Enforcing Internal Revenue Service Summonses Under the Taxpayer Compliance Measurement Program: The Need for Statutory Reform

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ENFORCING INTERNAL REVENUE SERVICE SUMMONSES UNDER THE TAXPAYER COMPLIANCE MEASUREMENT PROGRAM: THE NEED FOR STATUTORY REFORM

The Taxpayer Compliance Measurement Program (TCMP) is a statistical research project of the Internal Revenue Service (the Service). Its purpose is to evaluate taxpayer compliance with the tax laws and to reduce the Service’s operating costs by improving procedures for selection of returns for audit. Tax returns are selected randomly for TCMP audits, and taxpayers are subjected to a more detailed and extensive examination under a TCMP audit than under the usual Internal Revenue Service audit. This level of detail is required for the integrity of the statistical study. In addition, as in any regular audit, a TCMP audit concludes with a tax-liability determination, which may result in the taxpayer paying the tax due or receiving a refund.

The Service’s summons power is derived from section 7602 of the Internal Revenue Code, which authorizes the issuance of a summons to enable the Service to determine taxpayer liability. This

1. TCMP can be described as a scientific research system for measurement and evaluation of taxpayer compliance characteristics. The major uses of TCMP data are to measure the levels of compliance and tax administration gaps necessary for formulation of the Service's long-term enforcement policies; to determine changes in compliance levels over a period of time to properly direct enforcement programs; to develop and improve return selection procedures (Discriminant Function); to improve the effectiveness of enforcement operations; to identify alternative methods of operation; and to achieve greater operating economies.

2. United States v. Flagg, 634 F.2d 1087, 1089 (8th Cir. 1980).

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 is authorized—
(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
summons power has been interpreted broadly by the courts, in part because of its narrow terms and in part because of the Service's tremendous responsibility to enforce the tax laws in a self-reporting tax system.\(^4\) Such broad construction of section 7602 has produced confusion and disagreement. The primary conflict concerns whether section 7602 empowers the Service to issue a summons compelling a taxpayer to submit to an examination of his or her records where the examination is sought solely for TCMP, as distinguished from ordinary audit purposes.

Three different courts have recently concluded that a TCMP summons issued under the authority of section 7602 is indeed enforceable.\(^5\) In two of the cases, *United States v. First National Bank in Dallas*\(^6\) and *United States v. Flagg*,\(^7\) the Fifth and Eighth Circuits each reversed separate district court findings that the use of the summons power in furtherance of a TCMP audit is ultra vires because the TCMP audit is a research project, not a valid tax-liability determination.\(^8\)

Although each circuit court found the TCMP summons to be enforceable, their analyses differed slightly. The Fifth Circuit in *First National Bank in Dallas* found that a summons is enforceable where one of its objectives is the statutorily authorized purpose of ascertaining the correctness of a return.\(^9\) In so holding, the Fifth Circuit recognized that a TCMP summons may be issued for both tax-

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\(^4\) 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 may deem proper, to appear before the Secretary 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

\(^5\) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.


\(^7\) 634 F.2d 1087 (8th Cir. 1980), cert. denied, 101 S. Ct. 1977 (1981).


\(^9\) 635 F.2d at 396. For a full discussion of this point, see infra notes 106-18 and accompanying text.
determination and research purposes. By contrast, the Eighth Circuit, which also upheld enforceability, held that the only purpose of a TCMP audit is to ascertain the correctness of a return. This narrow view of the TCMP summons fails to recognize that a TCMP research project provided initial impetus for such an examination. The Eighth Circuit, however, correctly determined that the TCMP serves a legitimate purpose in our tax-enforcement system by helping to improve the efficiency of the Service and to lessen the enforcement burdens on taxpayers.

This note addresses the issue of TCMP summons enforcement under section 7602 in order to show that these circuit court decisions continued the judicial trend of construing the summons power broadly, both by expanding that power and by recognizing that broad enforcement powers are necessary for the efficient operation of a complex, self-reporting tax system. It also examines the argument that enforcement of TCMP summonses under section 7602 is ultra vires and suggests legislative revision of the code to conform with the present judicial trend. Such revision would alleviate unnecessary confusion in the law, provide statutory support for a broad summons power, attach greater legitimacy to an admittedly strained interpretation of the code, and expedite the tasks of enforcement.

