 1999); *United States v. Tweel*, 550 F.2d 297, 299 (5th Cir. 1977).

¹⁷⁷ *McKee*, 192 F.3d at 541; *Tweel*, 550 F.2d at 299.

The Due Process Clause also guarantees systematic justice.¹⁷⁸ It embodies a commitment to procedural regularity and legitimacy of government conduct,¹⁷⁹ holding the government to a standard of procedural correctness. Similarly, IRM Section 4565.21 guarantees fair process by ensuring uniform conduct by all IRS agents.¹⁸⁰ Due process requires the IRS to follow its announced procedures, and embodies the objective of uniform conduct by all IRS agents.¹⁸¹ It prohibits an IRS agent from acting arbitrarily and unfairly as he or she wishes. If agents could violate a self-imposed rule of conduct without sanctions, the end result would be terrifying. Failure to enforce these rules would erode citizens' faith in the even-handed administration of justice.

IV. HEAVY BURDEN FOR TAXPAYERS TO DEMONSTRATE IRS VIOLATION OF ITS MANUAL

Since IRM Section 4565.21 safeguards taxpayers' Fourth and Fifth Amendment rights, a taxpayer may challenge a tax conviction based on the IRS's alleged noncompliance with its procedures.¹⁸² Based on the current state of the law, however, it is difficult, if not impossible, for a taxpayer to litigiously enforce his or her constitutional rights against the IRS. Although IRM provisions expressly forbid a revenue agent from conducting a civil audit after developing a "firm indication of fraud,"¹⁸³ whether revenue agents truly adhere to this provision is questionable.¹⁸⁴ Numerous cases alleging that IRS civil agents have conducted criminal investigations under the guise of civil investigations have been filed.¹⁸⁵ Courts, however, rarely find that IRS agents violate provisions in their Manual.¹⁸⁶

¹⁷⁸ *United States v. Caceres*, 440 U.S. 741, 764 (1979) (Marshall, J., dissenting).

¹⁷⁹ *Id.*

¹⁸⁰ SALTZMAN, *supra* note 8, ¶ 3.04[b].

¹⁸¹ *United States v. Leahey*, 434 F.2d 7, 10 (1st Cir. 1970).

¹⁸² IRM § 4565.21 (1999).

¹⁸³ *Id.*

¹⁸⁴ See *United States v. Caceres*, 440 U.S. 741, 761 (1979) (Marshall, J., dissenting) (noting concern about the IRS's failure to detect or disapprove violations of its own internal rules and citing evidence that no dismissals or demotions had occurred following an internal audit which had revealed thirty-five to forty instances of improper conduct).

¹⁸⁵ See cases cited *supra* note 91.

¹⁸⁶ One of the sole cases where an IRS agent was found to have violated Section 4565.21 of the Manual was in *United States v. Tweel*, 550 F.2d 297, 299 (5th Cir. 1977).

This section begins by discussing the different approaches employed by the circuits to determine whether an IRS agent has conducted a criminal investigation under the guise of a civil audit. The section concludes that such tests are difficult to employ and are biased in favor of the IRS. Consequently, taxpayers bear a heavy burden in demonstrating that IRS agents infringed on their constitutional rights.

A. THE DIFFERENT APPROACHES EMPLOYED BY THE CIRCUITS

While courts have generally decided that the “firm indications of fraud” rule, as set forth in IRM Section 4565.21, is a good benchmark for determining whether the IRS has conducted a criminal investigation under the guise of a civil audit,¹⁸⁷ the circuits have used various tests to determine whether an IRS agent has violated this rule. In *Grunewald v. United States*,¹⁸⁸ the Eighth Circuit held that a taxpayer may prove that an IRS agent conducted a criminal investigation under the guise of a civil audit if the taxpayer establishes that: first, the IRS had a “firm indication of fraud” by the taxpayer; second, there is clear and convincing evidence that the IRS “affirmatively and intentionally” misled the taxpayer; and third, the IRS’s conduct resulted in prejudice to the taxpayer’s constitutional rights.¹⁸⁹

Other courts have developed constitutional tests closely resembling the “three *Grunewald* factors.”¹⁹⁰ For example, the

¹⁸⁷ See, e.g., *United States v. Peters*, 153 F.3d 445, 451-52 (7th Cir. 1998), *cert. denied*, 525 U.S. 1070 (1999); *United States v. Wadena*, 152 F.3d 831, 851 (8th Cir. 1998) (requiring a defendant seeking to suppress evidence to show that the IRS continued with civil audit after it developed firm indication of fraud), *cert. denied*, 526 U.S. 1050 (1999); *United States v. Grunewald*, 987 F.2d 531, 534 (8th Cir. 1993); *Groder v. United States*, 816 F.2d 139, 142 (4th Cir. 1987) (stating that continuation of fraud is relevant to issue of whether agency conducted investigation in good faith).

¹⁸⁸ 987 F.2d 531 (8th Cir. 1993).

¹⁸⁹ *Grunewald*, 987 F.2d at 534 (stressing the essence of its approach was the presence of affirmative and intentional misleading by the IRS); *Wadena*, 152 F.3d at 851 (citing the “three *Grunewald* factors”).

¹⁹⁰ See *United States v. McKee*, 192 F.3d 535, 542 (6th Cir. 1999) (noting that a taxpayer may seek to suppress evidence if he establishes by clear and convincing evidence that: first, the IRS agent made affirmative misrepresentations in the course of the investigation; and second, that because of those misrepresentations, the taxpayer disclosed incriminating evidence to the prejudice of his constitutional rights); *Peters*, 153 F.3d at 452 (“Rather than articulating ‘firm indication of fraud’ as independent from a showing that the IRS affirmatively and intentionally misled the defendant, the ‘firm indications’ rule is best utilized as a tool for assessing whether the IRS has affirmatively misrepresented the nature of its investigation under the guise of a civil audit.”). The *Peters* court noted that its approach was not a doctrinal departure from

McKee court stated that a taxpayer may seek to suppress evidence if the taxpayer establishes by clear and convincing evidence that: first, the IRS agent made affirmative misrepresentations in the course of the investigation; and second, that because of those misrepresentations, the taxpayer disclosed incriminating evidence to the prejudice of the taxpayer's constitutional rights.¹⁹¹ Any differences in the tests employed by the circuits, however, appear to be of form rather than of substance.¹⁹²

B. THE TEST FOR DETERMINING WHETHER A REVENUE AGENT HAS VIOLATED IRM SECTION 4565.21 IS DIFFICULT TO APPLY AND IS BIASED IN FAVOR OF THE IRS

Courts have devised several different incarnations of the constitutional tests set forth by *Grunewald* and *McKee*.¹⁹³ For simplicity purposes, the general test for determining whether a revenue agent has conducted a criminal investigation under the guise of a civil audit¹⁹⁴ can be condensed as follows: The taxpayer must produce clear and convincing evidence that the IRS agent affirmatively misrepresented that the tax investigation was routine after having developed a "firm indication of fraud," and that because of such affirmations, the taxpayer disclosed evidence to the IRS agent against his or her constitutional rights.¹⁹⁵

the approach set forth by the Eighth Circuit in *Grunewald* and *Wadena*, stating that in *Grunewald*, the Eighth Circuit stressed that the essence of its approach was the presence of affirmative and intentional misleading by the IRS. *Peters*, 153 F.3d at 452. See also *United States v. Prudden*, 424 F.2d 1021, 1033 (5th Cir. 1970):

The mere failure of a revenue agent . . . to warn the taxpayer that the investigation may result in criminal charges, absent any acts by the agent which materially misrepresent the nature of the inquiry, does not constitute fraud, deceit and trickery. Therefore, the record here must disclose some affirmative representation to establish the existence of fraud, and this showing must be clear and convincing.

cert. denied, 400 U.S. 831 (1970).

¹⁹¹ *McKee*, 192 F.3d at 542.

¹⁹² *Id.* In general, courts require the taxpayer to produce clear and convincing evidence that the agents affirmatively misled him as to the true nature of their investigation. See *id.*; *Peters*, 153 F.3d at 451-453; *Wadena*, 152 F.3d at 851; *Grunewald*, 987 F.2d at 534.

¹⁹³ See *supra* note 190 and accompanying text.

¹⁹⁴ IRM § 4565.21 (1999).

¹⁹⁵ See, e.g., *McKee*, 192 F.3d at 542; *United States v. Nuth*, 605 F.2d 229, 234 (6th Cir. 1979).

This test, however, is inadequate for several reasons. First, the “firm indication of fraud” standard is inherently vague,¹⁹⁶ and depends in large part on the good faith and professional judgment of the revenue agents conducting the investigation.¹⁹⁷ Second, the “affirmative misrepresentation” requirement is difficult to prove, and courts rarely find an affirmative misrepresentation on the part of the IRS agent.¹⁹⁸ Furthermore, the absence of a duty to warn a taxpayer of a potential ensuing criminal investigation is problematic.¹⁹⁹ Finally, this test is biased in favor of the IRS. Given the tremendous amount of deference that IRS agents have to carry out their official duties, courts are unwilling to hold that an IRS agent has abused his or her discretion in continuing an investigation.²⁰⁰ Taxpayers therefore bear a tremendous burden in proving that an agent has violated the Manual and infringed on their constitutional rights.

1. “Firm indication of fraud” standard is vague

IRM Section 4565.21 mandates that a revenue agent suspend his or her audit upon discovering a “firm indication of fraud,” and refer the case to the CID.²⁰¹ Courts, like the IRS, have adopted this “firm indication of fraud” standard as a benchmark for determining whether an IRS agent has conducted a criminal investigation under the guise of a civil audit.²⁰² Some courts, like *Grunewald*,²⁰³ have set forth a “firm indication of fraud” test as a separate factor, aside from the “affirmative misrepresentation” requirement, to determine whether the agent intentionally misled the taxpayer.²⁰⁴ Other courts use the “firm indications” rule as a tool for assessing whether the IRS

¹⁹⁶ See discussion *infra* Section IV.B.1.

¹⁹⁷ See discussion *infra* Section IV.B.1.

