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X. TAX

*The Summons Power of the IRS Under IRC Section 7602(b)—
A Legal Search and Seizure?*

Congress granted the Internal Revenue Service (IRS) the authority to investigate possible violations of the Internal Revenue Code (IRC).¹ To enable the IRS to exercise this authority, Congress enacted section 7602 of the IRC which provides that the IRS may summon an individual taxpayer to appear before the IRS, testify, and produce documents and records that may be relevant to the IRS' investigation.² If a taxpayer refuses to comply with a section 7602 administrative summons by either failing to appear before

1. I.R.C. § 7601 (West Supp. 1985). Section 7601 of the Internal Revenue Code (IRC) provides:

The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

Id.

In *United States v. Bisceglia*, the United States Supreme Court stated that the United States government based the tax structure on a system of self-reporting. *See United States v. Bisceglia*, 420 U.S. 141, 145 (1975). The Court emphasized that the Government expects that each taxpayer will disclose honestly all information relevant to his tax liability. *Id.* Observing that some persons who avoid paying tax to the government are not necessarily identifiable, the *Bisceglia* Court concluded that Congress gave the Internal Revenue Service (IRS) broad power under § 7601 to investigate and audit any persons who may be liable to pay taxes. *Id.*

2. I.R.C. § 7602 (West Supp. 1985). Section 7602(a) of the IRC provides:

(a) **AUTHORITY TO SUMMON, ETC.**—For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Id.

Congress enacted § 7602(a) as part of the IRC of 1939. I.R.C. § 3614 (1939). Congress has not changed section 7602(a) since the enactment of the IRC of 1939. *See I.R.C. 7602(a)*

the IRS or refusing to produce the requested documents, the IRS can institute an action in federal district court to enforce the summons.³ The fourth amendment to the United States Constitution, however, limits the power of the IRS to summon documents under section 7602 by requiring that the summons meets a standard of reasonableness.⁴ The fourth amendment also prohibits the government from searching and seizing an individual's possessions without first obtaining a warrant based upon a showing of probable

(West Supp. 1985). Prior to 1982, the IRS could issue a summons only for the purposes authorized in § 7602(a). *Id.*; see S. REP. No. 494, 97th Cong., 2d Sess. 285 (1982) reprinted in 1982 U.S. CODE CONG & AD. NEWS 1030, 1030. The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) amended § 7602 to include § 7602(b) and § 7602(c). Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, Title III, § 333(a), 96 Stat. 622 (1982) (codified at I.R.C. § 7602(b) and 7602(c)). Section 7602(b) of the IRC provides:

(b) PURPOSE MAY INCLUDE INQUIRY INTO OFFENSE.—The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) [of: § 7602] include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

I.R.C. § 7602(b) (West Supp. 1985).

Section 7602(c) of the IRC provides that the IRS may not issue a summons after the IRS has referred the case to the Department of Justice. I.R.C. § 7602(c) (West Supp. 1985).

Section 7603 of the IRC describes the manner in which the IRS must serve a summons. I.R.C. § 7603 (West Supp. 1985). Section 7603 requires that the Secretary of the IRS deliver a copy of the summons to the summoned person, or leave a copy at that person's last place of residence. *Id.* If the summons requests the production of books or documents, or other data, then the summons must describe the requested material with reasonable certainty. *Id.*

Section 7605 of the IRC describes the time and place of the examination of the summoned person. I.R.C. § 7605 (West 1954 & West Supp. 1985). Section 7605 requires that the time and place for the examination be reasonable and that the examination never be less than 10 days from the date of the summons. *Id.*

3. I.R.C. § 7604 (West 1954 & West Supp. 1985). When a person refuses to comply with an IRS summons, the IRS will examine the summoned person's situation and the investigative position of the IRS before applying to federal court for judicial enforcement of the summons. See H.G. BALTER, TAX FRAUD AND EVASION § 5.01[1](b) (5th ed. 1983). If the IRS decides that that person's records or testimony are of significant interest to the IRS investigation, then the IRS will begin enforcement proceedings against the summoned party in federal district court. *Id.* Section 7604(a) grants the federal district courts jurisdiction to enforce an IRS summons. I.R.C. § 7604(a) (West 1954). Section 7604(a) grants the district court the power to enforce a challenged summons after judicial review. *Id.* Section 7604(b) authorizes a court to punish for contempt any person who fails to comply with a judicially enforced summons. I.R.C. § 7604(b) (West Supp. 1985).

4. See U.S. CONST. amend. IV. The fourth amendment guarantees in part, that "the people [shall] be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *Id.* The fourth amendment applies to a criminal case when the Government conducts a search and a seizure, and the Government attempts to use the seized evidence to prosecute. See generally THE CONSTITUTION OF THE UNITED STATES 1045 (L. Jayson ed. 1973) (discussion of interpretation of fourth amendment). The fourth amendment protects an individual's privacy interests—not property. See *Warden v. Hayden*, 387 U.S. 294, 304 (1967); *United States v. Theodore*, 479 F.2d 749, 754 (4th Cir. 1973) (fourth amendment limits IRS to reasonable searches and seizures and prohibits unrestricted rummaging of person's private possessions).

cause⁵ and issued by a neutral magistrate.⁶ The United States Supreme Court has determined, nevertheless, that the IRS need not show probable cause before a neutral magistrate to gain enforcement of a summons that is reasonable in scope.⁷

Prior to 1982, the IRS could summon documents pursuant to IRC section 7602 only for civil investigations⁸ or joint civil-criminal investigations.⁹ Through the enactment of the Tax Equity and Fiscal Responsibility

5. See U.S. CONST. amend. IV. The Framers' inclusion in the fourth amendment of a search warrant requirement was a reaction to the general warrant and warrantless searches that the colonists suffered. See generally THE CONSTITUTION OF THE UNITED STATES 1043 (L. Jayson ed. 1973) (discussing reason behind fourth amendment warrant requirement). The fourth amendment warrant requirement mandates that the police obtain, whenever practical, judicial approval of a search and seizure through the warrant process prior to the search and seizure. See *Coolidge v. New Hampshire*, 403 U.S. 443, 474 (1971) (search or seizure of a suspect's property without warrant is per se unreasonable). The Framers intended the probable cause requirement to justify the invasion of a person's privacy by limiting the search through issuance of a warrant to that which is reasonable and relevant to the particular search. See *id.* at 473-484. Probable cause to search exists only when the police officers have a reasonable belief that a person has violated the law, that property related to the violations exists, that the police officer found the property in a certain place, and that the police officer can describe the property with particularity. See *Lowrey v. United States*, 161 F.2d 30, 33 (8th Cir.) (probable cause for issuance of search warrant implies specific violation with respect to specific property, premises, or persons, each of which police can identify unmistakably), *cert. denied*, 331 U.S. 849 (1947). The particularity requirement defines and limits the scope of the search and seizure, protecting the individual and preventing general searches and seizures. *United States v. Wroblewski*, 105 F.2d 444, 446-47 (7th Cir. 1939). Federal courts do not require a formal judicial warrant in all administrative searches. See *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967) (fourth amendment warrant exception applies to certain administrative searches). In warrantless administrative searches, courts must balance the necessity of the warrantless search against the rationale behind the warrant requirement. See *id.* (discussing whether burden of obtaining warrant is likely to frustrate governmental purpose behind search).

6. See U.S. CONST. amend. IV. The fourth amendment neutral magistrate requirement demands that a detached and neutral magistrate determine whether the evidence that the police officers presented is sufficient to justify the issuance of a search warrant. See *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). A neutral magistrate stands between zealous police officers in pursuit of evidence and the privacy rights of citizens. See *id.*

7. See *United States v. Powell*, 379 U.S. 48, 57 (1964). In *Powell*, the Supreme Court held that the IRS does not need to meet the fourth amendment requirement of probable cause to obtain enforcement of § 7602 summons because enforcement of the probable cause standard would jeopardize the liberal investigative powers of the IRS. *Id.*; see *supra* notes 4-6 and accompanying text (discussing fourth amendment warrant requirement); *infra* notes 70-76 and accompanying text (discussion of *United States v. Powell* Court's standards for enforcement of IRS summons).

8. See I.R.C. § 7602(a) (West Supp. 1985); see *supra* note 2 (discussing authority of IRS to summons documents pursuant to § 7602(a)); *infra* note 15 (revenue agents may issue summons pursuant to § 7602(a) only for purpose of determining whether taxpayer is civilly liable).

9. See *Donaldson v. United States*, 400 U.S. 517, 534-35 (1971) (IRS special agent of Criminal Division may conduct investigation jointly with revenue agent of Audit Division); see *infra* note 15 (IRS conducts joint investigation for both civil and criminal infractions).

Act of 1982 (TEFRA),¹⁰ Congress added section 7602(b)¹¹ to the IRC, which expanded the purposes for which the IRS may issue a summons to include solely criminal investigations.¹² In *United States v. Morgan*,¹³ the United States Court of Appeals for the Fourth Circuit considered whether the IRS could search and seize the documents of a taxpayer suspected of a criminal violation pursuant to amended section 7602(b) of the IRC without violating the fourth amendment warrant requirement.¹⁴

In *Morgan*, IRS revenue agent Leniel Brite of the Examination Division,¹⁵ approached the defendant-taxpayer, Olen Morgan, president and sole stock-

10. Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, Title III, § 333(a), 96 Stat. 622 (1982) (codified at I.R.C. § 7602(b) and 7602(c)); see *infra* notes 103-10 and accompanying text (discussion of legislative history of TEFRA § 333(a)).

11. I.R.C. § 7602(b) (West Supp. 1985); see *supra* note 2 (text of § 7602(b)).

12. I.R.C. § 7602(b) (West Supp. 1985); see *infra* notes 103-10 and accompanying text (§ 7602(b) authorizes issuance of summons for solely criminal investigations).

