

4.3 OPERATIONS

a. SURVEILLANCE CAPACITIES

ISSUE: IS THERE A NEED FOR DEFINING THE EXTENT TO WHICH TAS MAY AFFORD GOVERNMENT A MORE EFFICIENT INSTRUMENT FOR SURVEILLANCE OF TAXPAYERS AT HOME AND ABROAD?

SUMMARY

A sensitive personal data system with the operational potential and program goals of the TAS proposal may raise surveillance issues which would concern Congress and the public. To determine the relevance of this issue for TAS, a more exact description is needed of the extent to which the system may provide government or private organizations an instrument for monitoring, identifying, or locating people or groups. Information is needed about any safeguards which are planned to prevent unintended uses of TAS resources to monitor personal activities or conduct surveillance over citizens.

QUESTIONS

1. How may TAS be operated or programmed to locate, identify or monitor individuals, organizations, and other taxpaying entities? What new files are planned for this purpose?
2. To what extent could the characteristics of individuals or groups within the taxpaying population be retrieved and matched with other data from outside TAS, or outside the agency, and result in creation of data identifying or locating taxpayers or new and different data about people which (a) is not necessary for the administration and enforcement of the tax laws, (b) is not intended by the Internal Revenue Service, or (c) is not intended by the taxpayer?
3. What other uses will or could be made of this capacity?
4. How can Congress satisfy itself that the capacity is being used properly and wisely? What kinds of reports should it receive from IRS?

5. What are the present statutory and administrative safeguards against improper, illegal or unconstitutional use of IRS information for surveillance of individuals? How will they apply within the context of TAS technology?
6. What further statutory and administrative devices might be devised by Congress to guard against overuse or misuse of the surveillance and monitoring capacities of the TAS in compliance and enforcement aspects of tax-related programs within IRS and other agencies of government?
7. In order to control TAS use for non-tax related **purposes of the legislative or executive** branches, what safeguards should surround the capacity of TAS to locate groups or individuals by zip codes and other geographical areas and to **identify certain** groups by characteristics.
8. What are the civil liberties and social implications of the use of the social security number as a unique identifier in the application of the TAS technology within government?

BACKGROUND

The installation of a large integrated personal information system like TAS may raise the social issue of how drastically it may enhance the information and technical resources of government and private organizations for conducting surveillance over citizens, taxpayers as well as non-taxpayers. That is, it may facilitate the location, identification and monitoring of individuals.

This problem may take several forms. The concern is usually directed to official surveillance which is unreasonable or unauthorized and which therefore threatens privacy and other due process rights. Such surveillance or monitoring usually implies covert operations, such as wiretapping or maintaining dossiers on people and activities without the knowledge or consent of the subject. Instances of this kind of illegal governmental or private surveillance infringing on privacy and constitutional rights have been and continue to be the subject of investigations by Congressional and other groups. This phase of the problem now carries several general legal and procedural remedies upon which some kind of consensus is developing. one) for instance, is the ability of Congress, the press and the public to find **out what data** banks **Or files are maintained** by an agency; another is the ability of the individual to know what is in his file; another is the right to know who received information about him and why. This is enforced by the requirement in the Privacy Act of 1974 of "audit trails, " that is, creation in the file or elsewhere of a record stating details of access to the

information. Another kind of remedy is requiring the actual or implied consent of the person who is subject to the surveillance. Another kind of legislative remedy is the flat prohibition on conducting surveillance by specific techniques or for certain purposes.

IRS has cited 1976 statutory controls on dissemination or sharing of IRS data as barriers against future misuse of data in the system. It is not clear, however, to what extent these provisions were drafted with the proposed TAS in mind, or whether TAS with its complex management needs might, as planned, offer potentials for misuse of data for surveillance purposes which are not yet covered in law or regulation.

Two major problems may still be raised in this connection: the illegal internal use of the information, and the legal use. For instance, internal misuse for a purpose not intended under the agency mandate need not involve disclosure.

Viewed against the threat to personal and group privacy, and threats to security of data which have plagued other large computerized systems, the TAS may raise considerations of its use for unwarranted surveillance which is arbitrary or unreasonable. Some apparent gaps in the available public information about the TAS raise questions that the primary features of the system and the changes its use may bring to governmental information power the expanded data base, the increased linkage capacity, the derived data possibilities, increased retention of personal, financial, domicile, and associational information, the accelerated speed of transmission and decentralized availability of it — may combine to create an effective instrument for surveillance for the benefit of present and potential users of the system. It may offer rewards for unauthorized users inside or outside the IRS which outweigh the risks of violation of legal prohibitions or the public opprobrium of discovery.