Part I of this note describes the TCMP and its uses in our tax-enforcement system, and Part II describes the procedures of a TCMP examination. Both of these sections are essential to understanding the prevalent issues in TCMP summons cases. They lead in Part III to an explanation of the Internal Revenue summons power under section 7602 and the Supreme Court's interpretation of this power. Part IV provides an example of the basic scenario of a TCMP summons case, including various taxpayer arguments against enforcement. A discussion and critique of the different analyses applied by the courts in the TCMP cases follows in Part V. Finally, Part VI suggests possible section 7602 revisions that would clarify the scope of the I.R.S. summons power and provide guidance in this area of the law.

10. 635 F.2d at 395 n.4. This holding is analogous to the Supreme Court's "dual purpose" holding in United States v. LaSalle Nat'l Bank, 437 U.S. 298 (1978). See infra notes 69-74 and accompanying text.
11. 634 F.2d at 1088-89.
12. Id. at 1091. For a full discussion of this point, see infra notes 133-34 and accompanying text.
I. THE PURPOSE OF TCMP

Pursuant to section 7601, the Service is empowered to audit tax returns filed by taxpayers.\textsuperscript{13} The auditing process involves allocating the Service's limited resources of time and personnel over a relatively great number of audited returns.\textsuperscript{14} The actual number of returns audited, however, does not constitute a large percentage of the total number of tax returns filed in a given year. For example, in 1979, only approximately 2.2 million returns were examined\textsuperscript{15} out of the 140.2 million returns of all kinds that were filed.\textsuperscript{16} Because only a small percentage of total returns is actually selected for audit, our tax system must depend on voluntary compliance with the tax laws to survive.\textsuperscript{17} To encourage the necessary voluntary compliance, the Service must examine efficiently the small percentage of returns it does select for audit.

To help allocate limited resources and thereby increase efficiency, the Service implemented the TCMP in the early 1960's\textsuperscript{18} under its inquiry power.\textsuperscript{19} Two important uses of TCMP data are improving the Service's audit-return selection process and reducing operating costs.\textsuperscript{20} The statistics gathered by TCMP audits are helpful in the audit-selection process, for they are used in creating and modifying the Service's Discriminant Function System (DIF),\textsuperscript{21} which is the Service's primary means of selecting returns for audit from the general population of returns filed.\textsuperscript{22}

The DIF, introduced in 1969, "is a mathematical technique..."
used to classify income tax returns as to examination potential... by assigning weights to certain basic return characteristics. Generally the higher the score the greater is the probability of significant tax change. The highest score returns are made available to Examination upon request. For instance, if TCMP statistics reveal that sample returns show more than average error in a certain item or in a relationship between two items, these items might be weighted more heavily in the DIF formula than items having less correlation to errors in the TCMP sample. Thus, if a general-population return has disproportionate entries in items that have been weighted heavily in the DIF formula, the return is likely to be selected for audit. In short, the statistics compiled under TCMP are important in evaluating the DIF, which in turn is used to select more efficiently for audit returns from the entire population of taxpayers.

Through such use in the DIF, TCMP statistics help the Service reduce operating costs by determining a statistical model of tax-return accuracy. The improved selection process enables the Service to pinpoint more accurately which general-population returns warrant examination. For example, the statistical selection process has caused a decrease in the number of audits that produce no tax-liability adjustment after examination. The Service can thus expend its limited resources on returns that appear statistically most worthy of examination.

II. TCMP Audit Procedure

The TCMP is based on statistics obtained through audits of filed taxpayers' returns. After dividing this population into classes based on income, the Service compiles its TCMP sample by randomly selecting returns from each class for audit. The taxpayer

23. [1 Audit] INTERNAL REV. MAN. (CCH) ¶ 4131.2 (Dec. 4, 1979). "DIF mathematical formulas are confidential in nature and are distributed to IRS personnel only on a need-to-know basis. They are for official use only and will not be discussed with unauthorized personnel." [1 Audit] INTERNAL REV. MAN. (CCH) ¶ 4131.2(2) (Aug. 15, 1980).
25. Id. at 758. "Since DIF was introduced in 1969 the number of individual taxpayers whose examinations resulted in no tax change has been reduced from 43 percent in 1968 to 24 percent." 1978 COMM'R OF INTERNAL REV. ANN. REP. 24.
27. Id. at 756.
28. A TCMP sample of individual returns involves 50,000 of the approximately 80,000,000 returns that are filed each year. Id.
29. [3 Audit] INTERNAL REV. MAN. (CCH) ¶ 4861.1(2) (Aug. 27, 1980). The random sampling is based on ending digits of social security numbers or employee identification num-
audited under the TCMP is clearly and unmistakably aware that the examination is atypical of the normal Internal Revenue audit. First, the taxpayer is advised by letter that he is being audited under the TCMP.30 Second, the various documents used during the audit are specially labeled to reflect TCMP status.31 Third, upon meeting the auditor, the taxpayer is personally informed that his return is being audited under the TCMP.32