13. 761 F.2d 1009 (4th Cir. 1985).

14. *Id.* at 1012; see *supra* note 2 (text of IRC § 7602(b)).

15. See M.I. SALTZMAN, IRS PRACTICE AND PROCEDURE § 8.02 (1981). The IRS is divided into various divisions represented in both a National Office and field offices or district offices. *Id.* at 1.02[2]. THE COMPLIANCE DIVISION OVERSEES THE OPERATIONS AND COMPLIANCE ACTIVITIES OF THE IRS. *Id.* The IRS divided the Compliance Division into five subdivisions. *Id.* at 1.02[2][a]. The Correction Division assesses and collects delinquent taxes. *Id.* The Examination Division examines filed income tax returns. *Id.* The Criminal Investigation Division investigates possible criminal violations of the tax laws. *Id.* The Appeals Division supervises taxpayers' appeals of district determinations. *Id.* The Office of International Operations administers and enforces the internal revenue laws pertaining to certain United States citizens living abroad and nonresident aliens or corporations with income derived from the United States. *Id.*

The Collection Division, Examination Division, and Criminal Investigation Division supervise and direct the taxpayer compliance functions at the district level of the IRS. *Id.* At the district level, the IRS chooses some tax returns for field examination, or audit. *Id.* IRS revenue agents conduct both the examination of tax returns chosen for audit and the collection of delinquent taxes. *Id.* The IRS may hold a taxpayer civilly liable if he fails to comply with the internal revenue laws. *Id.* at 8.06; see generally I.R.C. CHAPTER 68 (§§ 6651-6699) (West 1954 & West Supp. 1985).

The IRS requires a revenue agent who uncovers indications of tax fraud during a civil investigation to suspend the examination and refer the case to the Criminal Investigation Division. INTERNAL REVENUE MANUAL 4565.21 MT 4500-324 (Oct. 16, 1980) (CCH). If the case warrants further examination, the Criminal Investigation Division assigns the case to a special agent. *Id.* A special agent can make an independent investigation of criminal liability or a joint investigation of civil-criminal liability with a revenue agent from either the Examination Division or Correction Division. *Id.* at 9781, HANDBOOK FOR SPECIAL AGENTS, § 3(10) 5, MT 9781-1 (Jan. 18, 1980); *id.* at 9311.2, MT 9-151 (April 3, 1980). A special agent in a criminal investigation attempts to discover evidence to develop a potential criminal case. *Id.* at 9781, HANDBOOK FOR SPECIAL AGENTS, § 3(10)7, MT 978-1 (Jan. 18, 1980). In any joint investigation, the criminal aspect of the case prevails over the civil aspect of the case. *Id.*

Both revenue agents and special agents have the authority to issue a summons. I.R.C. § 7602(a) (West Supp. 1985). A revenue agent may not issue a summons to further investigate a case if the revenue agent suspects that the taxpayer has committed fraud. INTERNAL REVENUE MANUAL 4565.21, MT 4500-324 (Oct. 16, 1980). Special agents of the Criminal Investigation Division are the only revenue officials whom the IRS allows to issue a summons to investigate possible criminal conduct. See SALTZMAN, *supra* at 13.01[2] (ADMINISTRATIVE PRACTICE).

holder of Pool Builders' Supply of the Carolinas, Inc. (PBS), to audit the records of PBS for the tax years 1979 and 1980.¹⁶ Morgan cooperated with agent Brite and allowed Brite to examine the requested PBS records.¹⁷ Upon finding a large discrepancy between the income reported on PBS' 1979 and 1980 tax returns and the deposits in the corporation's bank account, agent Brite asked Morgan for an explanation, but was dissatisfied with Morgan's answer.¹⁸ Agent Brite then referred the matter to the Criminal Investigation Division of the IRS to investigate the possibility of criminal tax fraud.¹⁹ Special Agent Howell of the Criminal Investigation Division issued Morgan an administrative summons pursuant to IRC section 7602, which required Morgan to produce certain PBS financial records and to give testimony pertaining to the investigation.²⁰ Morgan appeared before Special Agent Howell as the summons required, but refused to provide testimony or to produce the requested records.²¹ The IRS then petitioned the United States District Court for the Western District of North Carolina to enforce the

16. 761 F.2d at 1010. Tax returns selected for field examination have been computer classified as having audit potential and the IRS has chosen the returns for examination because the returns have a greater chance of containing errors. SALTZMAN, *supra* note 15, at 8.06. THE REVENUE AGENT EXAMINES THE TAXPAYER'S BOOKS AND RECORDS TO DETERMINE WHETHER, TO THE REVENUE AGENTS SATISFACTION, THE TAXPAYER HAS PAID THE CORRECT TAXABLE INCOME AND WHETHER THE TAXPAYER OWES ANY TAX. *Id.*

In *Morgan*, Agent Brite examined records of PBS for civil tax assessment purposes. Brief for Appellants at 3, United States v. Morgan, 761 F.2d 1009 (4th Cir. 1985). Agent Brite did not issue a summons. 761 F.2d at 1010.

17. United States v. Morgan, 579 F. Supp. 1463, 1465 (W.D.N.C. 1984).

18. *Morgan*, 761 F.2d at 1010. In *Morgan*, Agent Brite attempted to account for the large discrepancy between the amount of income reported on PBS' tax returns and the amount that PBS maintained in the bank by examining the records of PBS. *Id.* Agent Brite also asked Morgan and Morgan's attorney to explain the differences. *Id.* Agent Brite was unable to determine, to his satisfaction, the amount of discrepancy and the reason for the discrepancy. *Id.*; Brief for Appellants, *supra* note 16, at 2-3.

19. *Morgan*, 761 F.2d at 1010. The IRS instructs a revenue agent conducting an investigation of civil tax liability to be alert for any signs of possible tax fraud and to suspend the civil investigation and refer the case to the Criminal Investigation Division when the agent suspects fraud. INTERNAL REVENUE MANUAL 4565.21, MT 4500-324 (Oct. 16, 1980); see *supra* note 15 (indications of tax fraud require referral to Criminal Investigation Division for criminal investigation).

In *Morgan*, the Criminal Investigation Division assigned the *Morgan* case as a joint civil-criminal investigation to Special Agents Benjamin Howell and Robert Greene. 761 F.2d at 1010. Special Agents Howell and Greene indicated to Morgan's attorney that they were investigating possible criminal tax violations committed by Morgan. *Morgan*, 579 F. Supp. at 1465.

20. *Morgan*, 761 F.2d at 1010; I.R.C. § 7602 (West Supp. 1985). In *Morgan*, Special Agent Howell expanded the investigation of Morgan to include the tax year 1978. *Id.* The summons that Special Agent Howell issued called for production of documents including banking statements, cancelled checks, deposit tickets, check stubs and savings account records for PBS, and books and records maintained by PBS in the general course of business including cash receipt journal, ledgers, invoices, sales records, expense records, and loan documents. *Morgan*, 579 F. Supp. at 1465.

21. 761 F.2d at 1010.

summons pursuant to IRC section 7604.²²

Defendant Morgan objected to enforcement of the summons on both procedural and constitutional grounds.²³ Morgan argued that the IRS had not followed correct procedure since the IRS had not sent Morgan a second inspection notice as IRC section 7605(b) required.²⁴ Morgan also asserted that the scope of the summons that Special Agent Howell issued was too broad.²⁵ Defendant Morgan further alleged that the summons jeopardized unconstitutionally both his fourth amendment protection against an unreasonable search and seizure and his fifth amendment protection against self-incrimination.²⁶ Morgan argued that enforcement of the summons would

22. *Morgan*, 579 F. Supp. at 1465; see I.R.C. § 7604(a) (West 1954) (granting federal district courts jurisdiction to enforce IRS summons).

23. *Morgan*, 579 F. Supp. at 1465; see *infra* note 24 and accompanying text (discussion of defendant Morgan's procedural argument); *infra* notes 26-29 and accompanying text (discussion of defendant Morgan's constitutional argument).

24. *Morgan*, 579 F. Supp. at 1469. Section 7605(b) of the IRC states that the IRS cannot make more than one inspection of a taxpayer's records for each taxable year unless the IRS gives written notice to the taxpayer that an additional inspection is necessary. I.R.C. § 7605(b) (West 1954). In *Morgan*, defendant Morgan argued that the summons was not enforceable because Special Agent Howell's investigation constituted a second inspection of the same records that Revenue Agent Brite had inspected and that § 7605(b), therefore, required that Special Agent Howell issue a written notice of the second inspection. *Morgan*, 579 F. Supp. at 1469. Revenue Agent Brite testified that he had not completed the civil investigation of PBS' records when Brite referred the case to Special Agent Howell. Brief for Appellants, *supra* note 16, at 3. The district court ruled that an evidentiary hearing was necessary to establish whether Revenue Agent Brite had completed his investigation and whether Special Agent Howell therefore had to issue a written notice to Morgan under § 7605(b) prior to the second investigation. *Morgan*, 579 F. Supp. at 1469. The IRS appealed the decision. 761 F.2d at 1009. The Fourth Circuit reversed the district court's decision. 761 F.2d at 1010-11. The Fourth Circuit held as a matter of law that Special Agent Howell did not have to issue a written notice of a second inspection to Morgan under § 7605(b) since Revenue Agent Brite had suspended, although not completed, his civil investigation while Special Agent Howell conducted a criminal investigation. *Id.*