Surveillance through TAS data resources may also however, be for quite legal, authorized purposes now and in the future. TAS may offer resources for surveillance, through identification and location of people, that could prove irresistible, or at least highly tempting, to future Congresses, Presidents and Federal agencies hard-pressed for the promotion of social, law enforcement or national security programs.

Although laws may make it illegal to disseminate IRS information for illegal or unconstitutional surveillance purposes, these laws may not be enough. Security in an information system as sensitive as the TAS must be considered in a larger sense, that is, with its political element. In this sense, security against use of the TAS for surveillance which offends civil liberties principles or

which raises serious social policy issues, may rest finally on the changing perceptions of this system held by members of Congress, state legislatures, the Executive Branch, by the public and by judges evaluating the merits of claims for the inviolability of TAS against other needs of government.

For example, Congress has already seen the advantages of using income ~ return information to locate runaway fathers and has authorized such a program. Some thought was given to attempting to locate Vietnam War draft offenders through the Internal Revenue Service files in order to inform them of the clemency program. Other uses have been identified in numerous Congressional hearings and reports and in the comprehensive review conducted by the privacy protection Study Commission. If the TAS capacities for intended and unintended surveillance present advantages to future users, with a potential for significant adverse social impact, Congress might want to do more than merely appropriate funds for it; it might want to consider the need for additional safeguards before it is installed.

At a minimum, the intended and potential surveillance uses of the TAS resources and capacities by IRS, Treasury or other government agencies, including Congress, might be identified. Then, any social or political threat from such use may be weighed against existing legislative, administrative, and technical safeguards. With this, whenever executive or legislative policy-makers seek to incorporate TAS programs or use TAS surveillance resources in the compliance aspects of other programs, a legislative "trip-wire" could be made to operate. This might, for instance, be the need for specifically amending a law, or allowing for a Congressional veto power or such intended uses. While the confidentiality provisions of the 1976 Tax Reform Law have made substantial changes, they may not meet the complexity of TAS processes and technology.

The first step in guarding against unexpected or unintended use of the resources of TAS as an instrument for surveillance is the awareness of policy-makers and the public of its potential uses. This requires description of its intended and possible uses for that purpose to allow for judgments on privacy and other policy questions. The public documents on TAS do not spell out these uses sufficiently. As background for further study of TAS, the following uses have been noted from those documents. TAS is intended to afford the IRS the benefit of increased technological and administrative capacities for surveillance and monitoring *of* taxpayers and other citizens in **support** of the Service's missions; that is, it will be better able to keep more efficient track for a longer time of geographical residences, financial transactions and activities through information which is

provided on tax return forms, gathered by IRS investigators or reported from outside sources, or which is developed within IRS as new data from a combination of information sources.

The Service expects to be better able to identify individuals for certain administrative and research purposes and a few of these have been described in scattered testimony, public documents, and in some confidential in-house reports prepared for IRS. For instance, testimony and reports on the TAS indicate that with this system IRS hopes to be better able to identify those people with little or no income, and thus return refunds and negative income tax benefits. This capacity may also suggest, however, the means of identification and possibly retrievability of data about the impoverished, the drop-outs, and people living on the margins of society. While this has distinct equitable implications for those concerned with social justice, people stressing civil liberties issues may want to inquire further about a technical and programmatic capacity to locate taxpayers for non-tax purposes.

Furthermore, published hearings before several House subcommittees indicate that with better data processing equipment, IRS hopes to be better able to process and match documents sent by foreign governments reporting the finances of Americans working and conducting business or financial transactions abroad, thus bringing into the Treasury a substantial amount of revenue due the government.

This capacity may also suggest implications for the capacity to monitor the activities of Americans abroad for economic purposes or to serve the interests of foreign relations, military affairs, law enforcement, intelligence, or the research purposes of IRS, Treasury, or other agencies.