¹⁹⁸ See discussion *infra* Section IV.B.2.

¹⁹⁹ See discussion *infra* Section IV.B.3.

²⁰⁰ See discussion *infra* Section IV.B.4.

²⁰¹ IRM § 4565.21 (1999).

²⁰² See, e.g., *United States v. Wadena*, 152 F.3d 831 (8th Cir. 1998) (requiring a defendant seeking to suppress evidence to show that the IRS continued with civil audit after it developed firm indication of fraud), *cert. denied*, 526 U.S. 1050 (1999); *Groder v. United State*, 816 F.2d 139, 142 (4th Cir. 1987) (stating that continuation of fraud is relevant to issue of whether agency conducted investigation in good faith).

²⁰³ *United States v. Grunewald*, 987 F.2d 531 (8th Cir. 1993).

²⁰⁴ *Id.* at 534; *Wadena*, 152 F.3d at 851; *United States v. Serlin* 707, F.2d 953, 957 (7th Cir. 1983).

agent committed an affirmative misrepresentation as to the nature of the agent's investigation.²⁰⁵ Nonetheless, whether the "firm indication of fraud" standard is an independent factor or combined with the "affirmative misrepresentation" requirement, the criterion is problematic for the following reasons.²⁰⁵

Foremost, the courts' attempt to distinguish a "firm indication of fraud" from a "first indication of fraud", has proven to be unsuccessful.²⁰⁷ A "first indication of fraud" can be described as a mere suspicion of fraud.²⁰⁸ On the contrary, a "firm indication of fraud" confirms, supports and adds to the initial suspicion of fraud.²⁰⁹ IRS regulations instruct its revenue agents to suspend their civil activities when they detect the latter,²¹⁰ However, where the distinction lies between "first" and "firm" is unclear.

IRS regulations instruct a revenue agent to "perfect" any "first indication of fraud" to ensure that such indication is substantial, before referring the case to the CID.²¹¹ Indeed, IRS examiners are legally permitted to ask the taxpayer to explain and support discrepancies, which are the basis of the examiner's suspicions of fraud, and ask for any information that will resolve the question of the taxpayer's intent.²¹² However, this procedure is problematic because in doing so, the revenue agent examines the taxpayers' books and records, which may later become unavailable to the IRS when the taxpayer knows of the criminal nature of the investigation.

In the process of perfecting indications of fraud, a revenue agent may gather evidence for use in a criminal case without giving notice to the taxpayer that what began as an ordinary ex-

²⁰⁵ *United States v. McKee*, 192 F.3d 535, 542 (6th Cir. 1999) (using the "firm indication of fraud" standard as a tool to assess whether the IRS agent made an affirmative misrepresentation to the constitutional detriment of the taxpayer); *United States v. Peters*, 153 F.3d 445, 452 (7th Cir. 1998) (using the "firm indication of fraud" rule "as a tool for assessing whether the IRS has affirmatively misrepresented the nature of its investigation under the guise of a civil audit" rather than as an independent standard), *cert. denied*, 525 U.S. 1070 (1999).

²⁰⁶ *Grunewald*, 987 F.2d at 534 (noting that these two formulations do not doctrinally depart).

²⁰⁷ *Id.* at 455; *Wadena*, 152 F.3d at 851.

²⁰⁸ *Id.*; *Peters*, 153 F.3d at 455.

²⁰⁹ *Id.* (quoting IRM § 4565.21).

²¹⁰ IRM § 4565.21 (1999) (instructing revenue agents to be alert to fraud).

²¹¹ *Peters*, 153 F.3d at 455 (quoting SALTZMAN, *supra* note 8, ¶ 12.03[1][a]).

²¹² *Id.* at 445. Indeed, this development is necessary because the CID must have sufficient information from which to assess the potential of a criminal case.

amination has changed focus.²¹³ The agent must discontinue the investigation at "the earliest opportunity" and do so without disclosing the reason for suspending the audit to the taxpayer.²¹⁴ Yet, the "earliest opportunity" does not mean "immediately."²¹⁵ The reality is that the referring revenue agent may have obtained evidence useful to and perhaps critical in a criminal investigation, such as extracts or copies of the taxpayer's records, even before the special agent has appeared.²¹⁶ Any attempt to separate a "firm indication of fraud" from a "first indication of fraud" thus seems obscure.

The vagueness of the "firm indication of fraud" test is further exemplified by the courts' failure to devise a meaningful set of factors to determine exactly when there is a *firm indication* of the fraud.²¹⁷ Unable to express the "firm indication of fraud" standard in a set of absolute criteria,²¹⁸ courts have used several considerations to guide themselves in these open waters.²¹⁹ Case law suggests that a revenue agent has developed a "firm indication of fraud" upon occurrence of any of the following circumstances: the taxpayer has engaged in a consistent pattern of substantial underreporting income or overstating deductions, such that intent can be inferred;²²⁰ CID personnel participates in a civil audit prior to completion of a criminal referral;²²¹ the revenue agent continues audit activities after beginning preparation of the fraud referral report;²²² or the revenue agent has assessed the taxpayer's intent as willful or intentional.²²³ These

²¹³ SALTZMAN, *supra* note 8, ¶ 12.03[1].

²¹⁴ *United States v. Peters*, 153 F.3d 445, 452-53 (7th Cir. 1998), *cert. denied*, 525 U.S. 1070 (1999).

²¹⁵ *Id.*

²¹⁶ SALTZMAN, *supra* note 8, ¶ 12.03[1].

²¹⁷ *Peters*, 153 F.3d at 453 (noting the "firm indications of fraud" rule is not expressed in a set of absolute criteria, rather the facts and circumstances of each case must be assessed in their own light).

²¹⁸ *Id.*

²¹⁹ *Peters*, 153 F.3d at 453.

²²⁰ *United States v. Grunewald*, 987 F.2d 531, 534 (8th Cir. 1993).

²²¹ *Peters*, 153 F.3d at 445; *United States v. Caldwell*, 820 F.2d 1395, 1399 n.4 (5th Cir. 1987); *United States v. Robson*, 477 F.2d 13, 17 (9th Cir. 1973).

²²² *Peters*, 153 F.3d at 445; *United States v. Wadena*, 152 F.3d 31 (8th Cir. 1998), *cert. denied*, 526 U.S. 1050 (1999).

²²³ *See Peters*, 153 F.3d at 445 (recognizing that assessment of the taxpayer's intent is the most critical element in a revenue agent's determination of whether "firm indica-

factors, however, burden the taxpayer to establish an affirmative misrepresentation on behalf of the revenue agent. As later discussed, this is problematic because seldom is an affirmative misrepresentation clear.²²⁴ More often, taxpayers encounter the indistinct situation where an IRS agent leads a taxpayer to believe that the investigation pertains to a civil audit, or where the IRS revenue agent is silent.²²⁵

Finally, the "firm indications of fraud" standard is a difficult standard for federal courts to apply because it depends in large part on the good faith and judgment of the revenue agents conducting the investigation.²²⁶ IRS regulations require the revenue agent to exercise extraordinary delicate judgments as to when an investigation should be discontinued.²²⁷ The agent must discontinue the investigation at the exact point that the agent detects enough evidence to support fraud.²²⁸ But the dilemma is clear. This test does not protect taxpayers from overzealous IRS agents, and may be entirely inadequate to protect against agent misconduct during the "passion of the hunt."²²⁹

2. "Affirmative misrepresentation" by IRS agent is difficult to establish

To determine whether an agent violates IRM Section 4565.21, the taxpayer must also prove that the revenue agent made an "affirmative misrepresentation" that the investigation was a routine civil audit, when in fact, the investigation sought evidence for a criminal prosecution.²³⁰ This central "affirmative

tions of fraud" exist in any particular case); *Groder v. United States*, 816 F.2d 139, 143-144 (4th Cir. 1987) (stating that the taxpayer's intent to evade taxes differentiates a criminal violation from a civil case).

²²⁴ See discussion *infra* Section IV.B.2.

²²⁵ See discussion *infra* Section IV.B.2.

²²⁶ *Peters*, 153 F.3d at 452-53.

²²⁷ See *United States v. Michaud*, 860 F.2d 495, 498-99 (1st Cir. 1988); *United States v. Caldwell*, 820 F.2d 1395, 1402 (5th Cir. 1987) (noting that the criminal referral decision is discretionary in nature and is not governed by any absolute criteria).

²²⁸ See IRM § 4565.21 (1999).

²²⁹ Budner, *supra* note 3, at 801; see discussion *infra* Section V.B.

²³⁰ See, e.g., *United States v. McKee*, 192 F.3d 535 (6th Cir. 1999) (stating that if the revenue agent continues the civil audit even after she has discovered "firm indications of fraud," then the agent is in fact, making affirmative representations to the constitutional detriment of the taxpayer because he or she is gathering criminal evidence against the taxpayer under the guise of a civil proceeding); *United States v. Peters*, 153 F.3d 445, 447 (7th Cir. 1998), *cert. denied*, 525 U.S. 1070 (1999); *United States v. Wadena*, 152 F.3d 831, 851 (8th Cir. 1998), *cert. denied*, 526 U.S. 1050 (1999); *United*

misrepresentation" component, however, is difficult to establish. Courts rarely find an affirmative misrepresentation unless there is a "clear showing that the taxpayer was tricked or deceived."²³¹ With the exception of the Fifth Circuit case, *United States v. Tweel*,²³² seldom is an affirmative misrepresentation on the part of an IRS agent altogether clear.²³³

In *Tweel*, the taxpayer moved to suppress evidence obtained by the IRS during the course of a routine civil audit, from the ensuing criminal prosecution for tax evasion.²³⁴ The taxpayer argued that during the course of the civil audit, his accountant asked the IRS agent whether the special agent was involved to determine whether the nature of the tax examination was criminal or civil.²³⁵ The agent, however, denied criminal involvement without disclosing that the audit was conducted at the specific request of the criminal department.²³⁶

Applying the Fifth Circuit's rule that consent is ineffective under the Fourth Amendment if induced by an IRS agent's deceit, trickery or misrepresentation,²³⁷ the court held that the agent's failure to tell the taxpayer of the "obvious criminal nature of this investigation was a sneaky, deliberate deception by the agent"²³⁸ In these circumstances, "the misrepresentation was both intentionally misleading and material," thereby vitiating the taxpayer's consent to inspect his documents.²³⁹

States v. Grunewald, 987 F.2d 531, 534 (8th Cir. 1993); *United States v. Nuth*, 605 F.2d 229, 234 (6th Cir. 1979) (an affirmative misrepresentation by an IRS agent that the investigation is routine when it is, in fact, a criminal investigation, generally requires suppression of evidence).