25. *Morgan*, 579 F. Supp. at 1469. In *Morgan*, the summons that Special Agent Howell issued to Morgan contained the phrase "including [documents], but not limited to. . ." *Id.*; see *supra* note 20 (Special Agent Howell issued summons that requested production of documents and records of PBS). The district court held that the summons was too broad and ordered Morgan to produce only the documents actually listed in the summons. 761 F.2d at 1010. Neither defendant Morgan nor the IRS appealed this decision. *Id.*

26. *Morgan*, 579 F. Supp. at 1467. In *Morgan*, Morgan argued that enforcement of the summons would violate his fifth amendment privilege against self-incrimination. *Id.* Morgan asserted that since Special Agent Howell's investigation carried possible criminal liability, the fifth amendment guarantee against self-incrimination prohibited production of the records and his testifying. *Id.* The district court recognized that Morgan, as custodian of PBS's records, could invoke the fifth amendment privilege against self-incrimination when asked to give oral testimony, but that Morgan could not withhold production of PBS's records on the ground that the record contents might incriminate Morgan as custodian. *Id.* Morgan also argued, and the district court rejected, that Morgan, as president of PBS, could claim the fifth amendment privilege on behalf of PBS. *Id.* at 1468. On appeal, Morgan contended that § 7602(b) violates the fifth amendment guarantee of prosecution only upon the indictment as found by a grand jury. 761 F.2d at 1012. Morgan argued that § 7602(b) grants special agents overly broad powers that jeopardize the role of the grand jury as the main conduit for criminal discovery. *Id.* The *Morgan* court rejected defendant Morgan's fifth amendment powers of the IRS under § 7602(b). *Id.*

violate his rights under the fourth amendment because the IRS had not obtained a warrant based upon probable cause before seizing the PBS records.²⁷ Morgan also alleged that IRC section 7602(b) is unconstitutional on its face under the fourth amendment.²⁸ Morgan contended that IRC section 7602(b) allows an IRS special agent, through issuance of an IRC section 7602(b) summons, to compel a person or corporation to produce private records and documents for the sole purpose of investigating a possible criminal violation without first securing a warrant based on probable cause.²⁹

In response to Morgan's argument that the IRS had to issue a second inspection notice under IRC section 7605(b), the district court scheduled an evidentiary hearing to determine whether agent Brite had finished his audit, in which case Special Agent Howell would have had to issue a second inspection notice prior to summoning PBS' documents.³⁰ Also finding that the summons was too broad, the district court modified the summons.³¹ The district court then rejected defendant Morgan's constitutional argument and enforced the section 7602 summons.³²

The district court in *Morgan* found that the summons did not affect either defendant Morgan's fourth amendment interests or those of his corporation, PBS.³³ The district court reasoned that neither Morgan nor PBS had a legitimate interest, of which the fourth amendment afforded protection, because the documents that the IRS summoned did not fall within a constitutionally protected zone of privacy.³⁴ The district court noted that the summoned documents were the business records of PBS.³⁵ The district court rationalized, therefore, that the records sought were not the constitutionally protected "private papers" of either Morgan or PBS.³⁶ The district court

27. *Id.* at 1466. In *Morgan*, defendant Morgan argued that the IRS' investigation of PBS was solely a criminal tax investigation. *Id.* Defendant Morgan further asserted that the IRS should obtain a warrant based on probable cause before seizing information. *Id.*

28. *Id.*

29. *Id.* at 1468-1469. See *supra* note 2 and accompanying text (text of § 7602(b) as amended in 1982); *supra* notes 4-6 and accompanying text (discussion of fourth amendment guarantees and requirements); *infra* notes 103-10 and accompanying text (legislative history of IRC § 7602(b)).

30. *Morgan*, 579 F. Supp. at 1467; see *supra* note 24 (district court in *Morgan* scheduled evidentiary hearing to decide Morgan's procedural argument).

31. *Morgan*, 579 F. Supp. at 1469; see *supra* note 25 (district court in *Morgan* modified summons).

32. *Morgan*, 579 F. Supp. at 1467, 1469; see *infra* notes 33-41 and accompanying text (discussion of *Morgan* district court's reasoning).

33. *Morgan*, 579 F. Supp. at 1466.

34. *Id.* at 1466-67. The district court in *Morgan* held that the business records of PBS were not private papers and therefore the fourth amendment did not protect the records. *Id.*

35. *Id.*

36. *Id.* The district court in *Morgan* noted that the summons issued to Morgan, as president of PBS, sought only the business records of PBS. *Id.* The district court stated that these records were not the private records of either Morgan or PBS. *Id.* The district court recognized that the fourth amendment protected a person's "zone of privacy" from governmental investigative activities. *Id.* (citing *United States v. Miller*, 425 U.S. 435, 440 (1976) which held that bank checks voluntarily displayed to banks are not confidential communications of

also ruled that IRC section 7602(b) was constitutional.³⁷ The district court noted that before the 1982 amendment to section 7602, the IRS could issue a summons only for the congressionally authorized purposes listed in section 7602(a).³⁸ The district court stated that the 1982 TEFRA amendment to section 7602(b) permitted the IRS to issue a summons for a legitimate inquiry into any offense connected with the administration or enforcement of the internal revenue laws.³⁹ The district court noted that the Supreme Court already had approved implicitly the use of a section 7602 summons for a purely criminal investigation⁴⁰ and that the legislative history of section 7602(b) clearly indicated that Congress authorized the use of a summons for purely criminal investigations.⁴¹ Defendant Morgan appealed the district court's disposition of his constitutional argument to the Fourth Circuit.⁴²

In affirming the district court's decision, the Fourth Circuit in *Morgan* first addressed the power of the IRS to summon and examine documents under section 7602(a) of the IRC.⁴³ The *Morgan* court noted that prior to the 1982 TEFRA amendment to the IRC, the IRS could summon documents only for the purposes of ascertaining the correctness of a tax return, determining the tax liability of a person, and collecting any tax deficiency.⁴⁴ The Fourth Circuit stated, however, that TEFRA expanded the purposes for which the IRS can use the summons power to include solely criminal investigations.⁴⁵ The *Morgan* court, noting that TEFRA also limited the IRS' summons power, recognized that pursuant to the TEFRA limitation, the IRS may not issue a summons if the IRS has referred the investigation to the United States Department of Justice for criminal prosecution.⁴⁶

depositor); see *Donovan v. Mehlenbacher*, 652 F.2d 228, 231 (2d Cir. 1981) (payroll records kept pursuant to federal regulations have public aspect and fourth amendment will not protect).

37. *Morgan*, 579 F. Supp. at 1468-69; see *infra* notes 38-41 and accompanying text (discussion of district court's rationale in holding § 7602(b) constitutional).

38. *Morgan*, 579 F. Supp. at 1468-69; see I.R.C. § 7602(a) (West Supp. 1985); *supra* note 2 (I.R.C. § 7602(a) lists purposes for which IRS may issue summons).

39. *Morgan*, 579 F. Supp. at 1468; see I.R.C. § 7602(b) (West Supp. 1985); *supra* note 2 (I.R.C. § 7602(b) expanded purposes for which IRS may issue summons to include criminal investigations).

40. *Morgan*, 579 F. Supp. at 1469 (citing *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 318 (1978)); see *infra* notes 88-96 and accompanying text (discussion of *LaSalle*).

41. *Morgan*, 579 F. Supp. at 1469; see *infra* notes 103-10 and accompanying text (discussion of legislative history of IRS § 7602(b)).

42. *Morgan*, 761 F.2d 1009 (1985). The IRS appealed the district court's ruling that the IRS must provide a second inspection notice. *Id.* at 1011-11. The Fourth Circuit held that the IRS did not have to issue a second notice. *Id.* at 1011.

43. *Id.* at 1011.

44. *Id.* at 1012; see *supra* note 2 and accompanying text (text of § 7602(a)).

45. *Morgan*, 761 F.2d at 1012; see I.R.C. § 7602(b) (West Supp. 1985); *supra* note 2 (text of § 7602 as amended by TEFRA); *infra* notes 103-10 and accompanying text (discussing legislative history of IRS § 7602(b)).

46. *Morgan*, 761 F.2d at 1012; see I.R.C. § 7602(c) (West Supp. 1985); *supra* note 2 (text of § 7602 as amended by TEFRA); *infra* note 108 and accompanying text (limitations imposed on § 7602(b)).

The Fourth Circuit next addressed defendant Morgan's argument that IRC section 7602(b) violated the fourth amendment because section 7602(b) authorizes an IRS agent in a criminal investigation, without first having secured a warrant issued from a neutral magistrate and based upon probable cause, to issue a summons compelling a person to disclose his private records and documents.⁴⁷ The *Morgan* court stated that an IRS summons alone was not a search and seizure because an IRS summons is not self-enforcing.⁴⁸ The *Morgan* court noted that although a summons issued pursuant to section 7602 commands that a person appear before the IRS and produce records or give testimony,⁴⁹ an IRS agent cannot force a person to disclose the summoned records.⁵⁰ The *Morgan* court asserted that the only action that an IRS agent may take when a person refuses to comply with a summons is to petition a district court and request judicial enforcement of the summons.⁵¹ The Fourth Circuit noted that a court will not enforce a section 7602 summons if enforcement would abuse the judicial process by forcing a person to produce the summoned documents before the IRS has established that it had issued the summons in good faith.⁵² The *Morgan* court reasoned,

47. *Morgan*, 761 F.2d at 1012. In *Morgan*, defendant Morgan argued that § 7602(b) of the IRC violates the fourth amendment proscription against warrantless searches and seizures of private papers and records. *Id.*; Brief for Appellee at 25, *United States v. Morgan*, 761 F.2d 1009 (4th Cir. 1985). Defendant Morgan argued as if the IRS was investigating Morgan himself, not PBS, in a solely criminal investigation. See *Morgan*, 761 F.2d at 1012. The Fourth Circuit addressed the case as if the IRS was investigating Morgan personally. See *id.* Therefore, the Fourth Circuit did not base the *Morgan* decision on a distinction between Morgan's private papers and PBS' business records. See *id.*

48. *Morgan*, 761 F.2d at 1012. The *Morgan* court stated that defendant Morgan misinterpreted the character of an IRS summons. *Id.* The *Morgan* court noted that an IRS summons does not authorize a search or a seizure. *Id.*

49. *Id.*; see I.R.C. § 7602(a) (West Supp. 1985); *supra* note 2 and accompanying text (summons issued pursuant to § 7602 of IRC commands production of any relevant books, papers, records or data, and testimony by any person having information relevant to IRS inquiry).