In each instance which could be identified of a significant increase in surveillance capacities if TAS is installed, it might be necessary to obtain more information about the administrative standards and the technical safeguards which would govern programming or operation of TAS for the purpose of assuring that use of the surveillance resources is confined, at a minimum, to some judicially ascertainable standard of reasonableness in light of the statutory mission of the IRS and other governmental users of the system.

TAS will enable IRS to identify residents of small scale geographical areas as problem taxpayers for collection purposes. It is expected to increase workload control by collection personnel by assigning geographical areas, identified by zip codes, to Revenue officers and producing an inventory of geographical workloads.

TAS is expected to provide surveillance capacity for a more intensive audit effort over smaller geographic areas and over certain economic groups. One of its reported merits is that it will enable audit personnel to identify gaps in regional and district audit programs that are not recognized in the national Discriminant Function system for selecting returns for audit. Its data base of tax account information will, according to reports, permit more detailed analysis and improved criteria for selecting returns in need of audit. For example, it ~ be able to **identify** compliance problems of questionable deductions or unreported income by geographic area or business activity.

In addition to acquiring more information from the IRS, it was suggested that a scenario approach be used to identify further potential for surveillance and uses of TAS for which safeguards are needed. ¹⁹

19. See **also**, *Surveillance Technology, 1976: Policy and Implications: An Analysis and Compendium of Materials*. Staff Report, Subcommittee on Constitutional Rights of the U.S. Senate Committee on the Judiciary, 94th Cong., 2nd Sess. (Committee Print)

b. EQUITY AND EQUALITY OF TREATMENT UNDER THE LAWS

ISSUE: TO WHAT EXTENT, IF ANY, DOES THETAS PROPOSAL RAISE CONSIDERATIONS OF EQUITY AND OF EQUALITY OF TREATMENT FOR ALL TAXPAYERS?

SUMMARY

A concern expressed during the panel discussions was that TAS, like other large personal information systems used tax decisions affecting people's rights, may raise public fears that the technology in operation may not be neutral but may affect different groups differently. If, in fact, effective administration and enforcement of revenue laws depend on the taxpayer's voluntary compliance, then it is important that the IRS design and use an information system that not only *is* benign but which can be perceived to be benign for all taxpayers and to encourage equitable treatment and equal protection of the laws for all.

QUESTIONS

1. Could the TAS, over time, reinforce any existing inequities in the tax system by accelerating and intensifying the exercise of investigative, auditing, collection and law enforcement powers of both federal and state governments over certain categories of taxpayers? To what extent could TAS be viewed as a knob for tuning social policy?
2. To what extent was TAS designed with the assumption of the immutability of the present tax laws? Could its capacities influence reforms in the tax laws?
3. How might the new TAS, as programmed or operated, affect the right to equitable treatment under the laws of (1) taxpayers with a history of collection problems? (2) Taxpayers with serious tax problems? (3) Taxpayers who are audited?
4. What other groups are intended to be affected by the application of the technology? Why?
5. Will the TAS provide more responsive service to *all* taxpayers or simply better, more responsive service to selected groups in the taxpayer population?

6. Under the TAS, can there be a significant difference among regions or even among districts of a single region, in the quality of administrative protection afforded the privacy of the individual residents by the way information is collected and entered into the TAS, in the use of it, and in the observance of the confidentiality of it within the IRS and outside the agency?
7. To what extent, for instance, would the TAS, as designed and programmed, permit collection of non-programmed data essential to explain delinquency from the perspective of the taxpayer who may have fallen on hard times, suffered a serious illness, or other problem which might affect consideration of his case?
8. What research would be eliminated under TAS for different groups of taxpayers? With what effect or result?
9. What criteria will be used for developing computer programs for the new system which will affect specific groups of taxpayers?
10. To what extent might the new system be manipulable intentionally or unintentionally to discriminate against specified groups in the taxpayer population?