The TCMP audit is a thorough examination of the complete income tax return. The examiner is required to inspect supporting documents for all income and deductions and to report whatever discrepancies appear on the return.33 In fact, a TCMP audit requires the taxpayer to produce supporting evidence of all income, deductions, and credits34 on the 1040 form,35 including attached schedules.36 So thorough an examination is necessary to ascertain the correctness of the return and to ensure the integrity of the statistical study.37 It is this very depth of a TCMP audit, however, that taxpayers may complain is significantly more burdensome than a normal field audit.38

A field audit “involves an examination of the taxpayer’s books and records on the taxpayer’s premises. An examiner will check the entire return filed by the taxpayer and will examine all books, papers, records, and memoranda dealing with matters required to be included in the return.”39 As in the TCMP audit, when deficiencies are discovered the taxpayer must pay the delinquent amount. Conversely, in both kinds of audit, overpayments entitle the taxpayer to a refund.40 In theory, the two audits seem quite similar, and the TCMP examination appears no more burdensome to the taxpayer than the normal field audit. Nevertheless, practitioners have commented that “the approach in the field audit is generally to seek ver-

b ers. Premis, supra note 14, at 756.
31. Id. ¶ 4865.3 (Aug. 27, 1980).
32. Id. ¶ 4867.2(4).
33. Id. ¶ 4867.3(2).
34. Id.; Premis, supra note 14, at 756-57.
35. The “1040 form” is the basic tax form on which individuals file their yearly income tax.
37. Id. ¶ 4867.3(1) (Apr. 29, 1977).
40. United States v. Flagg, 634 F.2d 1087, 1089 (8th Cir. 1980).
ification of only major items,” whereas in the TCMP audit "the I.R.S. will be asking for supporting evidence of all income and expenses related to [the] taxpayer.” The time required by a taxpayer to produce supporting evidence for each item on his return and by the examiner to verify each item can indeed be extensive, making submission to a TCMP audit a burdensome task. Thus, if the taxpayer is to be compelled by summons to comply with this heavier burden of verification, the granting statute should clearly authorize the issuance of summonses for TCMP research purposes.

III. THE SUMMONS POWER UNDER SECTION 7602

Section 7601 enables the Service to “inquire after and concerning all persons therein who may be liable to pay any internal revenue tax.” The courts have interpreted this section to give the Service “a broad mandate to investigate and audit,” and the Service takes full advantage of this inquiry power. Nevertheless, section 7601 cannot be used by the Service to force a taxpayer to turn over his records for examination. To compel examination of books or records in a taxpayer's possession, the Service must turn to section 7602.

Section 7602 authorizes the use of the summons power for the purposes of ascertaining the correctness of a return, determining tax liability, and making a return where none has been made. If the Service issues a summons for a purpose not expressed in section 7602, the summons is unenforceable because “the Service does not enjoy inherent authority to summon production of the private papers of citizens. It may exercise only authority granted by Congress.” To ensure that the Service uses the summons within authorized limits, “Congress has provided protection from arbitrary or capricious action by placing the federal courts between the Government and the person summoned.” Thus, even where the Service issues a summons for one of the authorized purposes, it has no jurisdiction to enforce its own summons. Instead, it must file a petition with the district court.

42. Premis, supra note 14, at 757.
43. I.R.C. § 7601(a) (1976); see supra note 13.
45. I.R.C. § 7602. For the text of the statute, see supra note 3.
48. I.R.C. §§ 7604(a), 7402(b) (1976 & West Supp. 1981). Section 7604(b) provides:
Despite these apparently narrow statutory guidelines, the United States Supreme Court has interpreted the statute expansively, setting forth broad criteria for judicial enforcement of an I.R.S. summons. Two cases particularly illustrate this trend. In United States v. Powell and United States v. LaSalle National Bank, the Court ordered I.R.S. summonses enforced even though the respective summonses were issued for reasons other than ascertaining the correct tax liability of the taxpayer. In Powell, the Supreme Court upheld a summons for the production of taxpayer’s records even though the statute of limitations had barred any civil tax deficiency absent proof of fraud. The Court held:

[T]he commissioner need not meet any standard of probable cause to obtain enforcement of his summons, either before or after the three year statute of limitation on ordinary tax liability has expired. He must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the commissioner’s possession, and the administrative steps required by the code have been followed.

The Powell Court was not concerned that the summons was issued in an untimely way and therefore could not, absent proof of fraud, serve to ascertain tax liability. Instead, the Court created this four-pronged prerequisite to summons enforcement. In doing so, the

ENFORCEMENT—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(h)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

Id. § 7604(b)(1976).