50. *Morgan*, 761 F.2d at 1012.

51. *Id.*; see I.R.C. § 7604(b) (West Supp. 1985); *supra* note 3 and accompanying text (§ 7604(b) of IRC authorizes IRS to apply to district court for enforcement of summons). The Fourth Circuit, citing *United States v. Lask*, noted that a district court can compel a taxpayer to comply with a summons. 761 F.2d at 1012; see *Lask*, 703 F.2d 293, 297 (8th Cir.), *cert. denied*, 464 U.S. 829 (1983) (IRS has no power to enforce summons but through district court enforcement).

52. *Morgan*, 761 F.2d at 1012. The Fourth Circuit in *Morgan* cited *United States v. Powell* to support its conclusion that a court will not enforce a summons if the IRS has not met the burden of showing that the IRS met certain good faith standards enunciated in *Powell*. 761 F.2d at 1012; see *Powell*, 379 U.S. 48, 58 (1964); *infra* notes 73-76 and accompanying text (discussion of judicial standard of review enunciated in *Powell*).

The *Morgan* court also cited *United States v. LaSalle Nat'l Bank*, in which the Supreme Court summarized the requirements necessary for judicial enforcement of an IRS summons. 761 F.2d at 1012; see *LaSalle*, 437 U.S. 298, 318 (1978). The *LaSalle* court stated that to prevent the IRS from abusing the judicial process, a district court cannot enforce a summons before finding that the IRS issued the summons in good faith. 437 U.S. at 313-14 (citing *Powell*); see *infra* notes 88-96 and accompanying text (discussion of *LaSalle*).

therefore, that judicial enforcement proceedings would prevent a section 7602(b) administrative summons from endangering any constitutional guarantees.⁵³

The Fourth Circuit in *Morgan* ruled that an IRS summons issued during the investigation of possible criminal violations does not violate the fourth amendment guarantee of a search warrant.⁵⁴ The *Morgan* court's analysis is a correct application of the current standard applied to administrative summonses issued during the investigation of possible civil violations.⁵⁵ The *Morgan* court reasoned that when the IRS institutes a summons enforcement proceeding to investigate a taxpayer suspected of criminal fraud, the district court will protect the taxpayer's fourth amendment rights by ascertaining whether the summons is reasonable.⁵⁶ The Fourth Circuit based its decision on a series of Supreme Court cases that not only limited the IRS' broad authority to issue a summons, but also developed the standard of review that courts should follow in enforcing a summons.⁵⁷ Although the Supreme Court decided these cases, which are relevant to the enforcement of administrative summons issued for civil tax purposes,⁵⁸ prior to the amendment of section 7602(b) of the IRC,⁵⁹ the Fourth Circuit in *Morgan* applied the civil summons standard of review to a criminal summons case.⁶⁰

The Supreme Court, in *Reisman v. Caplin*,⁶¹ considered the rights of a person summoned pursuant to a civil investigation under section 7602(a) of the IRC.⁶² In *Reisman*, the Supreme Court set forth a procedure for

53. See *Morgan*, 761 F.2d at 1012; see also *infra* notes 117-43 and accompanying text (Morgan district court's standard of review of IRC § 7602(b) summons is not sufficient to protect constitutional rights of taxpayer).

54. *Morgan*, 761 F.2d at 1012; see *supra* notes 47-53 and accompanying text (Fourth Circuit's reasoning in *Morgan*).

55. See *infra* notes 73-76 and accompanying text (standard of review for administrative summonses issued for investigation of civil violations of tax laws); *supra* notes 47-53 and accompanying text (Fourth Circuit's analysis of enforcement of summonses in *Morgan*).

56. See *Morgan*, 761 F.2d at 1012; *supra* notes 52-53 (discussion of Fourth Circuit's view that judicial review curtails constitutional violations).

57. *Morgan*, 761 F.2d at 1012; see *supra* note 52 (cases relied on by Fourth Circuit in *Morgan*); *infra* notes 61-96 and accompanying text (discussion of Supreme Court cases establishing standard of review for enforcement of summonses).

58. See *infra* notes 61-96 and accompanying text (analysis of development of case laws pertaining to enforcement of administrative summonses issued for civil tax purposes).

59. See *Morgan*, 761 F.2d at 1012; I.R.C. § 7602(b) (West Supp. 1985).

60. *Morgan*, 761 F.2d at 1012.

61. 375 U.S. 440 (1964).

62. *Id.* at 445-50; see *infra* notes 63-65 and accompanying text (discussion of *Reisman*). Prior to the decision in *Reisman v. Caplin*, the Supreme Court had decided that the courts in the information gathering activities of administrative agencies could determine only whether the IRS issued the agency's summons for a lawful purpose. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 218 (1964). In *Oklahoma Press Publishing Co. v. Walling*, the Supreme Court upheld an investigative summons which the Fair Labor Administration had issued under the Fair Labor Standards Act of 1938 (FLSA). *Id.* at 218. See 29 U.S.C. §§ 201-219 (1976) (text of Fair Labor Standards Act). The defendant publishing company argued that the

challenging a summons issued pursuant to an administrative investigation.⁶³ The *Reisman* Court held that although section 7601 authorizes the IRS to examine books and papers through issuance of a summons pursuant to section 7602, the summons, if challenged by the party summoned, is not enforceable without a judicial determination of the challenge.⁶⁴ Under the administrative procedure that *Reisman* established, both the party summoned and the party that the summons affects may appear before the court and challenge the summons.⁶⁵

In *United States v. Powell*,⁶⁶ decided the same year as *Reisman*, the Supreme Court proposed that the investigative power of the IRS was

Administrator of the Fair Labor Administration had no reason to suppose that the defendant company had violated the statute. *Id.* at 189. Therefore, the defendant asserted that the Administrator was "fishing" for evidence. *Id.* at 191. The Court held that Congress had mandated statutorily the purpose for which the Administrator conducted the investigation. *Id.* at 208. The *Oklahoma Press* Court stated that the FLSA authorized the Administration to inquire into possible FLSA violations. *Id.* at 208. The Supreme Court noted that the investigative power of the Administration included the power to inquire into any possible violations of the Act. *Id.* at 201. The *Oklahoma Press* Court further determined that the purpose behind the congressionally authorized investigation was not only to investigate a charge or complaint but also to discover evidence to make a charge or complaint when justified. *Id.* Finally, the Supreme Court held that the Administration did not need to prove that "probable cause" existed for believing that the company had violated the act. *Id.* at 201. *See supra* note 5 (probable cause requirement). Although the *Oklahoma Press* Court found that the Administration had broad investigative powers, the Court limited that power by imposing a minimum standard of reasonableness and relevancy. 327 U.S. at 201, 208. The Supreme Court ruled that an enforcing court will determine only whether the statute authorizes the Administration's investigation. *Id.*

63. 375 U.S. at 445-49.

64. *Id.* at 446. The *Reisman* Court set forth several procedural rules that the IRS must follow when the party summoned challenges a summons. *Id.* at 445-449. The *Reisman* Court held that if the IRS wishes to enforce a summons, the IRS must petition the federal district court pursuant to § 7602(b). *Id.* Section 7402(b) of the IRC grants federal district courts jurisdiction to compel compliance with summonses. I.R.C. § 7402(b) (West Supp. 1985).

65. 375 U.S. at 445.

66. 379 U.S. at 48 (1964). In *United States v. Powell*, the IRS summoned respondent Powell to appear and produce records relating to the tax returns that Powell's laundromat had filed. *Id.* at 49. Powell appeared before the IRS, but refused to produce the records, contending that before the IRS could force him to produce the records, the IRS had to show some grounds for believing that Powell had committed a fraud. *Id.* Petitioner Powell also argued that § 7605(b) of the IRC prevented the IRS from examining the taxpayer's records because the IRS already had examined the records, and because the three years statute of limitations had run for assessment of deficiencies. *Id.* at 49-50; *see* I.R.C. § 7605(b) (West 1954). Section 7605(b) of the IRC provides that the IRS may not examine a taxpayer's documents twice in one year unless the IRS "notifies the taxpayer in writing that an additional inspection is necessary." I.R.C. § 7605(b) (West Supp. 1983). The IRS then petitioned the district court for enforcement of the summons, stating that the special agent investigating the case had reason to believe that the taxpayer fraudulently had falsified the laundromat's tax returns. 379 U.S. at 49. The district court in *Powell* ruled for the IRS. *Id.* The Third Circuit reversed, concluding that the IRS petition must satisfy a test of probable cause. *Id.*; *see supra* note 5 (discussion of standard of probable cause). The Supreme Court granted certiorari to determine what standards the IRS must meet to obtain judicial enforcement of a summons. 379 U.S. at 49; *see infra* notes 73-76 and accompanying text (discussion of *Powell* Court standards).

analogous to the power of a grand jury.⁶⁷ Relying on *United States v. Morton Salt Co.*,⁶⁸ the *Powell* Court stated that the IRS, like a grand jury, can issue orders for the discovery of possible violations of the IRC even if the IRS only suspects that a taxpayer violated the law or if the IRS wants assurance that the taxpayer is not violating the law.⁶⁹ The *Powell* Court held that the fourth amendment required the IRS to make a showing of probable cause to gain judicial enforcement of a summons.⁷⁰ The *Powell* Court stated that if courts were to enforce the probable cause standard to IRS summonses, the courts would jeopardize the investigative powers of the IRS.⁷¹ The *Powell* court set forth, however, four requirements that the IRS must adhere to in good faith before a court will enforce a summons.⁷² First, the IRS must conduct the investigation pursuant to a legitimate administrative purpose authorized in section 7602(a).⁷³ Second, the IRS must show that the inquiry is relevant to that legitimate purpose.⁷⁴ Third, the information sought must

67. See *infra* text accompanying note 69 (administrative investigation similar to grand jury investigation).

68. 338 U.S. 632 (1950).