BACKGROUND

The possibility of equity issues in TAS were described by one panelist, Sociology Professor Dr. Robert Boguslaw, in the following terms:

“It seems legitimate to raise the question as to whether TAS (unwittingly) is a system oriented toward increased surveillance of middle class and working class taxpayers, while having relatively few consequences for corporate and upper-class taxpayers. Does increased computerization of IRS procedures work to the advantage of corporate and other taxpayers who can afford the legal and accounting advice which will enable them to conform, superficially, to acceptable standards (i.e., to remain below the limits of deviation posed by Discriminant Function scores, etc.)? In short, from a social and political perspective, the threat posed by TAS is not simply the possibility of increased scrutiny of *all* taxpayers, but rather the prospects of more effective scrutiny of some and less de facto scrutiny of others.”²⁰

Responding during the panel's discussions to questions Of possible TAS impact on class bias, IRS officials observed that there would be no change, that TAS was essentially a better management tool; they felt that to the extent TAS will assist in such matters as income averaging, it will if anything, promote equity, but it is not going to *affect such things as the complexity of the tax code or*

20. Additional comments, Appendix of Report.

tax write-offs. This argument was further developed by a panelist, a former IRS official, who stated that fairness has historically been the concern of tax administrators, tax lawyers and economists. All want to see tax administration bear evenly on taxpayers and have sought to imbed a form of equity in tax laws.

The possible relationship of the TAS requirements and cost to future tax reforms may be related to equity issues. Concern was expressed during the panel discussion that the TAS design might reflect a perspective which accepts existing tax legislation as fixed and projects future requirements as reasonable extrapolations from past experience. Congress, however, might wish to review existing tax legislation from the perspective of the additional costs contemplated for TAS. As the question was expressed by a panelist, “would more generous ‘standard’ exemptions lead to increased benefits in the form of reduced costs of administration and equipment — to say nothing of eliminating much of the need for privacy among individual taxpayers in the working middle class?” If large numbers of people are not reporting details of personal financial activities, there is less of a burden on the organization to provide sophisticated privacy and confidentiality guarantees.

According to the IRS, the current ADP posture, with piecemeal improvements made without integrated planning, “creates difficulties in complete administration of the tax code and regulations. This is so especially as to the need for flexible, quick response to changes in statutory authority, and increased productivity of revenue agents to ensure compliance by all taxpayers. Reliance on voluntary compliance is tenable only to the extent that revenue activity is perceived by taxpayers as fair, thorough, and responsive to reasonable requests and inquiries. ”

To the extent that there have been complaints of inequitable handling of audit selection policies, such criticism may be associated by the public to whatever software is proposed for applying TAS technology to auditing. There have been public criticisms of the apparent lack of balance in making audit decisions, and of some IRS judgments about where and how to deploy personnel and other resources for conducting audits.

The courts have upheld the reasonableness of basic audit criteria, and to the extent that the Internal Revenue Service is attempting to audit people fairly, the computer software would simply embody more rational practices for selecting people for audit. If the application of the TAS in these areas follows reasonable criteria, these then might be reviewed to see that the proper use of computer-sorting capacity simply embodies judicially-acceptable auditing categories and criteria. If so,

then, in the interest of the appearance of equity, and the assurance of fair treatment, perhaps these should be spelled out in the budget justifications for the TAS.

If, on the other hand, there will be categories of taxpayer groups selected which would be substantially different from what have been the acceptable target groups, then this issue perhaps should be surfaced and examined.

Through its ADP resources, the IRS has developed a uniform standard for selecting returns for audit. This standard is afforded by use of a sophisticated computer selection technique, the “discriminant function” (DIF) which involves assigning numeric weights to certain characteristics of tax returns according to relative significance of that characteristic as an indicator of error in a return. TAS will enable similar computer programs for other purposes.

Equality of Treatment Under Laws and Rules

With TAS, there is a new administrative system evolving within the IRS which is intended to affect special groups of taxpayers. Under the existing system, presumably, there were safeguards for these people. An issue for possible inquiry is what new safeguards are needed to assure that these taxpayers will be treated fairly and enjoy rights of due process, privacy and confidentiality equal to those of all other taxpayers?

Residents of Different IRS Regions

TAS may raise a serious issue of equality of treatment which may have possible constitutional dimensions as an “equal protection of the laws problem.” This is whether or not residents of different geographic regions will enjoy equality in the administration of the Internal Revenue laws, and in enjoyment of their privacy and other rights which may be affected by IRS and related information programs.

Under the new system, there will be 10 different regional information management policies and 10 different sets and myriad subsets of information relationships among personnel of the IRS components and among those of federal and state users of IRS data.

In addition, there will be 10 different security systems, instead of one, for those interested in oversight to watch.