²³¹ *McKee*, 192 F.3d at 542 (suppressing evidence only upon a "clear showing that the taxpayer was tricked or deceived" (citing *United States v. Nuth*, 605 F.2d 229, 234 (6th Cir. 1979))); see also *United States v. Allen*, 522 F.2d 1229, 1233 (6th Cir. 1975) ("In the absence of a clear showing that the taxpayer has been tricked or deceived by the government agents into providing incriminating information, the documents and statements obtained by the Internal Revenue agents are admissible.").

²³² 550 F.2d 297 (5th Cir. 1977).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 298. Each of the IRS revenue agents made intentional misrepresentations to procure information the taxpayers otherwise would not have produced. *Id.*

²³⁶ *Id.* The investigation was conducted at the request of the Organized Crime and Racketeering Section of the Department of Justice, which is only involved in criminal investigations. *Id.*

²³⁷ See *United States v. Prudden*, 424 F.2d 1021, 1033 (5th Cir. 1970) (reversing suppression order), *cert. denied*, 400 U.S. 831 (1970).

²³⁸ *Tweel*, 550 F.2d at 299.

²³⁹ *Id.*

During oral argument, counsel for the Government stated that the procedures employed by the IRS agent were "routine."²⁴⁰ Interestingly, the court noted that "[i]f that is the case we hope our message is clear. This sort of deception will not be tolerated and if this is the 'routine' it should be corrected immediately."²⁴¹

Few cases demonstrate an affirmative misrepresentation by an IRS agent as clearly as *Tweel*. Most cases do not implicate a criminal law enforcement agency actually requesting that the IRS conduct a civil audit as part of an ongoing criminal investigation.²⁴² A more likely scenario is where an IRS agent silently changes focus of the investigation into one that is criminal in nature, and leads the taxpayer to believe that the purpose of the investigation continues to be one that is civil.²⁴³ As one vulnerable taxpayer claimed, "I was completely convinced that no criminal investigation would ensue, because the wording in [the letters from the revenue agent] gave me the impression that the [a]gent was finally closing the case."²⁴⁴

While an affirmative misrepresentation as to the nature of an investigation is strong evidence of coercion,²⁴⁵ courts have generally considered silence to be fraudulent only if there is clear and convincing evidence that the silence was intentionally misleading.²⁴⁶ Realistically, courts have simply not found an IRS

²⁴⁰ *Id.* at 300 n.9.

²⁴¹ *Id.* at 300 ("Our revenue system is based on the good faith of the taxpayers and the taxpayers should be able to expect the same from the government in its enforcement and collection activities.").

²⁴² See *United States v. Peters*, 153 F.3d 445, 457 (7th Cir. 1998) (noting that "unlike *Tweel*, this was not a case in which a criminal law enforcement agency requested that the IRS conduct a civil audit as part of an ongoing investigation"), *cert. denied*, 525 U.S. 1070 (1999).

²⁴³ See, e.g., *United States v. Prudden*, 424 F.2d 1021 (5th Cir. 1970), *cert. denied* 400 U.S. 831 (1970); *United States v. Tonahill*, 430 F.2d 1042 (5th Cir. 1970), *cert. denied*, 400 U.S. 943 (1970).

²⁴⁴ *United States v. Marra*, 481 F.2d 1196, 1200-01 (6th Cir. 1973).

²⁴⁵ *United States v. Mapp*, 561 F.2d 685, 689 (7th Cir. 1977); *United States v. Lehman*, 468 F.2d 93, 105 (7th Cir. 1972), *cert. denied*, 409 U.S. 967 (1972).

²⁴⁶ *Peters*, 153 F.3d at 451 ("Simple failure to inform defendant that he was the subject of the investigation, or that the investigation was criminal in nature, does not amount to affirmative deceit unless defendant inquired about the nature of the investigation and the agents' failure to respond was intended to mislead." (citing *United States v. Serlin*, 707 F.2d 953, 956 (7th Cir. 1983))); *Tweel*, 550 F.2d at 299 ("Silence can only be equated with fraud where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading." (citing *Prudden*, 424 F.2d at 1032))); *United States v. Meier*, 607 F.2d 215, 217 (8th Cir. 1979) (holding

agent's silence to be intentionally misleading. Cases like this are not in short supply.

In *United States v. Prudden*,²⁴⁷ the revenue agent referred the taxpayer's case to the CID upon finding a "firm indication of fraud."²⁴⁸ However, the revenue agent continued his examination and requested further information from the taxpayer.²⁴⁹ In several instances, the taxpayer refused to give the agent documents that he felt were outside the scope of the examination.²⁵⁰ However, the revenue agent informed the taxpayer that the IRS would continue to request further information until the taxpayer produced the records.²⁵¹ A succeeding revenue agent thereafter appeared with a special agent of the CID, who identified himself as such.²⁵² The two agents told the defendant they were examining his returns, but never told him that a criminal investigation was in progress.²⁵³ The district court suppressed all evidence obtained during the referral, but the Fifth Circuit reversed, holding that the revenue agent did not affirmatively misrepresent the nature of the examination to the taxpayer.²⁵⁴

Similarly, *United States v. Tonahill*²⁵⁵ involved a referral to the CID from the Examination Division during the course of a civil audit.²⁵⁶ Following the appearance of a special agent, the taxpayer asked both the revenue agent and the special agent why the investigation was so lengthy, and whether fraud was involved.²⁵⁷ The agents stated that they were attempting to reconcile large discrepancies, and did not advise the defendant about whether fraud was involved.²⁵⁸ After the taxpayer was aware of the formal criminal prosecution, he sought to suppress all evi-

that the taxpayer failed to present clear and convincing evidence that agent's silence was intended to mislead him), *cert. denied*, 445 U.S. 966 (1980).

²⁴⁷ *Prudden*, 424 F.2d 1021 (5th Cir. 1970), *cert. denied*, 400 U.S. 831 (1970).

²⁴⁸ *Id.* at 1022-23.

²⁴⁹ *Id.* at 1023.

²⁵⁰ *Id.* at 1024.

²⁵¹ *Id.* (taxpayer told the revenue agent that the revenue agent was simply on a fishing expedition—trying only to gather facts that would support the agent's preconceived conclusions).

²⁵² *Id.* at 1024-25.

²⁵³ *Id.*

²⁵⁴ *Id.* at 1035.

²⁵⁵ 430 F.2d 1042 (5th Cir. 1970), *cert. denied*, 400 U.S. 943 (1970).

²⁵⁶ *Id.* at 1044.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

dence obtained by the IRS agent during the purported civil audit, from the ensuing criminal prosecution. The trial court granted the motion to suppress the evidence.²⁵⁹ However, the Fifth Circuit, in reliance upon *Prudden*, reversed the granting of the motion to suppress.²⁶⁰

While recognizing that evidence obtained during a civil audit upon an affirmative misrepresentation by an IRS agent might be suppressed in a subsequent criminal trial, both *Prudden* and *Tonahill* recognize that failure by the IRS revenue agent to advise the taxpayer that a criminal investigation is underway does not amount to such conduct.²⁶¹ Indeed, few courts have actually found an affirmative misrepresentation on the part of the IRS agent.²⁶² As one court noted:

[The taxpayers did] not present clear and convincing evidence that the IRS affirmatively and intentionally misled the defendants by conducting the civil audit . . . with the express purpose of obtaining records for the criminal investigation. Indeed [taxpayers] point to nothing more than knowledge by the [revenue agent] that [the CID special agent] was conducting a criminal investigation. Neither [taxpayers] have established the second *Grunewald* factor.²⁶³

The court stated that proof of knowledge by the civil auditor that a criminal investigation had commenced was insufficient to prove an affirmative misrepresentation on behalf of the IRS agent. What, then, does the taxpayer need to prove? Each of these cases illustrates that proving an affirmative misrepresentation by the IRS agent is difficult, if not nearly impossible. Furthermore, even if district courts do find some form of affirmative act or misrepresentation, most cases are overturned on appeal.²⁶⁴ *Tweel*, the archetypal case of an "affirmative act" by a

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 1044-45.

²⁶¹ *Id.*; *United States v. Prudden*, 424 F.2d 1021 (5th Cir. 1970), *cert. denied*, 400 U.S. 831 (1970).

²⁶² *United States v. Tweel*, 550 F.2d 297, 298-99 (5th Cir. 1977).

²⁶³ *United States v. Wadena*, 152 F.3d 831, 852 (8th Cir. 1998), *cert. denied*, 526 U.S. 1050 (1999).

²⁶⁴ See, e.g., *Prudden*, 424 F.2d 1021 (reversing suppression of evidence obtained during the course of the audit referral); *Tonahill*, 430 F.2d 1042 (5th Cir. 1970) (reversing granting of motion to suppress evidence gathered during the course of civil audit), *cert. denied*, 400 U.S. 943 (1970).

revenue agent,²⁶⁵ is a rarity because seldom will the CID or any other criminal law enforcement agency explicitly request the Examination Division to further its investigation. What is more, *Tweel* is over thirty years old.²⁶⁶ The lack of judicial recognition of this requirement renders it effectively useless.