69. 379 U.S. at 57; see *United States v. Morton Salt Co.*, 338 U.S., 632, 642-43 (1956) (FTC has broad investigative powers).

70. 379 U.S. at 57. The *Powell* Court stated that courts should read the term "necessary" in section 7605(b) of the IRC in light of the authority of the IRS to investigate under § 7602 of the IRC. *Id.* at 56; see *supra* note 66 (text of § 7605(b)); *supra* note 2 (text of § 7602). The *Powell* Court held that the term "necessary" in § 7605(b) does not mean that the IRS has to meet a probable cause standard to obtain enforcement of a summons. 379 U.S. at 57; see *supra* note 5 (probable cause standard). The *Powell* Court reasoned that the IRS need not meet any standard of probable cause to obtain enforcement of a § 7602 summons because courts do not require other agencies with similar investigative powers such as the Federal Trade Commission to meet a probable cause standard prior to investigation of a possible violation. 379 U.S. at 57.

71. *Id.* at 56-57. The *Powell* Court examined the legislative history of section 7605(b) of the IRC and determined that Congress did not intend the courts to oversee the IRS' determinations to investigate possible violations. *Id.* at 56.

72. *Id.* at 57-58; see *infra* notes 73-76 and accompanying text (four requirements necessary for enforcement of summons under *Powell*).

73. 379 U.S. at 57. The *Powell* Court stated that a court will not enforce a summons if the IRS served the summons to obtain evidence for use in a criminal prosecution or for any other improper purpose that brings into question the good faith of the IRS in issuing the summons. *Id.* The *Powell* Court stated that the only legitimate purposes for issuing a summons were those persons listed in IRC §7602(a). *Id.*; see *supra* note 2 (text of § 7602(a)).

74. 379 U.S. at 57. The statutory language of § 7602(a)(2) authorizes the IRS to summon persons to produce documents "as may be relevant or material" to the inquiry of the correctness of the tax return. I.R.C. § 7602(a)(2) (West Supp. 1983). The test for relevance of the summoned information is whether the documents sought in the IRS' investigation might shed light upon whether a return is correct. See *United States v. Matras*, 487 F.2d 1271, 1274 (8th Cir. 1973) (relevancy in particular circumstances should indicate "realistic expectation rather than idle hope" that the police will discover something); *United States v. Egenberg*, 443 F.2d 512, 515 (3rd Cir. 1971) (same); *United States v. Harrington*, 388 F.2d 520, 523-524 (2d Cir. 1968) (same). Because the IRS cannot be certain that requested documents are relevant to an investigation until reviewed, the IRS need not meet a high threshold of relevancy in order to examine the documents requested. See *United States v. Noall*, 587 F.2d 123, 125 (2d Cir. 1978) (IRS must show that information sought might throw light upon correctness of taxpayer's

not be already in the possession of the IRS.⁷⁵ And finally, the IRS must follow the administrative steps set forth in the IRC.⁷⁶ The *Powell* Court reaffirmed the *Reisman* holding in concluding that only a court may enforce a challenged summons and that a court will not enforce a summons if enforcement would be an abuse of the judicial process.⁷⁷

The Supreme Court, in *Donaldson v. United States*,⁷⁸ elaborated on the legitimate purpose standard enunciated in *Powell*.⁷⁹ In *Donaldson*, the Supreme Court questioned whether the IRS has issued a summons for an improper purpose and in bad faith when the civil tax liability investigation might result in criminal tax fraud prosecution.⁸⁰ Defendant Donaldson argued

return), *cert. denied*, 441 U.S. 923 (1979); *United States v. Arthur Andersen & Co.*, 474 F. Sup. 322, 329 (D. Mass. 1979) (same); *In re Co-Build Cos., Inc. v. Rubin*, 77-2 U.S.T.C. (CCH) 9735 (E.D. PA. 1977) (SAME).

75. 379 U.S. at 58. *Powell* requires that the IRS show either that the IRS does not possess the information sought in the summons, or that the IRS cannot obtain the information practicably. *United States v. Theodore*, 479 F.2d 749, 755 (4th Cir. 1973).

76. 379 U.S. at 58. Under the final *Powell* requirement, the IRS must follow the administrative steps set out in the IRC relating to service of summons, the time and place of the examination, the description of records that the IRS wants produced, unnecessary and second inspections or examinations, and notice of when to serve a third-party recordkeeper. *Id.* at 255; see I.R.C. § 7603-7609 (West 1954 & West Supp. 1985) (required administrative steps for enforcement of § 7602 summons).

77. 379 U.S. at 58; see *supra* notes 64-65 and accompanying text (discussion of *Reisman* Court's analysis of abuse of Court's process); *infra* notes 117-43 and accompanying text (abuse of court's process). The Supreme Court in *Powell* stated that, because enforcement of an administrative summons invokes the judicial process, the court may not permit the IRS to abuse the court's process. *Id.* The *Powell* Court noted that an abuse of the court's process might occur if the IRS issued the summons for an improper purpose. *Id.* The Supreme Court determined that when the IRS issues a summons to either harass or pressure a taxpayer, or issues the summons in bad faith, the summons is improper. *Id.* In an enforcement proceeding, the IRS has the initial burden of proving that it has met all four *Powell* requirements. *United States v. Kis*, 658 F.2d 526, 536 (7th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982). Thus, the IRS has made a prima facie case for good faith enforcement of the proceeding once it has met all four *Powell* requirements. *Id.* The burden then shifts to the taxpayer to rebut the prima facie case by proving that the IRS has not met all four requirements. *Id.* at 540. In an enforcement proceeding, the taxpayer carries a heavy burden that requires the taxpayer to rebut the IRS' case by alleging specific facts that infer that some wrongful conduct exists on the part of the IRS. *Id.* at 39. The taxpayer must show by a preponderance of the evidence that the IRS did not follow all four *Powell* requirements or that the IRS abandoned any civil investigation. *Id.* at 543-44.

78. 400 U.S. 517 (1971).

79. See *id.* at 532; *Powell*, 379 U.S. at 57-58; see *supra* note 73 and accompanying text (legitimate purpose requirement of *Powell*).

80. 400 U.S. at 532. In *Donaldson v. United States*, an IRS special agent served a summons on defendant taxpayer Donaldson's former employer and the employer's accountant to obtain records of Donaldson's employment. *Id.* at 519-19. The IRS filed petitions for enforcement of the summons. *Id.* at 520. Donaldson filed a motion to intervene in the enforcement proceeding, alleging that the IRS was investigating him solely to obtain evidence concerning criminal tax violations. *Id.* at 521. Donaldson claimed that the IRS issued the summons for an improper purpose and not for the good faith purpose of ascertaining correct tax liability. *Id.* at 532. See *supra* note 73 (*Powell* stated that the IRS may not issue summons for improper purpose of obtaining evidence for use in criminal prosecution).

that the summons was outside the scope of the authorized purposes of IRC section 7602(a).⁸¹ The Supreme Court held that a summons is valid when the IRS issues the summons for the purpose of carrying out a section 7602(a) authorized investigation.⁸² The Supreme Court recognized that the IRS might issue a summons to assist a revenue agent in investigating possible civil liability as well as to aid a special agent in determining whether to recommend the case to the Department of Justice for prosecution.⁸³ The Supreme Court enforced the summons in *Donaldson* because the summons had a dual civil-criminal purpose.⁸⁴ The *Donaldson* court stated, however, that under the legitimate purpose standard enunciated in *Powell*,⁸⁵ a court will not enforce a summons when the IRS has issued the summons solely for a criminal investigation, or when the IRS has referred a case to the Department of Justice for criminal prosecution.⁸⁶

The *Donaldson* holding created conflict between the lower circuits concerning the meaning of the legitimate purpose standard.⁸⁷ In *United States v. LaSalle National Bank*,⁸⁸ the Supreme Court attempted to clarify the *Donaldson* legitimate purpose standard.⁸⁹ In *LaSalle*, the Supreme Court reversed the lower court's decision to deny enforcement of two summonses that the lower court had determined the IRS had issued in bad faith since

81. 400 U.S. at 532. In *Donaldson*, the defendant taxpayer argued that the dictum in *Reisman* precluded the IRS from issuing a summons for investigation of a civil violation that might result in criminal prosecution. *Id.*; see *Reisman*, 375 U.S. at 449. The *Reisman* Court had stated that a summoned person may challenge the summons on any appropriate ground, including the ground that the information in the summons is sought for an improper purpose such as obtaining evidence for use in a criminal prosecution. *Reisman*, 375 U.S. at 449 (citing *Boren v. Tucker*, 239 F.2d 767, 772-73 (9th Cir. 1956)). The *Donaldson* Court held that the *Reisman* dictum applied only to an investigation conducted pursuant to a pending criminal charge, or to an investigation for solely criminal purposes. *Donaldson*, 400 U.S. at 533; see *Reisman*, 375 U.S. at 449.