A number of Congressional reports have identified lack of central management and oversight in decentralization as causes of certain civil liberties abuses in the collection, storage, use and

sharing of certain kinds of IRS investigative information. Questions might be raised in connection with TAS as to (1) What are the oversight implications of these arrangements?, and (2) Who will be responsible for assuring equal protection of the laws to residents of different geographic regions?

Following are examples of groups intended to be affected, according to IRS documents, by the improvements TAS will bring to the Service. They are noted here for background information in considering TAS.

Taxpayers with a History of Collection Problems

The TAS Description Book; an internal document prepared for IRS, states that the TAS will aid the collection process by making available information of taxpayers with a history of collection problems. The availability of this data on those taxpayers accounts having a balance or return delinquency problem will, according to this document, eliminate a great deal of research presently carried out by Revenue Officers. To assure that rules for TAS permit fairness for this group, it might be asked to what extent the TAS, as designed and programmed, may permit the collection of nonprogrammed data essential to explain delinquency from the perspective of the taxpayer who may have fallen on hard times, suffered a serious illness, or other problems which might affect consideration of his case. Another area of inquiry for this group, as for other groups intended to be affected by TAS capabilities, would be what research would be eliminated under TAS which is now carried out for the various special categories of taxpayers with which IRS must deal.

Taxpayers with "Serious" Tax Problems

The Description Book for TAS states that through TAS improvements, taxpayers with the most serious tax problems will be dealt with before collection manpower is expended on those with less serious problems. Under the present system, employees have considerable administrative discretion to make such determinations and their decisions must necessarily involve value judgments in each case. TAS, according to the IRS internal document, will be used to produce an inventory report of the workload volume available within each specific geographical area. Through a special scoring system, based on the entity concept with weights assigned by pre-established criteria similar to Discriminant Function criteria, the Group Manager will be able to make maximum use of field collection manpower. "

To assure that the intended use of TAS capabilities for this **group** of taxpayers does not raise issues of fair and equitable treatment of equal protection of the laws, information might be sought to determine what a “serious problem“ is for the purposes of the new system, and who will decide this; what criteria will be used for developing computer programs for the new system which will affect these and other groups of taxpayers; how secure are the details; to what extent might this aspect of the new system be intentionally or unintentionally manipulable to discriminate against specified groups in the taxpayer population.

Taxpayers Who are Audited by Geographic Area or Business Activity

TAS, with its data base of tax account information, is expected by IRS to permit more detailed analysis and improved criteria for selecting returns in need of audit by geographic area or business activity. IRS stated that “this refinement will be especially beneficial in treating localized compliance gaps in regional and district audit programs that are not recognized in the National Discriminant Function system for selecting returns. Through data base analysis, it will be possible to identify compliance problems (questionable deductions or unreported income) by geographic area of business activity. ”

Also available in the expandable data base, according to an internal TAS document, would be prior year audit results by issue forth= years open under the statute of limitations, along with references to financial and other tax related transactions that impact future years reporting requirements. The audit history data is expected to permit better selection of returns and fewer successive “no-change” audits of computer selected returns. Better selection will in turn increase examiner efficiency since less “no-change work will allow more thorough examination of returns with high probability of error. References to financial or other activity affecting subsequent year filings will provide examiners with leads, further increasing the quality and efficiency of work effort.”

An area for possible inquiry for this group would be to determine the criteria to be programmed for defining computerized selection of returns and for measuring examiner efficiency.

similar questions might be asked concerning guarantees in TAS for fair treatment of American taxpayers living, working, or traveling abroad.

c. TAS AND THE COURTS

ISSUE: WHAT PROBLEMS MAY THE TAS TECHNOLOGY POSE IN THE JUDICIAL PROCESS FOR THE PROTECTION OF INDIVIDUAL RIGHTS?

SUMMARY

Judicial review of the intended or unintended consequences of TAS technology is not only likely but certain, given past and present judicial experiences with IRS earlier ADP system. An analogy might be drawn between TAS and judicial treatment of FBI computerized systems in the 1971 case of *Menard v. Mitchell*.²¹ Questions might be raised as to whether or not policies governing the collection, use, maintenance, and dissemination of IRS information are sufficient to stand up in court when the interest of the taxpayer or the government may be at stake.