3. *Absence of duty to warn taxpayer of a potential ensuing criminal investigation is problematic*

Underlying the vagueness of the affirmative misrepresentation requirement is the inherent problem that the IRS revenue agent need not warn taxpayers that the civil audit *may evolve* into a criminal investigation.²⁶⁷ Unlike a special agent,²⁶⁸ a revenue agent need not disclose to the taxpayer at the onset of the investigation, that the investigation may result in a criminal charge.²⁶⁹ Revenue agents also do not have a duty to apprise a taxpayer that the taxpayer need not furnish requested information,²⁷⁰ and that if the taxpayer does furnish such information, it may be used against him in criminal proceedings.²⁷¹ This is perhaps the

²⁶⁵ *Tweel*, 550 F.2d 297.

²⁶⁶ *Id.*

²⁶⁷ *United States v. Peters*, 153 F.3d 445, 447 (7th Cir. 1998), *cert. denied*, 525 U.S. 1070 (1999); *United States v. Wadena*, 152 F.3d 831, 851-52 (8th Cir. 1998) ("The mere failure of an IRS agent to inform a defendant that information developed in an audit may result in a further criminal investigation does not indicate affirmative and intentional deceit by the IRS."); *United States v. Tweel*, 550 F.2d 297, 298 (5th Cir. 1977) (holding that the mere failure of a revenue agent "to warn the taxpayer that the investigation may result in criminal charges, absent any acts by the agent which materially misrepresent the nature of the inquiry, do not constitute fraud, deceit or trickery." (quoting *Prudden*, 424 F.2d at 1033)).

²⁶⁸ *United States v. Tweel*, 550 F.2d 297, 299-300 (5th Cir. 1977). The *Tweel* court noted that a special agent must advise the taxpayer before the interview, of the following:

As a special agent, one of my functions is to investigate the possibility of criminal violations of the Internal Revenue Laws, and related offenses. In connection with my investigation of your tax liability (or other matter) I would like to ask you some questions. However, first I advise you that under the Fifth Amendment of the Constitution of the United States I cannot compel you to answer any questions or submit any information if such answers or information might tend to incriminate you in any way. I also advise you that anything which you say and any information which you submit may be used against you in any criminal proceeding which may be undertaken. I advise you further that you may, if you wish, seek the assistance of an attorney before responding. Do you understand.

Id. at 300 n.3.

²⁶⁹ *Peters*, 153 F.3d at 447.

²⁷⁰ *United States v. Spomar*, 339 F.2d 941 (7th Cir. 1964).

²⁷¹ The view that *Miranda* requirements do not apply to non-custodial questioning by IRS agents has been adopted by every Court of Appeals which has passed on this

most troublesome aspect of the civil audit. Taxpayers may not know that information turned over during the course of a civil audit may be used against them in a criminal proceeding.²⁷²

This problem is further exacerbated by the fact that the revenue agent has no duty to disclose to the taxpayer *when* the focus of the investigation has changed in status from civil to criminal,²⁷³ nor that the agent has referred the case to the CID.²⁷⁴ The IRS maintains that the mere fact that a taxpayer's returns are under audit should give the taxpayer "sufficient no-

question and by a majority of the District Courts which have done so. These courts have distinguished examinations introduced by misrepresentation and deceit, and those examinations that commence openly and correctly as routine audits but which later develop into criminal cases. See *United States v. Peters*, 153 F.3d 445 (7th Cir. 1998) (holding that simple failure to inform defendant that he was the subject of the investigation, or that the investigation was criminal in nature, does not amount to affirmative deceit unless defendant inquired about the nature of the investigation and the agents' failure to respond was intended to mislead), *cert. denied*, 525 U.S. 1070 (1999); *United States v. Lehman*, 468 F.2d 93 (7th Cir. 1972), *cert. denied*, 409 U.S. 967 (1972); *United States v. Ponder*, 444 F.2d 816 (5th Cir. 1971); *Prudden*, 424 F.2d 1021; *United States v. Squeri*, 398 F.2d 785, 789 (2d Cir. 1968) (stating that the requirement of a warning of right to counsel, necessary to prevent compulsion where the person questioned is in custody or otherwise deprived of his freedom of action in any significant way, does not extend to all other instances of government questioning, and "application of the full *Miranda* requirements to non-custodial questioning conducted during the initial stages of tax inquiry or other routine government inquiry, would impede an already difficult administrative task and seriously hinder the efficiency with which that task is carried out."); *United States v. Sciafani*, 265 F.2d 408, 415 (2d Cir. 1959) (holding that a routine tax investigation openly commenced as such lacks stealth or deceit because the ordinary taxpayer knows that there is inherent in it a warning that the government's agents will "pursue evidence of misreporting without regard to the shadowy line between avoidance and evasion, mistake and willful omission"), *cert. denied*, 360 U.S. 918 (1959); *Turner v. United States*, 222 F.2d 926, 931 (4th Cir. 1955) ("[I]t is not essential to the admissibility of statements secured by officers of the law from a defendant that he should be first warned that the information might be used against him in a criminal case, provided that it was voluntarily and understandingly given."); *Hanson v. United States*, 186 F.2d 61 (8th Cir. 1950). Note that the special agent must give *Miranda* warnings at the inception of the IRS's first contact with him after the revenue agent transfers the case to him. *United States v. Dickerson*, 413 F.2d 1111 (7th Cir. 1969).

²⁷² SALTZMAN, *supra* note 8, ¶ 2.03[2][b]; see *United States v. Meier*, 607 F.2d 215 (8th Cir. 1979), *cert. denied*, 445 U.S. 966 (1980); *United States v. Spomar*, 339 F.2d 941 (7th Cir. 1964).

²⁷³ *United States v. Marra*, 481 F.2d 1196, 1203 (6th Cir. 1973) ("[I]t is unrealistic to suggest that the government could or should keep a taxpayer advised as to the direction in which its necessarily fluctuating investigations lead." (quoting *United States v. Sciafani*, 265 F.2d 408, 414-15 (2d Cir. 1959))).

²⁷⁴ HARRY GRAHAM BALTER, TAX FRAUD AND EVASION 5.03[3][c] (1983) (stating that there is no need to warn taxpayer, or any of the taxpayer's representatives, that the revenue agent intends to submit his findings to the CID to determine whether to continue the investigation).

tice of the possibility of criminal prosecution regardless of whether the agents contemplate civil or criminal action"²⁷⁵

In *United States v. Nuth*,²⁷⁶ the taxpayer alleged that the IRS agent violated IRM Section 4565.21 by tricking the taxpayer into providing information that he would not have provided if he had known that a future investigation was pending.²⁷⁷ The court found, however, that the taxpayer had not been effectively tricked or deceived by the IRS agent as to the criminal nature of the tax investigation, because the taxpayer was an attorney and a businessman who must have been aware of the "potential criminal aspects" of the civil audit.²⁷⁸ The court embraced the notion that a taxpayer who cooperates with a revenue agent on the assumption that the investigation is a civil audit, and cooperates after the focus of the audit has changed, cooperates at the taxpayer's own risk.²⁷⁹ This is true even if the taxpayer would not have cooperated had the revenue agent advised him that a possible criminal case may evolve.²⁸⁰

The rationale of the court's decision in *Nuth* and its progeny reflects the assumption that every taxpayer knows or should know that when an audit by a revenue agent begins, there is always a possibility that the investigation may end up as a criminal case.²⁸¹ This assumption, however, is tenuous. Many taxpayers do not know of their constitutional rights to refuse to voluntarily furnish information to an IRS agent. They do not understand the danger or significance of their testimony, and that information they present in a civil audit may be used against them in criminal proceedings.²⁸² A taxpayer's ignorance or fail-

²⁷⁵ *United States v. Marra*, 481 F.2d 1196, 1203 (6th Cir. 1973) (quoting *United States v. Squeri*, 398 F.2d 785, 788 (2d Cir. 1968)).

²⁷⁶ 605 F.2d 229 (6th Cir. 1979).

²⁷⁷ *Id.* at 234.

²⁷⁸ *Nuth*, 605 F.2d at 234 (citing *United States v. Stamp*, 458 F.2d 759 (D.C. Cir. 1971)); see also *United States v. Allen*, 522 F.2d 1229 (6th Cir. 1975) (holding that suppression of evidence should not be granted unless there is a clear showing that the taxpayer was tricked or deceived).

²⁷⁹ See *Nuth*, 605 F.2d at 254.

²⁸⁰ *Id.*

²⁸¹ *Id.* In fact, this is inherent in the underlying IRS structure. See *Donaldson v. United States*, 400 U.S. 517 (1971).

²⁸² SALTZMAN, *supra* note 8, ¶ 2.03[2][b]; see *United States v. Meier*, 607 F.2d 215 (8th Cir. 1979), *cert. denied*, 445 U.S. 966 (1980); *United States v. Spomar*, 339 F.2d 941, 943 (7th Cir. 1964) (stating that "subjective lack of knowledge of [the taxpayer's constitutional] rights did not serve to vitiate the voluntary surrender of [the taxpayer's records] and did not thereby result in a violation of his right to remain silent

ure to know his or her constitutional rights, and to assert these rights, should not remove these constitutional protections.²⁸³

4. *Courts are hesitant to declare that an IRS agent has abused his or her discretion*

The ambiguity in the constitutional tests used by the courts to determine whether an IRS agent has violated IRM Section 4565.21 is embittered by the courts' tremendous deference to the judgment of the IRS and their reluctance to find that the IRS has abused this discretion.²⁸⁴ In determining whether the IRS has violated its own rules, courts have struggled to balance the judicial micro-management of the inner functioning of an administrative agency and the duty to protect the constitutional rights of taxpayers.²⁸⁵ The reality, however, is that courts are hesitant to determine that the IRS violates these provisions. The

and to withhold his private records"); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1961) (noting that the purpose of the right to counsel, guaranteed by the Constitution is to "protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution").

²⁸³ *Johnson*, 304 U.S. at 465.