Once in the district court, the taxpayer “may challenge the summons on any appropriate ground.” Reisman v. Caplin, 375 U.S. 440, 449 (1964).


51. There is no statute of limitations for a fraudulent return, and the civil tax deficiency may be collected at any time. I.R.C. § 6501(c)(1) (1976).

52. 379 U.S. at 57-58.
Court compared the Service’s inquiry power to that of the Federal Trade Commission, which like a Grand Jury, may investigate a person absent suspicion of violation. Indeed, under this analogy the Service may investigate a taxpayer “on suspicion that the law is being violated or even just because it wants assurance that it’s not.”

Nevertheless, even under Powell the Service’s summons power is somewhat limited. To be enforced, summonses not only must satisfy the four-pronged test but must also be issued in good faith. Justice Harlan’s majority opinion holds the judiciary responsible for refusing to enforce summonses issued in bad faith or for improper purposes:

It is the court’s process which is involved to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.

The Supreme Court again addressed the proper-purpose and good-faith requirements in United States v. LaSalle National Bank, another case involving an I.R.S. investigation. At the lower court hearing on a petition for enforcement of a summons, the evidence established that an I.R.S. special agent had been assigned to investigate the civil tax liability of a taxpayer. The special agent had requested the assignment because he had received a confidential tip regarding the taxpayer’s alleged criminal violations. The special agent pursued the case independently, intending to investigate “solely for the purpose of unearthing evidence of criminal conduct.” Because the taxpayer had rental income from land held in trust by LaSalle National Bank, the special agent issued summonses to the trustee-bank so that he could examine pertinent files regarding the rental income. The lower court denied enforcement of the sum-

53. Id. at 57 (citing United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950)).
54. Id. (quoting United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950)).
55. Id. at 58 (footnote omitted).
57. United States v. LaSalle Nat'l Bank, 76-1 T.C. 84,072, 84,072 (N.D. Ill. 1976), aff'd, 554 F.2d 302 (7th Cir. 1977), rev'd, 437 U.S. 298 (1978). Although a special agent frequently enters an investigation to determine criminal charges, the assignment of a special agent to a case does not automatically make the case a criminal investigation. 76-1 T.C. 84,072, 84,072.
58. 76-1 T.C. 84,072, 84,073 (N.D. Ill. 1976).
mons on the ground that the summons had not been issued in good faith since its sole purpose had been to conduct a criminal investigation. The Seventh Circuit affirmed, holding that "the use of an administrative summons solely for criminal purposes is a quintessential example of bad faith," an analysis that seems correct in view of law establishing that the use of a civil summons to investigate criminality constitutes an abuse of civil process, and in view of the very language of section 7602, which authorizes issuance of a summons only to ascertain correct civil-tax liability. Nevertheless, the Supreme Court reversed the appellate court's decision and enforced the summons, holding that a single agent's intention could not be the sole basis for deciding whether a summons had been issued in good faith. Justice Blackmun, writing for the majority, stated:

[T]he question whether an investigation has solely criminal purposes must be answered only by an examination of the institutional posture of the I.R.S. . . . [T]his means that those opposing enforcement of a summons do bear the burden to disprove the actual existence of a valid civil tax determination or collection purpose by the Service.

Noting further that the Service has an institutional responsibility to collect taxes, the Court maintained that one agent's personal, albeit improper motivation to discover criminal activity could not invalidate the summons and undermine the Service's fulfillment of that responsibility. Although the Court agreed that an agent's motivation in an investigation is a factor to be considered, the majority explained that the institutional approach to determining the propriety of a summons protects both the Service and the taxpayer. On the one hand, there are too many channels in the Service's hierarchy through which the decision to bring criminal charges must pass to

59. Id. at 84,072-73. The finding that the summons was issued solely for the purpose of criminal investigation was based strictly on evidence that the special agent himself was interested only in a criminal investigation. Id. at 84,073.

60. 554 F.2d 302, 309 (7th Cir. 1977).


63. 437 U.S. at 316.

64. Id. This holding appears to shift the burden for enforcement of a summons from the Service to the taxpayer, although the good faith standard still applies and the Service must meet it. This new standard for opposing enforcement of a summons additionally requires "that the Service not abandon in an institutional sense . . . the pursuit of civil tax determination or collection." Id. at 318.

65. Id. at 314.
allow the decision of a single agent to bind the Service. On the other hand, these channels protect a taxpayer from a single agent who hastily decides to seek criminal evidence on his own volition.