QUESTIONS

1. What new problems may the Tax Administration System present to the courts?
2. Is there a need to define additional rules and standards by statute or regulation to provide guidelines for judges and parties to civil and criminal actions whose cases may be related to the operations of TAS computers, its hardware, software, or personnel?

BACKGROUND

Serious consideration may have to be given to the adequacy of rules governing TAS unless the whole TAS system is to be jeopardized in the future by court decisions saying that the taxpayer is put at a disadvantage by the complex system. More and more as courts are being called on to resolve due process issues in governmental programs, it has become clear that they are not going to sacrifice their constitutional role and traditional functions to bad systems design. As courts begin

21. 430 F.2d 486 (D.C. Cir. 1970) decision upon remand, 328 F. Supp. 718 (D.D.C. 1971).

to look at the effects of automated data systems, they have given notice that they are not going to rely on good intentions. There is needed only the example Judge Gesell provides in his Federal District Court decision in the Menard case concerning the FBI's dissemination of arrest records and the right of expungement. The Judge found that the use of the system raised constitutional issues and that Congress has never authorized sharing of arrest records with state or local agencies for employment of licensing checks. He thus threw back to Congress the whole problem of establishing adequate rules for the system, something the Congress has struggled for years to resolve.

As the Internal Revenue Service has developed more sophisticated computer systems, billings, notices of all kinds, audits, collections and other processes have been automated for speedier, more economical service and compliance. Consequently, many Americans have become aware of unfortunate side effects as well as the beneficial effects of new information systems. As a result, the courts have begun to receive and to attempt to deal with complaints involving taxpayers' rights to due process and privacy m they are affected **by the IRS computers**. **Some** recent decisions have implications for the new TAS.

There is, for example, the reported case of Hattie Neal a taxpayer in New Jersey. Research reveals that as the case progressed, it became apparent that the IRS side of the story may not have been completely available. However, the fact situation as described, presents a possible scenario for testing rules which would govern TAS operations.

The reported facts are these: During 1973, income tax was withheld and paid to IRS on Ms. Neal's wages. The final 1973 return, filed in 1974, showed a tax which was \$910 less than the amount withheld, and she asked for a refund. Instead, she received an IRS form stating that the refund was applied to adjust her account for the **year 1971**. **Wportedly, no** information given to explain how and why this entry was made indicated that she inked three times for a hearing or explanation. In each case, the response was a computer print-out saying that the refund had been applied to the 1971 balance, without saying how the balance arose. Ms. Ned sued for the refund. The IRS, reportedly having withheld the facts from her, inked the court to dismiss her suit for lack of jurisdiction, on the grounds that-she lacked a sufficient showing On the basis of her claim.

The judge found that a strange request since, he said, "the government cannot ask the taxpayer to provide details which only the government possesses and which its computers will not disclose." He took note of the fact that enough taxpayers had this happen to them to suggest that what was at work was the GIGO Rule of Computers (Garbage In, Garbage Out). Since the

explanation for the phenomenon was never learned, maybe discovery in this case would provide it. He also noted that if the United States had been a creditor dealing with consumer credit, such as a retail merchant or a credit card company, it would be obliged to provide the details of a claimed billing error and to correct the error, within strict time limits. He ordered the IRS to provide the information.

The judge's comments on the facts as presented to him for decision are relevant to the proposed TAS: "The computer is a marvelous device that can perform countless tasks at high speed and low cost, but it must be used with care. This is because it can also make errors at high speed. Those who use computers for record and accounting purposes, including the government, are accordingly obliged to operate them with suitable controls to safeguard the reliability and accuracy of the information." After the decision the taxpayer did not fully respond to IRS requests for information about her deduction claims and the Court dismissed the case, noting: "Since both parties failed (at different stages) to provide information to which the other was entitled they are both tarred with the same brush."²

Impeaching Computer Print-Outs

Computerized programs have been involved in several recent cases of criminal prosecutions for failure to file tax returns. Judges have struggled with issues of privacy, due process and the new computer technology in these cases. Defendants have tried to discover IRS computer lists of taxpayers who failed to file so they could contact them and find people who had actually filed and were erroneously listed as non-filers.

In one 1974 Pennsylvania case, the IRS fought such an effort as unreasonable and a violation of privacy. The Judge rejected their arguments and ordered IRS to delete Social Security numbers and furnish the defendant taxpayer a list of random selection of names of non-filing taxpayers.