²⁸⁴ See *United States v. Michaud*, 860 F.2d 495, 498-499 (1st Cir. 1988) (noting that courts must give considerable weight to the IRS' own interpretation of their regulations); *United States v. Caldwell*, 820 F.2d 1395, 1402 (4th Cir. 1987) (noting the referral decision is discretionary in nature and is not governed by any absolute criterion); *Groder v. United States*, 816 F.2d 139, 143 (4th Cir. 1987) (second-guessing a revenue agent's judgment should not become a routine chore for judges (citing *United States v. Matis*, 476 F. Supp. 1287, 1292-93 (S.D.N.Y.))); *Liberty Financial Services v. United States*, 778 F.2d 1390 (9th Cir. 1985) (stating that since administration of revenue laws is a function which by congressional direction and by expertise belongs to the IRS, courts hesitate second-guessing a revenue agent's judgment). Even the Audit Guidelines for Examiners indicate that the referral decision is inescapably a discretionary one. I CCH IRM (Audit) para. 961 (Manual states that "how far to extend the examination will depend on the examiner's judgment in a particular case," however, "[t]here can be no absolute criterion established upon which to rely in making a decision when to suspend an investigation and refer a case to Criminal Investigation.").

²⁸⁵ *United States v. Peters*, 153 F.3d 445, 453 (7th Cir. 1998) (noting that on the one side, courts face "the Scylla of judicial micromanagement of the inner functioning of an administrative agency, a peril recognized by many of the courts that have addressed this issue"), *cert. denied*, 525 U.S. 1070 (1999); *United States v. Grunewald*, 987 F.2d 531, 534 (8th Cir. 1993) ("If IRS agents, exercising sound discretion and good judgment, fear suppression of evidence where no intentional, prejudicial misrepresentation is afoot, civil audits will prematurely and unnecessarily be referred to CID.").

McKee court,²⁸⁶ holding that the IRS did not violate their Manual provisions, stated:

We reach this conclusion reluctantly. It is particularly troubling that almost all of the government's evidence against the McKees was practically handed to the CID on a silver platter as a result of the civil investigation . . . Nevertheless, as this case exemplifies, the reality is that revenue agents sometimes perform the same functions of evidence gathering as their CID counterparts, and such evidence is often admissible at a criminal trial.²⁸⁷

In hindsight, the *McKee* court stated that the IRS revenue agent should have transferred the matter to the CID earlier than it did.²⁸⁸ The court espoused a cursory warning, encouraging revenue agents to "err on the side of protecting taxpayers' constitutional rights when they conduct their investigations."²⁸⁹ Nonetheless, the court's ruling was based on the fact that courts must defer to the discretion of revenue agents to carry out their official duties.²⁹⁰ This case is not an anomaly. In *Groder v. United States*, the court noted that the revenue agent was inexperienced and that "a more experienced agent would have discontinued the investigation at an earlier stage."²⁹¹ Nonetheless, the court dismissed the taxpayer's claim because the taxpayer produced no evidence of bad faith or intent to deceive on the part of the agent.²⁹² This type of reasoning is frightening. Both the *McKee* and *Groder* courts acknowledged that the IRS agents erred in retaining the cases longer than they should have, but the courts were apprehensive about preempting the IRS agents and limiting their authority.

There is no indication that the courts are curtailing this discretion. If IRS discretion were limited, arguably there may be fewer tax convictions and lower penalties or associated taxes col-

²⁸⁶ *United States v. McKee*, 192 F.3d 535 (6th Cir. 1999).

²⁸⁷ *Id.* at 544.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Groder v. United States*, 816 F.2d 139, 144-45 (4th Cir. 1986). The court noted that "assessment of the facts by a seasoned agent may well have led to an earlier referral than occurred here." *Id.* Nonetheless, inexperience was different from bad faith, and the district court found no impropriety on the part of the IRS. *Id.*

²⁹² *Id.*

lected.²⁹³ Tax-evaders may go free.²⁹⁴ The civil Examination Division may also refer more cases to the CID for investigation.²⁹⁵ Nonetheless, not all cases referred to the CID are prosecuted criminally.²⁹⁶ Cases are individually assessed based on the chances of collecting the taxes, and the deterrent effects that prosecution would have on the taxpayer.²⁹⁷ Moreover, the dangers of affording too much discretion to IRS agents are far greater.

The most obvious peril is the challenge that it will pose to the system of voluntary compliance.²⁹⁸ Furthermore, if IRS internal operating procedures afford anything less than faithful adherence to constitutional guarantees, courts may actually encourage revenue agents to violate their rules, and simultaneously undermine public confidence in the IRS.²⁹⁹ Finally, allowing constitutional infringements on unsuspecting taxpayers would be the greatest pitfall of all.

V. REMEDIES AND SPECIFIC PROPOSALS FOR CHANGE

When an IRS agent violates Section 4565.21 of its Manual by conducting a criminal investigation under the auspice of a civil audit, the IRS infringes on a taxpayer's constitutional rights. These constitutional transgressions require redress. This section begins by arguing that suppression of evidence is the only appropriate remedy if an IRS agent illegally obtains evidence in violation of a taxpayer's Fourth and Fifth Amendment rights.³⁰⁰

²⁹³ See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 354, 416-28 (1974) (noting that restrictions on law enforcement reduce society's ability to control crime).

²⁹⁴ *Id.*

²⁹⁵ See *Groder v. United States*, 816 F.2d 139, 144 (4th Cir. 1987) (stating that a less deferential approach "would encourage premature referrals of taxpayers for fraud investigations based on little more than a revenue agent's unsubstantiated hunch").

²⁹⁶ See COMISKEY ET AL., *supra* note 7, ¶ 4.02[3][a], P4.02[4]. Special agents do not recommend all investigations for prosecutions. Investigations that involve flagrant violations with high prosecution potential and deterrent impact on compliance, are favored for prosecution. *Id.*

²⁹⁷ *Id.*

²⁹⁸ COMISKEY ET AL., *supra* note 7, ¶ 1.03; KOSTELANETZ, *supra* note 1, at 72.

²⁹⁹ See *James v. Illinois*, 493 U.S. 307, 311 (1990) (noting that police misconduct would be encouraged by permitting such use of illegally obtained evidence).

³⁰⁰ See *Weeks v. United States*, 232 U.S. 383, 393 (1914):

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those

This section urges that greater proactive protections for taxpayers are imperative to decreasing agency abuse and increasing congressional and judicial action. In light of the potential for IRS agent misconduct, attention of Congress and the Supreme Court is necessary to provide for a clearer indication of when the IRS violates its own laws, and to enforce IRS adherence to its rules.

A. SUPPRESSION OF EVIDENCE UNDER THE EXCLUSIONARY RULE

To preserve Fourth and Fifth Amendment liberties, courts have generally fashioned an exclusionary rule in criminal and administrative proceedings.³⁰¹ Under this rule, evidence obtained illegally by government officials in violation of an individual's constitutional rights and privileges is inadmissible in criminal proceedings.³⁰² Typically applied in the context of criminal and administrative proceedings, the exclusionary rule deters future unlawful governmental conduct, protects defendants from the abuses of overzealous law enforcement personnel, and supports the ideal of judicial integrity.³⁰³ These general exclusionary principles apply in tax prosecutions as well.³⁰⁴

A primary purpose of the exclusionary rule is to deter future unlawful governmental conduct.³⁰⁵ Courts can best serve this

thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

³⁰¹ *Id.*

³⁰² Budner, *supra* note 3, at 789 (citing *Weeks*, 232 U.S. at 398). "Although controversial, this rule arguably guards the rights of defendants from the abuses of overzealous law enforcement personnel." *Id.*

³⁰³ See *United States v. Payner*, 447 U.S. 727, 734 (1980) (declaring that the Court's purpose is to prevent "willfully lawless activities [from being] undertaken in the name of law enforcement"); SALTZMAN, *supra* note 8, ¶ 13.09[5].

³⁰⁴ Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, U. ILL. L. R. 518, 536 n.90 (1975) (citing *Weeks*, 232 U.S. at 392) (holding that exclusionary rules apply to all who execute the criminal laws of the country to obtain convictions by means of unlawful seizures and enforced confessions); see also *Boyd v. United States*, 116 U.S. 616, 630 (1885) (stating that the limitations of the Fourth Amendment reach beyond state officers to the Federal Government and its agencies).

³⁰⁵ *United States v. Peltier*, 422 U.S. 531, 536-39 (1975) (relying on the exclusionary rule's deterrent purpose in applying the exclusionary rule to unconstitutionally seized evidence); *United States v. Calandra*, 414 U.S. 338, 348 (1974) (characterizing the ex-

purpose by excluding from trial any illegally obtained evidence.³⁰⁶ Judicial admission of the fruits of an illegal search would undermine the purpose of the Fourth Amendment,³⁰⁷ and implicitly condone approval of the unconstitutional conduct that produced the evidence.³⁰⁸ Absent the exclusionary rule, the government would be free to manipulate or deceive without the possibility of consequences.³⁰⁹ Indeed, with lax enforcement of internal IRS rules, agent misconduct may increase because no person reasonably relies on rules that are ignored.³¹⁰

Furthermore, the integrity of the judicial process and of the revenue collection scheme in general is also at stake.³¹¹ Judicial integrity requires that courts not become accomplices in the violation of the Constitution they are sworn to uphold.³¹² If courts permit the IRS to obtain a federal conviction on the basis of the fruits of an illegal search, the judiciary has condoned and given full effect to deliberate governmental violations of the law.³¹³

clusionary rule as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect").

³⁰⁶ *Vander Linden v. United States*, 502 F. Supp. 693, 697 (S.D. Iowa, 1980).

³⁰⁷ See *Weeks v. United States*, 232 U.S. 383, 393 (1914) (If private documents can be seized and held and used in evidence against an accused citizen, "the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.").

³⁰⁸ See *id.*; *Nardone v. United States*, 308 U.S. 338, 340 (1939) (noting that the purpose of the exclusionary rule is to protect constitutional rights of privacy).

³⁰⁹ See *Caceres*, 440 U.S. 741, 766 (1979) (Marshall, J., dissenting) ("Restricting application of the exclusionary rule to instances of bad faith would invite law enforcement officials to gamble that courts would grant absolution for all but the most egregious conduct.").

³¹⁰ *Id.* at 762 (Marshall, J., dissenting).