The Court correctly determined that the purpose of an I.R.S. investigation must be decided by the Service, as an institution, rather than by a single agent. If the single agent’s reason for investigating or for issuing a summons were to be held dispositive even though the Service intended a civil tax liability investigation, the enforcement policies of the Service, as an institution, would undoubtedly be frustrated. Therefore, under LaSalle, a showing that the investigating agent himself may have issued a summons to a taxpayer for what might be considered a bad-faith reason does not necessitate a finding that the Service, as an institution, issued the summons in bad faith. Absent proof of institutional bad faith, such a summons may be enforceable. “After all, the purpose of the good-faith inquiry is to determine whether the agency is honestly pursuing the goals of § 7602 by issuing the summons.”

In addressing what does constitute institutional good faith, the Court determined that a summons is presumed to have been issued in good faith and is enforceable unless the taxpayer can prove that the Service, as an institution, lacks a valid civil-tax-determination purpose for issuing the summons. The Court explained that our tax-enforcement system has not provided for separate criminal investigations and civil investigations, but rather was designed with intertwined criminal and civil elements. If a taxpayer fraudulently prepared his return, he would be subject to both criminal penalties under I.R.C. sections 7206 and 7207 and a civil tax penalty of 50% of the underpayment by authority of section 6653(b). Therefore, “[w]hen an investigation examines the possibility of criminal misconduct, it also necessarily inquires about the appropriateness of assessing the 50% civil tax penalty.” As a result, an I.R.S. summons may have a dual purpose; in fact, it usually does. In LaSalle, the dual purpose for the summons was a criminal-investigation, civil-tax-

66. Id. at 315. In fact, the Service, as an institution, might not know what true, secret intention a single agent may have in issuing a summons in furtherance of an investigation until the agent testifies at a hearing for the enforcement of such summons.

67. Id.

68. Id. at 316 (emphasis added).

69. Id.

70. Id. at 309.

71. Id. at 308 (citing I.R.C. §§ 7206-7207, 6653(b) (1976)).

72. Id. at 309.
determination purpose. Despite the criminal investigation, the Court enforced the summons because it found "that the Service had not abandoned in an institutional sense . . . the pursuit of civil tax determination or collection."73 Using this holding as an analytical springboard, one can interpret LaSalle as suggesting that as long as one of the Service's institutional purposes for issuing a summons is to determine a taxpayer's civil tax liability, it is irrelevant that the Service might also have another purpose for issuing that summons, which, standing alone, would constitute bad faith and thus render the summons unenforceable.74

Thus, through Powell and LaSalle, the Supreme Court has broadened the narrow scope of section 7602. After these cases, the Service arguably needs only a good reason to issue a summons; yet the enabling statute authorizes the issuance of summonses only for tax-determination purposes. This broad interpretation of the statute is responsible for the present controversy in the TCMP cases. If the summons section were amended to reflect the courts' broad interpretation, confusion surrounding the TCMP summons would be alleviated. Moreover, statutory language specifically authorizing summonses for research purposes would both contribute to the Service's efficiency and relieve taxpayers from the burden of unnecessary examinations.

IV. ENFORCEABILITY OF TCMP SUMMONSES UNDER SECTION 7602

Issuance of TCMP summonses under the authority of section 7602 has produced considerable controversy. Litigation has arisen when taxpayers have refused to comply with summonses directing them to submit to TCMP audits. In the typical case,75 the Service

73. Id. at 318.
74. See United States v. Pittsburgh Trade Exch., 644 F.2d 302, 308 (3rd Cir. 1981). This analysis had support prior to LaSalle as well. In 1969, the Fifth Circuit observed that section 7602 "does not limit the examination it authorizes solely to the issue of correctness." United States v. Roundtree, 420 F.2d 845, 851 (5th Cir. 1969) (emphasis in original) (quoting Boren v. Tucker, 239 F.2d 767, 772 (9th Cir. 1956)). The Roundtree Court continued: "So long as the IRS does have [the correctness] purpose, other purposes need not vitiate its authority." Id. The Fifth Circuit qualified its statement, however, by pointing out that if the invalid purpose that accompanied the valid purpose for the summons was harassment, the summons would be quashed because the court may not assist in such harassment. Id. As another example, a summons may not be issued if the case has been recommended to the Justice Department for criminal prosecution even if a valid civil tax determination remains to be made at the time of recommendation. Donaldson v. United States, 400 U.S. 517, 536 (1971).
75. E.g., United States v. Flagg, 45 A.F.T.R. 2d 80-618 (S.D. Iowa 1979), rev'd, 634 F.2d 1087 (8th Cir. 1980), cert. denied, 101 S. Ct. 1977 (1981). The facts in Flagg are com-
first informs the taxpayer that his return has been selected under section 7601 for a TCMP audit, and explains the examination procedure. If the taxpayer refuses to comply, the Service then issues a summons under section 7602 to compel submission to the TCMP audit. If the taxpayer still resists, the Service may seek enforcement of its summons in federal district court under the authority of section 7604(b).