In doing so, he commented on the *privacy* issue:

"The right of a citizen to privacy is, of course, an interest that is and should be zealously protected. But so is a citizen's right to his good name. It is the latter interest that the defendant here seeks to preserve. When it is considered that the information the defendant seeks is public anyway, the asserted invasion of privacy seems, at best, elusive. Defendant's interest, on the other hand, is very real."

22. *Neal v. U.S.* 402 F. Supp. 678 (1975)

The Government contended that the lists do not purport to be conclusive lists of persons who have failed to file returns, but serve merely as a starting point in the process of identifying non-filers; that only after further extensive investigation is the list complete, so the lists were immaterial to the defense. The judge said their conclusion "was short-sighted," and that:

"The defendant seeks to reveal not **merely the inaccuracy** of the computer lists, but rather the unreliability of the entire Internal Revenue Service system of weeding out non-filers. The government suggests that there are many reasons why names will appear on the non-filer list that should not be there-returns in the process of audit, marriage and change of name, death. This is no doubt true. But it may be equally true that some names are on the list simply because the computer makes mistakes. The latter reason could well have a significant bearing on a crucial issue in this case-the reliability of the entire IRS procedure of identifying non-filers. Nothing short of the discovery sought will reveal the truth. "

The judge noted that the testimony of the government witnesses established that the overall IRS system of processing returns has remained unchanged and that any changes in computer equipment were improvements over the prior art. "It comes to this," he stated:

"Defendant is reduced to seeking to expose inaccuracies in a present overall system unchanged since his alleged delinquencies, but operating with better equipment. His *a fortiori* argument is that if those shortcomings exist now, with better equipment, they had to exist in 1969 without the improved equipment. Circumstances, and not mere chronology, are the touchstone of relevance. "

In an elaborate order, the Court gave the taxpayer access to IRS computer processing locations and documentation relating to the electronic data processing system. This included: systems documentation, programming documentation, operating documentation and instructions, training aids, job descriptions of systems personnel, organization charts, systems and programming changes, configuration detail, forms, systems personnel selection criteria, audit trail reports, exception reports, all logs relating to data processing (including volume log, error log, reject log, unposted log, changes log), attendance statistics for systems personnel, machine use @s, budget and budget requests, reports of systems operations, any studies relating to all aspects of the processing of income tax returns, all reports and evaluation of the income tax processing system or any portion thereof.

The Court allowed him to inspect and operate the equipment under certain conditions, and required the Government to bear the costs of the examination, including the salaries of personnel required to assist the defendant's experts, the salaries of personnel prevented from carrying out their normal tasks, and the cost of use of computers or peripheral equipment.

The lower court dismissed the charges against the taxpayer when the Government failed to supply the lists. The Court of Appeals reinstated the criminal charge on the grounds that the IRS

had alternative means of getting the information the taxpayer wanted. The Appeals Court weighed the 6th Amendment right of the defendant to confront a major “witness” in the form of IRS computer print-outs against the right of privacy of individuals on the list and the need to avoid confidentiality problems in managing presentation of the evidence in court. “Although the great majority of persons on the lists in fact have filed a return or have legitimate reasons for not doing so, being a suspect under investigation by a government agency is a circumstance which every person except the bizarre would prefer to hold in confidence,” the Court stated.

Alternatives by which access to IRS documents and experts, and permission to have his own experts run tests on IRS computers would allow the taxpayer “to cross-examine the computer testimony confronting him by analyzing the reliability of the computer system in theory and checking the accuracy of the system in fact. Moreover, the alternatives should provide information focusing directly on the credibility of the computer testimony and more likely should develop the facts than the digression sought” stated the opinion.

The U.S. Supreme Court denied certiorari in this case.²³

Judges have had to deal with the breakdown of administrative barriers by the flow of information in computerized networks of the IRS.

In a case this year, defendant taxpayers who were charged by IRS with criminal tax evasion claimed the right to have evidence suppressed which was gathered in violation of their rights under the 5th Amendment against self-incrimination and under the 6th Amendment right to counsel.

The Judge in this case ruled that when incriminating evidence had been filed in a generally accessible computerized information bank, and the file was transferred to an audit group whose sole function was limited to investigation of taxpayers believed to have income from illegal sources, the Government was required to give the defendants a Miranda-style warning of their rights.