82. 400 U.S. at 535; see *supra* note 2 (text of § 7602(a)).

83. 400 U.S. at 534-35. The *Donaldson* Court stated that merely because a special agent is investigating possible tax fraud in conjunction with a revenue agent's civil investigation does not mean that prosecution will ensue. *Id.*

84. *Id.* at 534.

85. See *supra* note 73 (discussion of legitimate purpose standard).

86. 400 U.S. at 533-36. The *Donaldson* opinion did not clarify the point in time at which the IRS may be deemed to have issued a summons for an improper purpose. *Id.* First, the *Donaldson* Court held that the IRS may issue a § 7602 summons in good faith and prior to a recommendation for criminal prosecution. *Id.* The Court also ruled that the IRS might have issued a summons for an improper purpose if the IRS had issued the summons for a solely criminal purpose, or if the IRS had recommended the case for criminal prosecution. *Id.* The *Donaldson* opinion also stated that the IRS may issue a summons to conduct a joint civil-criminal investigation up to the point in time at which the investigation is sufficiently far enough along to support a recommendation to the Department of Justice for criminal prosecution. *Id.*

87. *Id.* at 533-36; see *supra* note 86 (*Donaldson* opinion did not clarify exactly when summonses that IRS issued for criminal evidence might be issued for improper purpose).

88. 437 U.S. 298 (1978).

89. *Id.* at 313-316; see *infra* notes 90-96 and accompanying text (discussion of *LaSalle* decision).

the special agent was conducting the investigation for solely criminal purposes.⁹⁰ The *LaSalle* Court ruled that although a special agent may be pursuing an investigation for solely criminal purposes, courts must examine the institutional posture of the IRS to determine whether the investigation has solely criminal purposes.⁹¹ The *LaSalle* Court formulated a test which requires that the IRS meet two conditions before a court will enforce a summons.⁹² The first condition of *LaSalle* requires the IRS to issue the summons before the IRS recommends the case to the Department of Justice for criminal prosecution.⁹³ Under the second condition of the *LaSalle* test, the IRS must use the summons power in good faith for the purposes authorized under IRC section 7602(a),⁹⁴ which, the Court stated, include issuing the summons before making an institutional commitment to recommend the case to the Department of Justice for criminal prosecution.⁹⁵ The *LaSalle* Court concluded that the good faith condition also requires the IRS to meet the four requirements enunciated in *Powell*.⁹⁶

The dissent in *LaSalle*⁹⁷ opposed the majority's "institutional purpose" test⁹⁸ on the grounds that the *Donaldson* interpretation of IRC section 7602 did not view the issuance of a summons solely for a criminal purpose as improper.⁹⁹ The *LaSalle* dissent further disagreed with the institutional

90. 437 U.S. at 299, 321. In *United States v. LaSalle Nat'l Bank*, an IRS special agent received information from a confidential informant that a certain taxpayer was not disclosing rental income in violation of the IRC. *Id.* The special agent investigated the case on his own, without any assistance from a revenue agent. *Id.* While investigating the taxpayer, the special agent issued two summons to respondent LaSalle National Bank which held land trusts for the taxpayer. *Id.* at 300-01. LaSalle argued that the special agent's investigation was purely criminal and that the IRS had issued the summons in bad faith. *Id.* at 303.

91. *Id.* at 316. The question presented in *LaSalle* was whether the special agent's criminal purpose precluded the enforcement of the summons under the improper purpose or bad faith rule. *Id.* at 307. The *LaSalle* Court stated that the IRS must exercise the summons authority in good faith and in accordance with the congressionally authorized purpose of § 7602. *Id.* The Supreme Court held that regardless of the special agent's intention to conduct a solely criminal investigation, the Court entered the summons nonetheless because the IRS as an institution had not abandoned the civil investigation. *Id.*

92. *Id.* at 318; see *infra* notes 93-96 and accompanying text (discussing *LaSalle* test for determining whether to enforce IRS summons).

93. 437 U.S. at 318.

94. *Id.*; see *supra* note 2 (purposes authorized by § 7602).

95. 427 U.S. at 318. The *LaSalle* Court stated that to prove improper purpose or bad faith under the second condition of the *LaSalle* test for judicial enforcement of a summons the taxpayer must show that the IRS does not have a valid civil determination or collection purpose. *Id.* at 317. The Court recognized that because civil and criminal tax liabilities are often coterminous, the taxpayer has a heavy burden in proving that the IRS as an institution has abandoned a valid civil tax determination or collection purpose. *Id.*

96. *Id.* at 318; see *supra* notes 72-77 and accompanying text (discussing *Powell* minimum requirements of good faith test).

97. 437 U.S. at 319 (Stewart, J., dissenting).

98. See *supra* note 95 and accompanying text (discussing *LaSalle* institutional purpose test).

99. 437 U.S. at 320 (Stewart, J., dissenting). The *LaSalle* dissent stated that § 7602 and

purpose test because the dissent felt that the test would prove unworkable and provoke unnecessary litigation.¹⁰⁰ The dissent preferred the objective bright-line test of *Donaldson*.¹⁰¹ Therefore, the dissent argued that a court should enforce a summons when the IRS has issued the summons in good faith and prior to recommending the case for criminal prosecution.¹⁰²

In holding that a summons is not available once the IRS institutionally has abandoned the civil tax liability investigation, and is pursuing exclusively a criminal investigation,¹⁰³ the *LaSalle* decision resulted in excessive litigation concerning whether the IRS was using summonses for an improper criminal purpose.¹⁰⁴ In response to the *LaSalle* problem, Congress enacted section 333(a) of the Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982.¹⁰⁵ TEFRA amended IRC section 7602 by expanding the statutorily authorized purposes for which the IRS may issue a summons to include the purpose of investigating any offense of the internal revenue laws.¹⁰⁶ In enacting TEFRA, Congress codified the bright line test enunciated in the *LaSalle* dissent.¹⁰⁷

the *Donaldson* opinion both required only that the IRS issue the summons in good faith and prior to recommending the case to the Department of Justice for criminal prosecution. *Id.*

100. *Id.* The *LaSalle* dissent stated that the "institutional purpose" test, which states that the IRS issued the summons in good faith if the IRS as an institution has not abandoned the civil investigation, was too elusive. *Id.* The dissent feared that the test would produce endless discovery proceedings concerning the subjective position of the IRS. *Id.*

101. *Id.* The *LaSalle* dissent realized that the *LaSalle* majority had clarified the *Donaldson* opinion. *Id.*; see *supra* note 86 (*Donaldson* opinion confusing to lower circuits). The majority in *LaSalle* noted that *Donaldson* ruled that a court may enforce a summons issued under § 7602 if the IRS issued the summons in good faith pursuit of the congressionally authorized purposes and prior to any recommendation for prosecution to the Department of Justice. 437 U.S. at 318; see *Donaldson*, 400 U.S. 517 at 536. The *LaSalle* dissent stated that although the majority had clarified the *Donaldson* holding, the majority had not relied solely on *Donaldson* but instead had added the institutional purpose test. 437 U.S. at 320 (Stewart, J. dissenting); see *Donaldson*, 400 U.S. 517 at 536. The *LaSalle* dissent noted that the institutional purpose test did not have any IRC authority or case precedence. 437 U.S. at 320 (Stewart, J., dissenting). The *LaSalle* dissent assumed that the institutional purpose test would require the courts to examine subjectively the posture of the IRS whereas the requirements under *Donaldson* would require only an objective examination. *Id.*; see *Donaldson*, 400 U.S. at 532-33 (summons proper if issued prior to recommendation for prosecution).

102. 437 U.S. at 320.

103. See *supra* note 95 and accompanying text (discussing *LaSalle* "institutional purpose" test).

104. S. REP. NO. 494, 97th Cong., 2d Sess 285 (1982) reprinted in 1982 U.S. CODE CONG. & AD. NEWS 1030, 1031 (1982) [hereinafter cited as S. REP. NO. 494]. The Senate Finance Committee noted in the Committee Report on TEFRA that the *LaSalle* institutional purpose test resulted in wasteful litigation without any significant benefit to the taxpayers because taxpayers find it virtually impossible to prevent enforcement of a summons on the basis of the institutional purpose test. *Id.*; see *infra* notes 106-09 and accompanying text (legislative history of § 333(a) of TEFRA).

105. Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, Title III, § 333(a), 96 Stat. 622 (1982) (codified at I.R.C. § 7602(b) and 7602(c)).

106. *Id.*; see I.R.C. § 7602(b) (West Supp. 1985) (codifying § 333(a) of TEFRA).

107. *The Tax Compliance Act of 1982, and Related Legislation: Hearing on H.R. 6300 Before the Comm. on Ways and Means, 97th Cong., 2d Sess. 89 (1982)* (statement of Hon.