Various arguments are available to taxpayers resisting enforcements of such a summons. First, since section 7602 facially authorizes summonses only to ascertain tax liability, a taxpayer may oppose as ultra vires any summons issued in furtherance of a TCMP research project. Second, a taxpayer might contend that a TCMP audit is purely voluntary, since submission to such an audit is required neither constitutionally nor by statute, and that compulsory compliance would impose unjustifiable burdens on taxpayers. Even a normal tax audit imposes emotional and time burdens on taxpayers; a TCMP audit, so much more extensive and time-consuming, may produce considerable distress. Such a potentially harrowing experience is difficult to justify purely for research purposes, especially in the absence of explicit statutory authorization.

Additionally, a taxpayer might argue that the TCMP audit generates an inequitable paradox. If taxpayer A, for example, falsely reports a medical deduction, his return may be selected for a normal audit, in which the Service scrutinizes only the medical deduction.
On the other hand, if taxpayer B, having properly completed and filed a tax return, is selected for a TCMP audit, every item on his return may be subjected to exhaustive examination. There is thus an equitable argument against submitting to a mandatory TCMP audit. A thorough discussion of cases litigated in the federal courts reveals a variety of Service responses and court resolutions of these aspects of the TCMP controversy.

V. THE TCMP SUMMONS CASES

The earliest of the TCMP summons cases was United States v. Waegemann. The earliest of the TCMP summons cases was United States v. Waegemann. In an unreported decision, a United States District Court in California enforced the Internal Revenue summons, rejecting the taxpayer's argument that the TCMP audit put too costly a burden on him due to the additional steps required to complete the investigation. The district court, citing no authority, stated that a taxpayer is not allowed to determine the form of audit the Service performs on his return. In addition, the court stated that the government has the authority to scrutinize each and every transaction of a return selected for audit.

At the time it was decided in 1978, Waegemann seemed a fairly insignificant summons case and was never appealed. As the law developed, however, Waegemann became the forerunner of United States v. First National Bank in Dallas and United States v. Flagg, two cases that explored in greater detail the extent of the Service's summons power to achieve compliance with research programs deemed necessary to its tax-enforcement system.

In First National Bank in Dallas, a Texas District Court held that a TCMP summons issued under section 7602 was ultra vires and could not be enforced. In deciding that the Service cannot compel a taxpayer to submit to a TCMP audit of his tax return, the First National Bank in Dallas court relied on United States v. Humble Oil Refining Co., which had denied the Service summons power

82. Id., slip op. at 8-9.
83. Id. at 5.
84. Id.
88. 518 F.2d 747 (5th Cir. 1975) (per curiam).
to examine returns for the purpose of carrying on research. 98

In *Humble*, the Service issued a John Doe summons 99 to the taxpayer, in order to obtain a list of its land-lessees so that the Service could determine whether these lessees had complied with certain Internal Revenue Code requirements regarding the depletion allowance. 90 At the time the summons was issued, neither Humble nor any of its lessees were under I.R.S. investigation; an I.R.S. agent testified that he had been attempting to measure tax compliance and that the summons had been issued to facilitate his research. In its effort to justify this use of a summons, the Service maintained that section 7601 provided broad inquiry powers and that it had “sought to facilitate its inquiry by utilizing the summons power set forth in § 7602.” 91

In rejecting this argument, the court stated:

The Internal Revenue Service is not empowered by section 7602 to issue a summons in aid of its section 7601 research projects or inquiries, absent an investigation of taxpayers . . . from whom information is sought. Section 7602 simply cannot be read to give the I.R.S. an unrestricted license to enlist the aid of citizens in its data gathering projects. 92

The court concluded that while section 7601 inquiry power may be construed broadly, the section 7602 summons power may not be invoked to facilitate all such inquiries. 93 The court, in construing the two pertinent sections, noted that section 7601 authorizes general “inquiries,” while section 7602 speaks of “examinations,” and that although section 7601 permits the Secretary to inquire from time to time as he deems it practicable, section 7602 authorizes issuance of a summons only for examining the correctness of a return. 94