A special agent of the IRS Intelligence Division spotted the taxpayer driving a customized Cadillac automobile in the downtown Milwaukee area, ran a check on the car and found it was registered to one of the defendant taxpayers. Using routine request procedures, the IRS obtained the defendant’s joint income tax returns from the IRS Service Center in Kansas City, and filed a report, (or “information item”) with a recommendation that the Intelligence Division, which deals with criminal matters, conduct an investigation of taxpayers. This was rejected. Later, the audit

23. *U.S. v. Liebert*, 383 F. Supp. 1060 (1974) U. S.C.A. 3rd Ct. No. 74-2294 (June 30, 1975) U.S. (1975)

division began investigating for civil liability, and the Intelligence Division began investigating for narcotics trafficking. All the time, however, incriminating evidence was being fed into the Information Gathering Retrieval Unit (IGRU), where it became available to every division of the Internal Revenue Service. The IRS claimed that since the taxpayers' file was not *formally* transferred to the Intelligence Division until a certain date, the IRS had no responsibility.

In his opinion, the judge spelled out the intricate details of the case, referring to it as a "computer" case. The IRS, he said, could not erect artificial barriers between different Internal Revenue Divisions in order to defeat the taxpayers' defense.

"The proper substantive inquiry is "When [does] the investigative machinery of the government [become] directed toward the ultimate conviction of a particular individual?" "

"Under all the facts and circumstances of the present case, when defendants' file was transferred to Audit Group 1208, whose sole function is limited to investigation of taxpayers believed to have income from illegal sources I find that in substance the "adversary process" had begun and the Government's investigative machinery began to be directed toward accomplishing the indictment and conviction of these defendants. *Incriminating evidence had been filed in a generally accessible computerized information bank.* Further proceedings without an admonition of rights allowed the defendants to misapprehend the nature of the continuing inquiry, their obligation to cooperate with the investigation, and the possible consequences of such cooperation."²⁴

These are only a few of the judicial decisions involving due process and harassment issues arising in the operation and management of IRS computers. The procedures governing collection, use, and exchange of the sensitive information which the IRS acquires in the course of carrying out its statutory mandates affect the lives and well-being of all taxpayers and taxpaying entities, individuals, citizens, businesses, corporations, organizations> wherever they may be, at home or abroad.

In considering the sufficiency of the policies and practices governing TAS operations, it is well to recall Judge Gesell's warning:

"While conduct against the state may properly subject an individual to limitations upon his future freedom within tolerant limits, accusations not proven, charges made without adequate supporting evidence when tested by the judicial process, ancient or juvenile transgressions long since expiated by responsible conduct, should not be indiscriminately broadcast under governmental auspices. The increasing complexity of our society and technological advances which facilitate massive accumulation and ready regurgitation of far-flung data have presented more problems in this area, certainly

24. *U.S. v. Mapp* 406 F. Supp.817 (1976)

problems not contemplated by the framers of the Constitution.²⁵ These **developments** emphasize a pressing need to preserve and to redefine aspects of the right of privacy to insure the basic freedoms guaranteed by this democracy.

A heavy burden is placed on all branches of Government to maintain a proper equilibrium between the acquisition of information and the necessity to safeguard privacy. Systematic recordation and dissemination of information about individual citizens is a form of surveillance and control which may easily inhibit freedom to speak, to work, and to move about in this land. If information available to Government is misused to publicize past incidents in the lives of its citizens the pressures for conformity will be irresistible. Initiative and individuality can be suffocated and a resulting dullness of mind and conduct will become the norm. We are far from having reached this condition today, but surely history teaches that inroads are most likely to occur during unsettled times like these where fear or the passions of the moment can lead to excesses. The present controversy, limited as it is, must be viewed in this broadest context. In short, the overwhelming power of the Federal Government to expose must be held in proper check.²⁶

25. See President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Science and Technology, at 74-77 (1967). Dealing specifically with arrest records, the Commission noted three serious problems in their use:

The record may contain incomplete or incorrect information.

The information may fall into the wrong hands and be used to intimidate or embarrass.

The information may be retained long after it has lost its usefulness and serves only to harass ex-offenders, or its mere existence may diminish an offender's **belief** in the possibility of redemption.

26. 328 Fed. Supp. 279 (1971).