³¹¹ See Budner, *supra* note 3, at 805-807.

³¹² Henry Lueders Henderson, *Justice in the Eighties: The Exclusionary Rule and the Principle of Judicial Integrity*, 65 JUDICATURE 354, 356 (1982); see also *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (noting that "[n]othing can destroy a government more quickly than its failure to observe its own laws"); *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting):

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure conviction of a private criminal—would bring terrible retribution.

³¹³ Budner, *supra* note 3, at 806 n.155 ("If the federal court permits such evidence [obtained by the illegal conduct of a law enforcement agent] to be used to obtain a conviction, it places its imprimatur upon such lawlessness and thereby taints its own

Competing considerations must give way to the higher goal of protecting the individual taxpayer's constitutional rights.³¹⁴ Furthermore, other evidence may exist which could support the tax assessment, and the government could unearth this evidence. Courts should thereby apply the exclusionary rule in tax prosecutions as well,³¹⁵ and suppress evidence that an IRS agent illegally obtains in a civil tax audit and attempts to use in a subsequent criminal proceeding.

B. POLICY REASONS FOR CHANGE: INADEQUACY OF IRS SELF-REGULATION

Proactive change must also be made to decrease IRS abuse. The Internal Revenue rules, coupled with the lack of judicial and legislative intervention, currently grant individual revenue agents too much latitude in making the criminal referral decision.³¹⁶ The IRS's extremely broad authority enables an agent to commit "abusive and arbitrary acts" at the expense of the taxpayer's constitutional liberties.³¹⁷ The ramifications of these transgressions are two-fold. First, these violations severely

integrity." (quoting *United States v. Payner*, 447 U.S. 727, 746 (1980) (Marshall, J., dissenting))).

³¹⁴ Courts have generally employed a balancing test to determine whether the likely deterrent effect of exclusion outweighs the benefits of admitting the tainted evidence. *United States v. Calandra*, 414 U.S. 338, 348-54 (1974) (making explicit the balance of interests test implicit in all Fourth Amendment exclusionary rule decisions, and stating that weighing the potential benefits of exclusion against the potential for harm of losing relevant evidence is required). For discussion and criticism of how this balance of interests test has been articulated and applied, see 1 WAYNE R. LA FAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* §1.5 (1996).

³¹⁵ See *United States v. McKee*, 192 F.3d 535, 542 (6th Cir. 1999); *United States v. Nuth*, 605 F.2d 229, 234 (6th Cir. 1979) ("[G]enerally an affirmative misrepresentation by an IRS agent that the investigation is routine when in fact it is a criminal investigation requires suppression of evidence."); *United States v. Tweel*, 550 F.2d 297, 300 (5th Cir. 1977) (stating that evidence obtained in violation of the taxpayer's Fourth Amendment rights, as well as any evidence derived therefrom, should be suppressed); *Vander Linden v. United States*, 502 F. Supp. 693, 696-697 (S.D. Iowa, 1980) (suppression of evidence is the appropriate remedy when tax evidence was illegally seized, violating taxpayer's Fourth Amendment rights.); SALTZMAN, *supra* note 8, ¶ 13.09[5]; Budner, *supra* note 3, at 811-16. *But cf.* *United States v. Payner*, 447 U.S. 727, 735-37 (1980) (holding that a federal court could not suppress otherwise admissible evidence that IRS agents obtained unlawfully, even if the evidence was brought to them directly by a third person); *United States v. Caceres*, 440 U.S. 741, 755 (1979) (stating that exclusionary remedy is an extreme one appropriately used in limited circumstances); *United States v. Janis*, 428 U.S. 433, 459-60 (1976).

³¹⁶ *Id.*

³¹⁷ BURNHAM, *supra* note 3, at 64-66.

threaten the American voluntary reporting system. Moreover, taxpayers frequently have little recourse against agent misconduct.

Although agency abuse is a collective concern,³¹⁸ curtailing IRS abuse should be of paramount importance because progressive abuse threatens the substructure of the nation's voluntary reporting system.³¹⁹ Our nation's tax collection system centers on the self-reporting and voluntary compliance of taxpayers.³²⁰ If taxpayers are threatened by IRS abuse, however, they may not cooperate.³²¹ The whole system will collapse if taxpayers refuse to submit to routine tax examinations.³²² Agents may be encouraged to violate the rules, and public confidence in the IRS will decline.³²³ While the IRS properly requests permission to examine taxpayers' books and records in order to collect tax revenue, use of such information to secure evidence for criminal prosecution poses a danger to the entire system.

What is worse, taxpayers frequently have little recourse against agent misconduct. The legislature fails to specify a remedy for taxpayers who have been injured by an IRS agents' failure to adhere to his or her regulations. The IRS has matured into an enormously powerful instrument of social control in the United States³²⁴ due in part to tacit congressional and judicial

³¹⁸ *United States v. Caceres*, 440 U.S. 741, 767 (1979) (Marshall, J., dissenting) (while self-scrutiny is a "lofty ideal," there is no reason why the IRS' disciplinary procedures should enjoy the Court's special confidence (citing *Wolf v. Colorado*, 338 U.S. 25, 42 (1949) (Murphy, J., dissenting))); Budner, *supra* note 3, at 801 (quoting Address by Professor Benjamin Civiletti, The University of Texas School of Law) (Feb. 8, 1989) ("Former Attorney General Benjamin Civiletti, commenting on the inadequacies of relying on agency self-regulation, correctly observed that 'it is difficult to punish your own family,' and that such internal regulations are 'insufficient to deter [agent misconduct] in the passion of the hunt.'").

³¹⁹ KOSTELANETZ, *supra* note 1, at 72.

³²⁰ See *United States v. Flora*, 362 U.S. 145 (1958) (stating that the American "system of taxation is based on voluntary assessment and payment, not upon distraint"); KOSTELANETZ, *supra* note 1, at 72; TRAC, *IRS at Work: IRS History*, available at <http://www.trac.syr.edu/tracirs/findings/aboutIRS/irsHistory.html> (last visited Nov. 2, 2001) (noting that in 1999, the IRS Commissioner Charles O. Rossotti published a plan called Modernizing America's Tax Agency, which called for a substantially increased agency effort to improve voluntary compliance with the tax laws).

³²¹ *Id.*

³²² *Id.*

³²³ See *James v. Illinois* 493 U.S. 307, 317-19 (1990) (recognizing that police officers will ignore rules that courts do not enforce).

³²⁴ BURNHAM, *The Abuse of Power*, N.Y. TIMES, Sept. 3, 1989, § 6 (Magazine), at 26, cols. 1-2.

policies not to interfere with the collection of taxes.³²⁵ Congress has enacted only limited protections for tax defendants. Furthermore, Congress has taken minor action to decrease agent misconduct during the collection of evidence, providing only spot enforcement of unlawful actions by IRS officials.³²⁶ Empirical evidence indicates that the IRS has not reacted constructively to these investigations.³²⁷

Moreover, although Congress has traditionally permitted taxpayers to recover damages from the IRS for certain Code violations,³²⁸ Congress has failed to specify any remedy for IRS violations of taxpayers' constitutional rights.³²⁹ Through the Taxpayers' Bill of Rights, Congress has enacted a collection of provisions designed to increase taxpayers' awareness of their rights during an IRS audit, and to enhance procedural safeguards available to taxpayers during an audit.³³⁰ The Act provides civil remedies to taxpayers that are hurt financially if an IRS agent acts improperly, but the Act fails to specify any remedy for violations of taxpayers' constitutional rights.³³¹

³²⁵ Budner, *supra* note 3, at 790 (citing BURNHAM, *supra* note 3, at 21).

³²⁶ See BURNHAM, *supra* note 3, at 303 (noting that because of fear of retaliation by IRS agents, members of Congress "have been discouraged from supporting legislative efforts to improve the administration of tax laws...opposed by the IRS").

³²⁷ *Id.*

³²⁸ "In the mid-1990s, the overall performance of the IRS—particularly the way it dealt with individual taxpayers—. . . became the subject of widespread public concern." TRAC, *IRS at Work: IRS History*, available at <http://www.trac.syr.edu/tracirs/findings/aboutIRS/irsHistory.html> (last visited Nov. 2, 2001). The concern led to the formation of a special commission, a series of oversight hearings by the Senate Finance Committee and the passage of corrective legislation. In 1988, Congress enacted the Technical and Miscellaneous Revenue Act. See Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342 (codified as amended in scattered sections of IRC (West Supp. 1989)). Included in the Act is a Taxpayer Bill of Rights, a collection of provisions designed to clarify and strengthen the rights of taxpayers, better inform them of their rights, and give them more ways to get relief from IRS action.

³²⁹ Budner, *supra* note 3, at 790.

³³⁰ H.R. 4163, 106th Cong. (2000) ("Taxpayer Bill of Rights 2000"); 146 CONG. REC. H2057 (daily ed. Apr. 11, 2000); see S. 1774, 100th Cong., 1st Sess., 133 CONG. REC. S13,891-99 (daily ed. Oct. 8, 1987); Creighton R. Meland, Jr., *Omnibus Taxpayers' Bill of Rights Act: Taxpayers' Remedy or Political Placebo?*, 86 MICH. L. REV. 1787 (June 1988).

³³¹ Budner, *supra* note 3, at 813; Meland, *supra* note 332, at 1814-18 (the Bill provides for "actual damages" for unreasonable IRS actions, but there is no plain meaning of "actual damages" at common law or elsewhere.); see H.R. 4163, 106th Cong. (2000) ("Taxpayer Bill of Rights 2000"); 146 CONG. REC. H2057 (daily ed. April 11, 2000); S. 1774, 100th Cong., 1st Sess., 133 CONG. REC. S13,891-99 (daily ed. Oct. 8, 1987).