Using a similar analysis, the district court in *United States v.*

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89. Id. at 748-49.
90. A John Doe summons is issued to compel a third party having records of an unidentified taxpayer in his possession to produce them. Such summonses are enforceable just as if the taxpayer were identified. See, e.g., *United States v. Bisceglia*, 420 U.S. 141 (1975); *United States v. Carter*, 489 F.2d 413 (5th Cir. 1973)); *United States v. Turner*, 480 F.2d 272 (7th Cir. 1973).
91. 488 F.2d 953, 954-55 (5th Cir. 1974).
92. Id. at 956.
93. Id. at 962-63.
94. Id. at 960.
95. Id. Although a close reading of section 7602 suggests that the words “inquiry” and “examination” are used interchangeably, the remainder of the statutory language does suggest that the summons power is of narrower scope than the inquiry power. See *supra* notes 3 & 13.
First National Bank in Dallas96 determined, in effect, that the TCMP summons was unenforceable because the taxpayer’s return had been selected for TCMP “inquiry” rather than for tax “examination.”97 Because determining tax liability is clearly not one of the TCMP’s enumerated purposes,98 a TCMP summons could not be enforced. To issue a valid summons, the Service must be involved in an examination or investigation of a taxpayer, rather than in a research project.99

On appeal, the Fifth Circuit reversed and remanded with instructions to enforce the TCMP summons.100 Limiting the anti-summons-enforcement impact of its Humble decision,101 and adopting a dual-purpose rationale similar to that advanced in United States v. LaSalle National Bank,102 the court of appeals found that the “I.R.S. has the statutory power under 26 U.S.C. § 7602 to issue summonses where one good-faith purpose is to ascertain the correctness of specific tax returns.”103 The district court had misinterpreted Humble.104 Humble did not hold that a summons issued primarily to facilitate research was unenforceable, but rather, that a summons issued absent a particularized investigation was unenforceable.105 Therefore, the court concluded, since a TCMP summons is issued in furtherance of a particular investigation and one of its purposes is to ascertain the correctness of the return, it is enforceable under section 7602.106

In predicing its decision on this limited reading of the Humble case, the Fifth Circuit paid only brief attention to an analogous case, United States v. Carter,107 where an I.R.S. summons was enforced even though issued for reasons other than ascertaining the correctness of a return. In Carter, the court enforced a John Doe summons

97. Id. at 416.
98. For the Service’s description of TCMP uses, see supra note 1.
99. 468 F. Supp. at 416. The court’s reading of the Humble decision is not unreasonable. In his concurring opinion in United States v. Bisceglia, 420 U.S. 141 (1975), Justice Blackmun cited Humble as appropriately distinguishing between an investigation and a research project. Id. at 152 (Blackmun, J., concurring) (citing 488 F.2d at 958).
101. See supra notes 88-95, and accompanying text.
103. 635 F.2d at 392.
104. Id. at 395.
105. Id.
106. Id. at 395-96.
107. 489 F.2d 413 (5th Cir. 1973).
issued to a tax preparer who had incorrectly prepared a test return under the Service's Tax Preparer's Project.\textsuperscript{108} The project had been intended, among other things, to upgrade the accuracy of tax returns prepared. The summons sought names of the preparer's clients so that the Service could determine the competency of the tax preparer. The district court in \textit{First National Bank in Dallas}, though finding that \textit{Carter} did "muddy the waters,"\textsuperscript{109} distinguished it because in \textit{Carter}, unlike the TCMP cases, the Service had reason to believe that the preparer's clients' returns were incorrect.\textsuperscript{110} In addition, it found that the Tax Preparer's Project "was not a research project with a goal of determining if tax preparers were accurately preparing returns, but an \textit{investigation} as to the competency of individual tax preparers and the returns they had prepared."\textsuperscript{111}

The first of these distinguishing features seems insignificant: The Service need not have reason to believe that a return is incorrect before issuing a summons.\textsuperscript{112} Although such a requirement might prove reasonable and necessary in the case of a John Doe summons to prevent arbitrary or capricious issuance of a summons, in a TCMP case both a known taxpayer and a valid civil-tax-determination reason justify the issuance of the summons.\textsuperscript{113} Thus, the risk of arbitrary use of the summons power is diminished. The second distinguishing feature pointed out by the court is equally unpersuasive. Specifically, it is difficult to comprehend the court's finding that the Tax Preparer's Project is not a research project, but purely an investigation. In \textit{Carter}, the Service used the summons to obtain a list of those taxpayers for whom the defendant prepared tax returns. Suggesting that the tax returns of those on such a list are checked solely to determine whether the preparer made mistakes fails to recognize

\textsuperscript{108} \textit{Id.} The Tax Preparer's Project has been described as "a process by which an agent visits a tax preparer and requests the preparation of a tax return from a standard set of facts. If the I.R.S. determines that the return obtained through 'shopping' is inaccurate, it may seek to find out whether this inaccuracy pervades the other returns prepared by that person." United States v. Turner, 480 F.2d 272, 274 (7th Cir. 1973).