Under TEFRA, the IRS now may issue a summons to gather evidence of a criminal violation of the internal revenue laws as long as the IRS has not referred the case to the Department of Justice for prosecution.¹⁰⁸ Although the enactment of section 333(a) of TEFRA has clarified when a valid summons exists in a case with a criminal aspect,¹⁰⁹ the IRS now may issue an administrative summons solely for the purpose of gathering evidence of a criminal violation.¹¹⁰

While TEFRA expanded the purposes for which the IRS may issue a summons to include solely criminal investigations, TEFRA does not require the IRS to make a greater showing to the court for enforcement of a criminal summons than for enforcement of a civil summons.¹¹¹ Rather, the IRS must show only that the IRS issued a summons according to the requirements of

Glenn Archer, Jr., Assistant Attorney General, Tax Division, U.S. Department of Justice [hereinafter cited as *Hearing on H.R. 6300*]. Mr. Archer stated that taxpayers had used the *LaSalle* case primarily for delaying enforcement proceedings. *Id.* at 89. Mr. Archer found that many taxpayers challenge a summons under the institutional purpose test, although taxpayers usually do not succeed on this challenge. *Id.* Therefore, Mr. Archer supported an amendment to IRC § 7602 authorizing the IRS to issue a summons at any time prior to referring the case to the Department of Justice. *Id.* Mr. Archer noted that this limitation on the summons authority of the IRS would prohibit the institutional purpose tests that the *LaSalle* case formulated. *Id.*

108. See S. REP. No. 494, *supra* note 104, at 1031. See I.R.C. § 7602(b) (West Supp. 1985); I.R.C. § 7602(c) (West Supp. 1985). The Senate Report accompanying TEFRA stated that to provide a clear definition of a properly issued summons in an investigation with a criminal aspect the purposes for which the IRS may issue a summons had to be expanded. S. REP. No. 494, *supra* note 104, at 1031. The Senate Report explained that the IRS may issue a summons, or commence an action to enforce a summons, as long as the IRS had not referred the case to the Department of Justice. *Id.*; see I.R.C. § 7602(b) (West Supp. 1985); I.R.C. § 7602(c) (West Supp. 1985).

109. See I.R.C. § 7602(b) (West Supp. 1985); I.R.C. § 7602(c) (West Supp. 1985); see STAFF OF THE JOINT COMM. ON TAXATION, 97TH CONG., 2D SESS., COMPARATIVE DESCRIPTION OF H.R. 6300 (THE TAX COMPLIANCE ACT OF 1982) AND H.R. 5829 (THE TAXPAYER COMPLIANCE IMPROVEMENT ACT OF 1982) (Comm. print 1982) (TEFRA § 333(a) provides bright line test for determining whether IRS may issue summons); see note 108 (TEFRA amendment provides clear definition of properly issued summons).

110. See, e.g., *Pickel v. United States*, 746 F.2d 176, 184 (3d Cir. 1984) (investigation of criminal violations of IRC is valid purpose for issuance of section 7602(b) summons); *Moutevelis v. United States*, 727 F.2d 313, 314 (3d Cir. 1984) (same); *McTaggart v. United States*, 570 F. Supp. 547, 550 (E.D. Mich. 1983) (same); Joint Committee on Taxation, ANNUAL EXPLANATION OF THE REVENUE PROVISIONS OF THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT, 97th Cong., 2d Sess. at 234-36 (1982). The Joint Committee on taxation stated that under pre-TEFRA law, the IRS could issue an administrative summons only to make a determination of civil tax liability and to aid in the collection of taxes. Joint Committee on Taxation, ANNUAL EXPLANATION OF THE REVENUE PROVISION OF THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT, 97th Cong., 2d Sess. at 234-36 (1982). The Committee explained that TEFRA expanded the purposes for which the IRS may issue a summons to include criminal offenses, even when the criminal investigation is the sole investigation. *Id.*

111. S. REP. No. 494, *supra* note 104, at 1032. The Senate Report stated that TEFRA does not change any of the other requirements under present law that the IRS must make under *Powell*. *Id.*; see *supra* notes 72-77 and accompanying text (IRS must meet *Powell* requirements for enforcement of summons).

Powell.¹¹² Specifically, a court can enforce a challenged summons when the IRS conducts the investigation pursuant to a legitimate purpose, the inquiry is relevant to that purpose, the information sought is not already in the possession of the IRS, and the IRS has followed the administrative steps that the IRC required.¹¹³ Thus, IRC section 7602(b), as amended, authorizes the IRS to issue a summons pursuant to the investigation of a criminal offense without a showing probable cause.¹¹⁴

By expanding the purposes for which the IRS may issue a summons to include the investigation of a criminal tax violation until the IRS has made a referral to the Department of Justice, Congress provided for an easy judicial determination of when an IRS summons is enforceable.¹¹⁵ The Supreme Court decisions of *Reisman*, *Powell*, *Donaldson* and *LaSalle*, however, imply that a summons issued to investigate a solely criminal charge would involve a more serious invasion of privacy than a summons issued to investigate a civil charge.¹¹⁶ Although all four Supreme Court decisions provided various standards for a district court's review of a summons issued in pursuit of a civil or joint civil-criminal investigation, the standards of review do not protect the fourth amendment rights of a taxpayer suspected

112. See S. REP. No. 494, *supra* note 104 at 1022; *Powell*, 379 U.S. at 57-58. *Powell* requires that the IRS conduct the IRS investigation pursuant to a legitimate, administrative purpose, show that the inquiry might be relevant to that legitimate purpose, show that the IRS does not already possess the information, and follow the administrative steps outlined in the IRS. *Powell*, 379 U.S. at 57-58.

113. See *supra* notes 72-77 and accompanying text (discussing *Powell* requirements for enforcement of summons).

114. I.R.C. § 7602(b) (West Supp. 1985); see *supra* note 2 (§ 7602(b) authorizes the IRS to investigate any violation of IRC); S. REP. No. 494, *supra* note 104, at 1032 (TEFRA does not alter four *Powell* requirements that IRS must meet to gain enforcement of challenged summons); *Powell*, 379 U.S. at 57; *supra* note 70 and accompanying text (IRS does not need to meet standard of probable cause).

115. See *supra* note 107 and accompanying text (Congress codified bright line test to reduce litigation).

116. See *Reisman*, 375 U.S. at 445-46. The *Reisman* decision held for the first time that an enforcement action under § 7602 is an adversarial proceeding that involves a court making a determination of the challenges between the adversarial parties. *Id.* The *Reisman* Court realized that the IRS should allow judicial review of the civil action to the parties summoned. *Id.* In holding that a challenge to a civil action demanded a judicial determination, the *Reisman* Court implied that a solely criminal action would necessitate a more stringent standard of judicial determination than would the civil action. See *id.* The *Powell* Court stated that the court does not require probable cause in all agency investigations because importing a probable cause standard would "jeopardize" the investigative power of the agency. *Powell*, 379 U.S. at 56. The *Powell* Court stated, however, that the same limitations that restrain a court in issuing pretrial orders also restrains an agency's investigative function. *Id.* In so stating, the *Powell* Court implied that an investigative agency like the IRS does not have inherent powers to search and seize evidence of a criminal violation without the limitations that the fourth amendment imposes upon the Government. *Id.* at 57. The *Donaldson* Court stated that when the sole object of a summons is to gather information for criminal prosecution, the purpose of the summons is not legitimate and a court should deny enforcement of the summons. *Donaldson*, 400 U.S. at 533. The *LaSalle* Court emphasized that the IRS could use a summons in a criminal

of criminal fraud either before¹¹⁷ or after judicial review of an IRS summons.¹¹⁸

In the enforcement proceeding of a summons issued for a criminal investigation, if the taxpayer challenges the summons, the IRS must show that the IRS met the *Powell* requirements to make a prima facie case for enforcement.¹¹⁹ The IRS does not have to make a showing of probable cause before the enforcing court that the IRS believes the taxpayer has committed a specific violation.¹²⁰ Rather, once the IRS has established that a summons satisfies the *Powell* requirements, the burden of proving that the IRS issued the summons for an improper purpose shifts to the taxpayer.¹²¹ Since after TEFRA the IRS may summon a taxpayer for solely criminal investigative purposes prior to referring the case to the Department of Justice, the taxpayer has a heavy burden in proving that the IRS issued the summons for an improper purpose.¹²² The *Powell* Court stated that the IRS has issued a summons for an improper purpose if the IRS intended either to harass the taxpayer, to pressure the taxpayer into settling the dispute, or to investigate the taxpayer for nontax purposes.¹²³

Similarly, the *LaSalle* Court maintained that the IRS has issued a summons for an improper purpose when the IRS has acted solely as an information gathering agency for the Department of Justice.¹²⁴ The potential

investigation when the IRS was investigating civil conduct. *LaSalle*, 437 U.S. at 308-09. The *LaSalle* Court noted that this dual civil-criminal purpose was inherent in the nation's tax system. *Id.* at 312. The *LaSalle* Court, therefore, concluded that only when the criminal and civil aspects of the tax fraud case begin to diverge should a court place a limitation on the IRS' authority to issue a summons. *Id.* at 311. Thus, the *LaSalle* Court stated that a court would not enforce a summons issued solely for a criminal investigation prior to recommendation to the Department of Justice. *Id.* at 314.

117. See *infra* notes 141-43 and accompanying text (summons that are not challenged do not protect fourth amendment rights of taxpayer).

118. See *infra* notes 119-39 and accompanying text (summons enforcement proceeding does not protect fourth amendment rights of taxpayer).

119. See *e.g.*, *United States v. Reis*, 765 F.2d 1094, 1096 (11th Cir. 1985) (IRS summons is enforceable if IRS makes prima facie showing before court that IRS has met *Powell* requirements); *United States v. Centennial Builders, Inc.*, 747 F.2d 678, 681 (11th Cir. 1984) (same); *Pickel v. United States*, 746 F.2d 176, 184 (3d Cir. 1974) (same); *United States v. Beacon Federal Savings and Loan*, 718 F.2d 49, 51 (2d Cir. 1983) (same).

120. *Powell*, 379 U.S. at 57; *supra* note 70 and accompanying text (courts do not require IRS to meet standard of probable cause).

121. See, *e.g.*, *Kroll v. United States*, 573 F. Supp. 982, 985-986 (N.D. Ind. 1983) (taxpayer must disprove existence of legitimate purpose or show enforcement of summons is improper or abuse of court's process to meet burden; *Godwin v. United States*, 564 F. Supp. 1209, 1213 (D. Del. 1983) (same); *Universal Life Church v. United States*, 52 AFTR2d 83-6318, 83-6320, (P-H) 83-5366 (W.D. VA. 1983) (SAME).