Furthermore, judicial action insufficiently redresses these wrongs. Courts defer tremendous judgments to individual agents,³³² and generally do not enforce vulnerable taxpayers' rights against the IRS. The IRS is the least judicially examined law enforcement agency in the country, regularly intruding on the lives of more Americans than any other federal agency.³³³ As a result of its rampant abuses,³³⁴ self-regulation may be entirely insufficient to prevent agent misconduct during the "passion of the hunt."³³⁵ The IRS rarely enforces its own rules,³³⁶ and punishment for agent misconduct is infrequent and lenient.³³⁷ "The IRS has no great incentive to scrutinize carefully the conduct of interviews by its agents if the conduct does not affect the result of the prosecution. Indeed, an agent's violation of these procedures in selective cases may benefit the agency."³³⁸ Courts and legislatures need to moderate IRS self-regulation in an attempt to abate the abuse and safeguard taxpayers' constitutional rights.

C. SPECIFIC PROPOSALS FOR CHANGE

Greater protections for taxpayers are imperative in light of the high potential for IRS misconduct. Indeed, both policy and legal rationales justify a more rigorous role of the legislature and the courts. The attention of Congress and the Supreme

³³² See *United States v. Michaud*, 860 F.2d 495, 498-499 (1st Cir. 1988) (noting that courts must give considerable weight to the IRS' own interpretation of their regulations); *United States v. Caldwell*, 820 F.2d 1395, 1402 (4th Cir. 1987) (noting the referral decision is discretionary in nature and is not governed by any absolute criterion); *Groder v. United States*, 816 F.2d 139, 143 (4th Cir. 1987) (second-guessing a revenue agent's judgment should not become a routine chore for judges (quoting *United States v. Matis*, 476 F. Supp. 1287, 1292-93 (S.D.N.Y.)))

³³³ BURNHAM, *The Abuse of Power*, N.Y. TIMES, Sept. 3, 1989, at 26.

³³⁴ *Id.*

³³⁵ Budner, *supra* note 3, at 801.

³³⁶ See *Caceres*, 440 U.S. at 761 (Marshall, J., dissenting) (noting concern about the IRS's failure to detect or disapprove of violations of its own internal rules); BURNHAM, *supra* note 3, at 24 ("[T]he rapid turnover at the very top of the IRS, the recruitment of most of its top administrators from within, and the almost complete lack of outside review make the agency astonishingly consistent in the often erratic and hard-nosed way that it deals with the American people.").

³³⁷ See *Caceres*, 440 U.S. at 767 n.9 (Marshall, J., dissenting) (citing evidence that no dismissals or demotions had occurred following an internal audit, which had revealed thirty-five to forty instances of improper monitoring as demonstrating why the Court could not expect anything but de minimus sanctions from the inter-agency disciplinary process).

³³⁸ *United States v. Leahey*, 434 F.2d 7, 11 (1st Cir. 1970).

Court is imperative to mandate that Internal Revenue regulations have the effect of law. Additionally, courts must enforce IRS adherence to its own laws, and provide for a clearer indication of when the IRS violates its own rules. The following set of proposals embody these ideals:

1. *The Supreme Court must revisit the Caceres decision*

Foremost, the Supreme Court must revisit the *United States v. Caceres*³³⁹ decision, and declare that the IRM has the force and effect of law where IRM provisions safeguard taxpayers' constitutional rights. The Supreme Court must confront the tension between the line of cases which hold that the IRM is merely a set of operating procedures designed to govern the internal proceedings of the IRS,³⁴⁰ and those cases which hold that the IRM has the effect of law.³⁴¹ By addressing this issue, the Court will allay much of the current debate over whether a taxpayer can challenge the IRS based on noncompliance with its Manual.

The Supreme Court has long recognized that "[a] court's duty to enforce an agency regulation is most evident when compliance with the regulation is mandated by the Constitution or federal law."³⁴² Furthermore, the Supreme Court has long since held that a citizen under investigation is legally entitled to insist upon the observance of rules promulgated by an executive or legislative body.³⁴³ Where an individual right is affected by agency deviation from an established rule, the agency must follow it even if it concerns only internal agency procedure.³⁴⁴ Thus, using its own precedent as a guide, the Supreme Court should find the IRM enforceable against the IRS, at the very least, when its provisions pertain to a substantive right guaranteed by the Constitution.

The Supreme Court need not even overturn its decision in *Caceres* to reach this conclusion. *Caceres*, read broadly, stands for the proposition that every violation of the IRM is not tantamount to a per se constitutional infringement on a taxpayer's

³³⁹ 440 U.S. 741 (1979).

³⁴⁰ See cases cited *supra* note 119.

³⁴¹ See cases cited *supra* note 128.

³⁴² *Caceres*, 440 U.S. at 749 (citing *Bridges v. Wixon*, 326 U.S. 135, 152-53 (1945)).

³⁴³ See *United States v. Nixon*, 418 U.S. 683, 695-96 (1974); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *Yellin v. United States*, 374 U.S. 109 (1963); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

³⁴⁴ *Morton*, 415 U.S. at 235.

rights. Upon revisitation of this decision,³⁴⁵ the Supreme Court will recognize that while it did reject this per se rule, the Court acknowledged the possibility that a federal court may enforce an agency regulation when the Constitution or federal law mandates compliance.³⁴⁶ The Court need only refine its prior language.

Furthermore, the Supreme Court should confront the tension between the line of cases that hold that the IRM Section 4565.21 is merely an operating rule of the IRS,³⁴⁷ and those cases, which hold that the IRM has the effect of law.³⁴⁸ Because significantly different rights, responsibilities and expectations apply to civil audits compared to criminal tax investigations, it would be unconstitutional if IRS agents could deliberately deceive taxpayers into incriminating themselves during an audit when activities of an obviously criminal nature are under investigation.³⁴⁹ IRM Section 4565.21 is designed to protect a taxpayer from unreasonable search and seizure, self-incrimination, and due process infringement. The Supreme Court should therefore rule that IRM Section 4565.21 protects a taxpayer's Fourth and Fifth Amendment rights, and confers substantive rights on taxpayers.

2. Congress must augment Taxpayer Bill of Rights and codify pertinent IRM provisions

Not only judicial action, but also congressional attention, is imperative to declare that the IRM has the force and effect of law. Congress must confer legal effect to pertinent provisions of the IRM by codifying IRM provisions, which are mandated by the Constitution or other federal law, and thereby grant substantive rights on taxpayers.

No statute currently addresses whether the IRM has the force of law.³⁵⁰ The Taxpayers' Bill of Rights, which enhances procedural safeguards available to taxpayers³⁵¹ by codifying certain provisions of both the IRM and Treasury Regulations,³⁵²

³⁴⁵ 440 U.S. 741 (1979).

³⁴⁶ *Id.*

³⁴⁷ *Groder v. United States*, 816 F.2d 139, 142 (4th Cir. 1987).

³⁴⁸ *McKee v. United States*, 192 F.3d 535 (6th Cir. 1999).

³⁴⁹ *Id.* (quoting *Grunewald v. United States*, 987 F.2d 531, 534 (8th Cir. 1993)).

³⁵⁰ *See id.*

³⁵¹ *See id.*

³⁵² Meland, *supra* note 332, at 1800.

currently lacks provisions necessary for full protection against an IRS agent patently violating provisions of its Manual.³⁵³ Furthermore, the Taxpayers' Bill of Rights fails to specify any remedy for violations of taxpayers' constitutional rights.³⁵⁴ Codification of pertinent IRM provisions such as Section 4565.21 would therefore afford greater protection to taxpayers.

Because the Taxpayers' Bill of Rights already provides a damages remedy for an IRS violation of a pertinent statute or regulation, its protection will not extend to mere violations of the IRM.³⁵⁵ Codification of IRM Section 4565.21 would provide taxpayers with a remedy against constitutional infringements by IRS agents, and give legal effect to the safeguards presently embodied in the Manual.³⁵⁶ In addition to protection against agency caprice, codification eliminates the need for a taxpayer to demonstrate detrimental reliance on the internal rule, mandated by some courts.³⁵⁷ Furthermore, codification of these provisions affords greater protection to taxpayers without significant changes to protections provided by current Manual provisions.³⁵⁸

³⁵³ See H.R. 4163, 106th Cong. (2000) ("Taxpayer Bill of Rights 2000"); 146 CONG. REC. H2057 (daily ed. April 11, 2000); see S. 1774, 100th Cong., 1st Sess., 133 CONG. REC. S13, 891-99 (daily ed. Oct 8, 1987); Meland, *supra* note 332, at 1800; Budner, *supra* note 3, at 813.

³⁵⁴ See Budner, *supra* note 3, at 813 (citing PRENTICE HALL INFORMATION SERVICES, A COMPLETE GUIDE TO THE TECHNICAL AND MISCELLANEOUS REVENUE ACT OF 1988, ¶ 901 at 233 (1988)); Meland, *supra* note 332, at 1814-18 (the Bill provides for "actual damages" for unreasonable IRS actions, but there is no plain meaning of "actual damages" at common law or elsewhere).

³⁵⁵ See H.R. 4163, 106th Cong. (2000) ("Taxpayer Bill of Rights 2000"); 146 CONG. REC. H2057 (daily ed. April 11, 2000).

³⁵⁶ Meland, *supra* note 332, at 1800-01. The Administrative Procedure Act does not give the force of law to the Manual. It is settled law that regulations promulgated pursuant to notice and comment or on-the-record requirements of the Administrative Procedure Act have the force of law. *Service v. Dulles*, 354 U.S. 363 (1957). It follows, therefore, that an agency action that violates agency rules cannot stand. Meland, *supra* note 332, at 1800-01. The debate that has been seen thus far stems from the fact that the IRM, as internal agency rules, has been allowed different treatment from regulations and statutes. *Id.* "[B]ecause Section 23 of the Bill provides a damages remedy for an IRS violation of a pertinent statute or regulation, the bill's protection has not extended to violations of the Internal Revenue Manual." *Id.*

³⁵⁷ Such a requirement does not exist with a statute, since its provisions apply regardless of whether or not the taxpayer relied on them.

³⁵⁸ Meland, *supra* note 332, at 1800.

3. Courts must revise constitutional tests used to determine violations of
IRM Section 4565.21

To alleviate the tremendous burden that taxpayers bear in establishing that an IRS agent has violated Section 4565.21 of the Manual, courts must revise the constitutional tests employed to determine whether an IRM provision safeguards a taxpayer's constitutional rights. Currently, the "affirmative misrepresentation" requirement, requiring a taxpayer to demonstrate an affirmative misrepresentation by the revenue agent that an examination was a civil audit when it was in fact criminal, is too narrow and grants individual revenue agents too much latitude and discretion in making the criminal referral decision.³⁵⁹ Courts rarely find an affirmative misrepresentation on the part of the IRS agent.³⁶⁰ The requirement thus places the taxpayer at a tremendous disadvantage, while favoring the IRS.³⁶¹ Courts need to broaden this test to one that incorporates a "totality of the circumstances" standard.³⁶²

The "totality of the circumstances" test would consider more factors than merely the actions of the IRS agent. It would take into account the entire set of circumstances from the perspective of the taxpayer,³⁶³ such as the taxpayer's education, experience and intelligence, and whether it was reasonable for the taxpayer to believe that the case was civil when it was in fact criminal, based on the agent's representations. Courts would find that an IRS agent misrepresented the criminal nature of the audit based on these individual circumstances of the taxpayer. This test would ease the burden that a taxpayer bears in showing that an agent has violated the provisions of the Manual, and would introduce a notion of overall fairness to the constitutional tests.

³⁵⁹ See discussion *supra* Sections IV.B.1., IV.B.2.

³⁶⁰ See discussion *supra* Sections IV.B.1., IV.B.2.

³⁶¹ *Id.*; see, e.g., *United States v. Prudden*, 424 F.2d 1021 (5th Cir. 1970), *cert. denied* 400 U.S. 831; *United States v. Tonahill*, 430 F.2d 1042 (5th Cir. 1970), *cert. denied* 400 U.S. 943.

³⁶² *United States v. Adams*, 214 F.3d 724 (6th Cir. 2000); *Stores v. Hardees Food Systems*, 2000 U.S. App. LEXIS 6307, Nos. 98-3285, 98-3320 (April 6, 2000) (whether a risk of peril above and beyond the ordinary is reasonably foreseeable is determined based on the totality of the circumstances); *United States v. Mancillas*, 183 F.3d 682 (7th Cir. 1999).

³⁶³ *Mancillas*, 183 F.3d 682 (using "totality of the circumstances" because the judicial process does not deal with hard certainties but with probabilities).

Additionally, courts must afford less deference to the individual revenue agents. Limiting enforcement of regulations to instances of bad faith invites law enforcement officials to ignore constitutional principles and gamble for a lenient application of the rules. Therefore, courts must not espouse cursory warnings encouraging revenue agents to err on the side of protecting taxpayers' constitutional rights, but must reign in agents when they have lulled taxpayers into compromising their constitutional rights.

4. *Courts should require revenue agents to warn taxpayers of their constitutional rights*

Courts should also require that IRS agents warn taxpayers of their constitutional rights. At the onset of a tax investigation, a revenue agent should disclose to the taxpayer that the civil investigation may result in criminal charges. The agent should also notify the taxpayer when the focus of the investigation has changed in status from civil to criminal. Although not constitutionally required,³⁶⁴ these warnings would instruct taxpayers about their constitutional rights, should they relinquish evidence to the revenue agent for inspection.

Currently, a revenue agent, unlike a special agent,³⁶⁵ need not disclose to the taxpayer, at the onset of the investigation, that the investigation may result in criminal charges.³⁶⁶ Revenue agents also do not have a duty to apprise a taxpayer that the taxpayer need not furnish requested information, and that if the taxpayer does furnish such information, it may be used against him in a criminal proceeding.³⁶⁷ Furthermore, the revenue agent also has no duty to disclose to the taxpayer when the

³⁶⁴ *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (explaining that warnings of taxpayers' constitutional rights are required only when suspect is subjected to custodial interrogation).

³⁶⁵ *United States v. Tweel*, 550 F.2d 297, 299-300 (5th Cir. 1977).

³⁶⁶ See discussion *supra* Section IV.B.3.; see, e.g., *Katz*, 705 F.2d at 1243; *Tweel*, 550 F.2d at 298 (holding that mere failure of a revenue agent "to warn the taxpayer that the investigation may result in criminal charges, absent any acts by the agent which materially misrepresent the nature of the inquiry, do[es] not constitute fraud, deceit or trickery"); *United States v. Prudden*, 424 F.2d 1021 (5th Cir. 1970), *cert. denied* 400 U.S. 831; *United States v. Spomar*, 339 F.2d 941 (7th Cir. 1964) (revenue agents do not have a duty to apprise a taxpayer that he need not furnish requested information); *Greene v. United States*, 296 F.2d 841, 842-43 (2d Cir. 1961) (revenue agents do not have a duty to apprise a taxpayer that if he does furnish requested information, such information may be used against him in criminal proceedings).

³⁶⁷ *United States v. Spomar*, 339 F.2d 941 (7th Cir. 1964).

focus of the investigation has changed in status from civil to criminal.³⁶⁸ Thus, taxpayers may not know that information turned over during the course of a civil audit may be used against them in a civil proceeding.³⁶⁹

Several commentators and a few courts have argued that "the thrust of the Supreme Court's opinion in *Miranda v. Arizona* . . . requires that all taxpayers interviewed by IRS [a]gents be warned of the potential criminal *implications* of a tax investigation."³⁷⁰ The benefits of these *Miranda*-like warnings would be numerous, while the cost would be minimal. Clarifying the rights to taxpayers would prevent litigation resulting from taxpayers claiming that they are unaware of their rights, and that the IRS agents should have provided some sort of warning. Furthermore, this added warning would be easy to implement. Finally, these warnings would provide additional protection of taxpayers' constitutional rights. A taxpayer's ignorance or failure to know his or her constitutional rights should not remove these constitutional protections.

5. *IRS must strengthen enforcement of its own rules*

Finally, attention of the IRS is necessary to restrict future agent misconduct, and to penalize those agents who violate their rules. The IRS has matured into the least judicially examined law enforcement agency in the country.³⁷¹ The effectiveness of the regulations promulgated by the IRS depends in large part on the good faith and judgment of its agents in conducting their investigations. IRS regulations such as IRM Section 4565.21 require the revenue agent to exercise extraordinary delicate judgment as to when a civil investigation should be discontinued, and referred to the CID for criminal prosecution.

³⁶⁸ See cases cited *supra* note 271.

³⁶⁹ SALTZMAN, *supra* note 8, ¶ 2.03[2][b]; see *United States v. Meier*, 607 F.2d 215 (8th Cir. 1979), *cert. denied*, 445 U.S. 966 (1980); *United States v. Spomar*, 339 F.2d 941 (7th Cir. 1964).

³⁷⁰ *United States v. Leahey*, 434 F.2d 7, 8 (1st Cir. 1970) (citing *United States v. Dickerson*, 413 F.2d 1111 (7th Cir. 1969)); *United States v. Turnzynski*, 268 F. Supp. 847 (N.D. Ill. 1967); Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1 (1966); Hewitt, *The Constitutional Rights of the Taxpayer in a Fraud Investigations Under Escobedo and Miranda: The "Critical Stage,"* 53 IOWA L. REV. 1074 (1968)).

³⁷¹ BURNHAM, *The Abuse of Power*, N.Y. TIMES, Sept. 3, 1989, at 26.

But the rules do not protect taxpayers from overzealous IRS agents in the "passion of the hunt".³⁷²

The IRS needs to spend the additional time and resources necessary to adequately inform its agents of the scope and intent of these rules. Indeed, the IRS must encourage its revenue agents to "err on the side of protecting taxpayers' constitutional rights when they conduct their investigation."³⁷³ As an agency that has been largely left unexamined by legislative agencies, the IRS needs to strengthen its own internal self-regulation if it wishes to maintain its history of voluntary compliance, and the confidence of its taxpayers.

Moreover, the IRS needs to enforce penalties on agents who ignore their rules and jeopardize the constitutional rights of tax-paying citizens. Limiting enforcement of regulations to instances of bad faith invites law enforcement officials to ignore constitutional principles and gamble for a lenient application of the rules.³⁷⁴ The IRS must therefore rein in its agents when they have effectively used the effect of a "civil audit" to lull taxpayers into compromising their constitutional rights.

CONCLUSION

The silent transition from a civil audit to a criminal investigation should concern taxpayers and courts alike. Presently, however, taxpayers seem to be the only ones disturbed. Courts have generally failed to enforce taxpayers' rights, deferring instead to the individual discretion of IRS agents.³⁷⁵ While most courts have recognized the problems inherent in affording too much deference to the IRS, they have generally neglected to curtail the IRS's power.³⁷⁶ As a result, IRS agents have been known to violate provisions of their own Manual.³⁷⁷

While efforts to bring tax-avoiding citizens to punishment are praiseworthy, IRS agents cannot aid this effort by sacrificing

³⁷² Budner, *supra* note 3, at 801.

³⁷³ United States v. McKee, 192 F.3d 535, 542 (6th Cir. 1999).

³⁷⁴ United States v. Caceres, 440 U.S. 741, 766 (1979) (Marshall, J., dissenting).

³⁷⁵ See United States v. Michaud, 860 F.2d 495, 498-99 (1st Cir. 1988) (holding that courts must give considerable weight to the IRS' own interpretation of their regulations); Groder v. United States, 816 F.2d 143 (4th Cir. 1987) (stating that second-guessing a revenue agent's judgment should not become a routine chore for judges).

³⁷⁶ See McKee, 192 F.3d 535; United States v. Peters, 153 F.3d 445 (7th Cir. 1998), *cert. denied*, 525 U.S. 1070 (1999).

³⁷⁷ Caceres, 440 U.S. at 761 (Marshall, J., dissenting).

taxpayers' fundamental rights. Therefore, judicial and congressional intervention is necessary to provide a clearer indication of when the IRS violates its own rules, and to enforce adherence to its own laws. If courts and Congress remain idle, taxpayers and their attorneys, who follow proper procedures, may find themselves ambushed.