122. *Frent v. United States*, 571 F. Supp. 739, 741 (E.D. Mich. 1983) (taxpayer has heavy burden to prove that enforcement of IRS summons would abuse court's process unless IRS has recommended case to Department of Justice) (citing *United States v. Garden State Nat'l Bank*, 607 F.2d 61, 71 (3rd Cir. 1979)).

123. *Powell*, 379 U.S. at 58.

124. *LaSalle*, 437 U.S. at 317. The *LaSalle* Court stated that the IRS may not use the summons power to summon information for use by an agency other than the IRS. *Id.*

exists, therefore, for the IRS to delay reference to the Department of Justice under section 7602(c) of the IRC while the IRS summons evidence for a criminal prosecution.¹²⁵ In this situation, the taxpayer would be unable to prove that the IRS was acting solely as an information gathering agency for the Department of Justice because most IRS criminal investigations are interwoven with IRS civil investigations.¹²⁶

The limitations on an IRS summons issued for a solely criminal investigation do not protect a taxpayer suspected of a criminal violation in the same way that the fourth amendment limitations protect a person suspected of a crime.¹²⁷ The IRS, however, may not issue a summons for an investigation of a criminal case after the IRS has referred the case to the Department of Justice.¹²⁸ Although the IRS must issue a summons if the taxpayer is unwilling to comply with a request, the fourth amendment only limits the summons by requiring that the IRS summons be reasonable in scope.¹²⁹ If the summoned taxpayer challenges the summons, section 7604 of the IRC entitles the taxpayer to federal district court review.¹³⁰ Although the district court examines the challenge before enforcing the summons, the court will enforce the summons only if the IRS meets the four *Powell* requirements.¹³¹

On the other hand, the fourth amendment limits the police investigation of a person suspected of a crime by requiring that the search and seizure of

125. See *Universal Life Church v. United States*, 52 AFTR2d 83-6318, 83-6320, (P-H) 83-5366 (W.D. VA. 1983). In *Universal Life Church v. United States*, the defendants argued that under the bright line test of IRC § 7602(c), the IRS could delay referral of the case to the Department of Justice while the IRS gathered evidence through the IRS summons power. *Id.* The *Universal Life Church* court stated that since defendant's exhibits demonstrated that the IRS had made an institutional commitment to refer the case to the Department of Justice but did not show that the IRS actually had referred the case to the Department of Justice, the IRS summons was valid. *Id.* at 83-6321.

126. See *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 314 (1978). In *United States v. LaSalle Nat'l Bank*, the Supreme Court noted that a tax fraud investigation rarely is solely criminal in nature because an inquiry into the criminal nature of the case is inseparable from an inquiry into the civil nature of the case. *Id.*

127. See *infra* notes 129-32 and accompanying text (limitations on IRS summons issued for solely criminal investigation); *infra* notes 132-38 and accompanying text (discussing fourth amendment limitations on police officer's investigation of person suspected of crime).

128. I.R.C. § 7602(c) (West Supp. 1985) (IRS may not issue summons if IRS has referred case to Department of Justice).

129. See U.S. CONST. amend. IV (fourth amendment protects against unreasonable searches and seizures); *United States v. Theodore*, 479 F.2d 749, 754 (4th Cir. 1973) (fourth amendment limits IRS to reasonable searches and seizures and prohibits unrestricted rummaging of person's private possessions); *supra* note 4 and accompanying text (discussion of fourth amendment limitation of IRS summons).

130. I.R.C. § 7604 (West Supp. 1985) (federal district courts have jurisdiction to enforce IRS summons).

131. See *Powell*, 379 U.S. at 57-58. A court will enforce an IRS summons if the IRS conducts the investigation pursuant to a legitimate administrative purpose, the IRS shows that the inquiry is relevant to that legitimate purpose, the IRS does not possess the information sought, and the IRS follows the administrative procedures set forth in the IRC. *Id.*; see *supra* notes 73-76 and accompanying text (discussion of *Powell* requirements).

that person's possessions be reasonable.¹³² The fourth amendment also requires that the police obtain a search warrant prior to the search.¹³³ Unlike the limitations on an IRS summons, however, the fourth amendment also requires that the police base a search warrant on probable cause¹³⁴ and that a neutral magistrate issue the warrant.¹³⁵ Probable cause implies that a specific person has committed a specific violation with respect to specifically identified property or persons.¹³⁶ If the police do not establish probable cause to search and seize, the neutral magistrate will not issue a search warrant.¹³⁷ Therefore, the district court's standard of review in *Morgan* for enforcing an IRS summons in a solely criminal investigation does not provide the protection that the fourth amendment warrant requirement affords in a police investigation of a person suspected of a crime.¹³⁸

In holding that an IRS summons issued pursuant to a criminal investigation does not violate the fourth amendment, the Fourth Circuit in *Morgan* implied that redress to the judicial process will cure any defects in the IRS summons procedure.¹³⁹ Nonetheless, the IRS enforces many summonses without the intervention of the judicial process.¹⁴⁰ While voluntary consent to a search constitutes a valid waiver of fourth amendment protection, a taxpayer may consent to an IRS search merely because the IRS summons may appear self-enforcing on its face, or because the taxpayer may not know that he can challenge the summons.¹⁴¹ Thus, resort to the courts for protection of a taxpayer's constitutional rights may never become an alternative for the taxpayer who does not challenge an IRS summons.¹⁴²

132. See U.S. CONST. amend. IV (fourth amendment protects against unreasonable searches and seizures).

133. See *id.* (fourth amendment requires that police obtain search warrant prior to search and seizure); *supra* note 5 and accompanying text (discussion of fourth amendment warrant requirement).

134. See U.S. CONST. amend. IV (fourth amendment requires that government base search warrant on probable cause); *supra* note 5 (discussion of fourth amendment probable cause requirement).

135. See U.S. CONST. amend. IV (fourth amendment requires that neutral magistrate issue search warrant); *supra* note 6 (discussion of fourth amendment neutral magistrate requirement).

136. See *supra* note 5 (discussion of determination of probable cause).

137. See *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (neutral magistrate determines whether evidence that police officers presented justifies probable cause for issuance of search warrant).

138. See *supra* notes 128-38 and accompanying text (fourth amendment warrant requirement provides greater determination of reason for searching and seizing a person's possessions than IRS summonses).

139. *Morgan*, 761 F.2d at 1012; see *supra* notes 48-52 and accompanying text (*Morgan* court's discussion of means by which judicial process will prevent abuse of summonses).

140. See *infra* notes 142-43 and accompanying text (district court does not review unchallenged summonses).

141. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 230 (1973) (voluntary consent to search and seizure of evidence in course of search may constitute waiver of person's constitutional rights under fourth amendment).

142. See *supra* text accompanying notes 141 (unchallenged summons may violate taxpayer's fourth amendment rights).

In enforcing an IRS criminal summons, the Fourth Circuit in *Morgan* applied a standard of review which the Supreme Court developed for enforcing an IRS summons issued in pursuit of a civil investigation.¹⁴³ The Fourth Circuit noted that TEFRA authorized the IRS to issue a summons for a criminal investigation.¹⁴⁴ When Congress enacted TEFRA, Congress meant only to clarify prior Supreme Court decisions by creating a bright line test for determining when the IRS could not issue a summons.¹⁴⁵ IRC section 7602(b) is noteworthy since the *LaSalle* determination of when the IRS could issue a summons proved unworkable.¹⁴⁶ TEFRA establishes an easy test for determining whether a summons issued for the purpose of pursuing a criminal investigation is enforceable by declaring that the IRS may issue a summons in pursuit of a criminal investigation only until the IRS refers the case to the Department of Justice.¹⁴⁷ Section 7602(b), however, gives the IRS the authority to examine the personal documents and records of a taxpayer suspected of criminal tax fraud without requiring the IRS to obtain a warrant based upon probable cause and issued by a neutral magistrate.¹⁴⁸ Therefore, the Fourth Circuit's holding in *Morgan* jeopardizes the privacy interests of a taxpayer that the fourth amendment warrant requirement protects.¹⁴⁹

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143. *Morgan*, 761 F.2d at 1011-12; see *supra* notes 43-53 and accompanying text (Fourth Circuit's determination that IRS summons issued for criminal purposes was valid); *supra* notes 62-97 and accompanying text (discussing Supreme Court's development of standard of review for enforcement proceeding of IRS civil summons).

144. *Morgan*, 761 F.2d at 1011; see *supra* notes 43-46 and accompanying text (Fourth Circuit's discussion of TEFRA); *supra* notes 106-12 and accompanying text (discussing legislative history of § 333(a) of TEFRA).

145. See *supra* notes 105-10 and accompanying text (discussion of reasons that Congress enacted § 333(a) of TEFRA).

146. See *supra* note 104 and accompanying text (Congress enacted TEFRA because *LaSalle* holding did not clarify point in time at which IRS could issue summons property).

147. See I.R.C. § 7602(c) (West Supp. 1985) (IRS may not issue summons if IRS has referred case to Department of Justice for criminal prosecution); *supra* note 108 and accompanying text (same).

148. I.R.C. § 7602(b) (West Supp. 1985); see *supra* note 2 (text of IRS § 7602(b)); *supra* notes 111-14 and accompanying text (discussing requirements IRS must establish for enforcement of criminal summons).

149. 761 F.2d at 1011-12; see *supra* notes 4-7 and accompanying text (discussing fourth amendment search warrant requirements); *supra* notes 119-42 and accompanying text (fourth amendment warrant requirement requires stricter determination of reason for invading person's privacy than standard of review for IRS summons).