\textsuperscript{109} 468 F. Supp. at 416.

\textsuperscript{110} \textit{Id.} The Court stated that this distinction was analogous to the \textit{Humble} court's explanation that the John Doe summons was enforced in United States v. Bisciglia, 420 U.S. 141 (1975), because there was a strong suspicion that someone in particular (although his identity was unknown) had not paid his taxes. 468 F. Supp. at 416.

\textsuperscript{111} \textit{Id.} at 416-17 (emphasis added).

\textsuperscript{112} United States v. Stuart, 587 F.2d 929 (8th Cir. 1978).

that the Tax Preparer’s Project is not only an investigation to determine the competency of a tax preparer, but also a method of selecting returns to investigate for tax liability.\textsuperscript{114} Clearly, then, the Tax Preparer’s Project summons, like the summons in \textit{LaSalle}, may have a dual purpose. The foregoing demonstrates that \textit{Carter} does more than “muddy the waters” of the TCMP cases and that adopting the \textit{LaSalle} dual-purpose doctrine is warranted unless section 7602 is revised to alleviate the current confusion.

In fact, the TCMP summons cases fit quite neatly within the dual-purpose doctrine introduced in \textit{LaSalle}.\textsuperscript{115} If one accepts that a TCMP examination has in fact both research and tax-determination purposes, then one may perceive the summons issued to facilitate the TCMP audit as having a dual purpose that is analogous to the \textit{LaSalle} criminal-civil tax-determination dual purpose.\textsuperscript{116} Because a TCMP audit necessarily implies both ascertaining the taxpayer’s correct tax liability and the taxpayer’s paying any deficiency found (or the Service’s refunding any overpayment found), the Service’s TCMP summons arguably has a “valid civil tax determination or collection purpose.”\textsuperscript{117} Under this analysis, a TCMP summons is issued in good faith and should be enforceable even if one of the purposes of the audit is research.

Furthermore, the dual-purpose doctrine could be applied in the TCMP summons cases for the benefit of the tax-enforcement system. Just as the criminal-civil tax aspects of our tax system are intertwined, so are the civil tax and research aspects of our tax system. In addition, just as the tax system’s efficiency is promoted by aligning its civil and criminal elements, such efficiency will also be enhanced by parallel treatment of the TCMP’s tax-determination and research components. It is therefore sensible to recognize as valid a TCMP summons issued for the dual purpose of determining tax liability and research. The Fifth Circuit’s holding—that an I.R.S. summons need not be restricted to the one statutorily authorized purpose of section

\textsuperscript{114} United States v. Turner, 480 F.2d 272, 274 (7th Cir. 1973) (Tax Preparer’s Project admittedly intended in part to select names for investigation).

\textsuperscript{115} See supra notes 63-74 and accompanying text.

\textsuperscript{116} See \textit{id.} The district court in United States v. Flagg, 45 A.F.T.R.2d 80-618 (S.D. Iowa 1979), rev’d, 634 F.2d 1087 (8th Cir. 1980), cert. denied, 101 S. Ct. 1977 (1981), however, did not find a valid dual purpose. The court decided “that while the ‘sole’ purpose of ever looking at this taxpayer’s return was the T.C.M.P. program, that after that choice was made, the person examining had a new purpose, to see if that return was correct. This is not the same dual purpose at the inception of the issuance as contemplated by LaSalle.” \textit{Id.} at 80-622.

\textsuperscript{117} \textit{LaSalle}, 437 U.S. at 316.
7602 and may, in fact, be issued "for research purposes as long as
the summons is based in good faith upon a section 7602 pur-
purpose," is both reasonable and ultimately beneficial to taxpayers,
who will receive more efficient service as a result of improvements
based on TCMP data.

Although the district court in First National Bank in Dallas,
faced with the restrictive statutory language of section 7602, could
not justify a TCMP summons, the circuit court advanced the goals
of tax enforcement and tax research by using the tax-determination
aspect of TCMP audits as a basis for enforcing such a summons.
Other courts have approached this problem differently. In United
States v. Flagg, for example, a United States Magistrate recom-
mended limited enforcement of a TCMP summons. Reasoning from
the language of section 7602, which authorizes the use of the sum-
mons power only to determine the tax liability of a taxpayer, the
Magistrate recommended that the TCMP summons be enforced only
to the extent necessary for the examination of the correctness of the
return, and that any information sought solely in furtherance of the
TCMP should not be subject to the summons. He agreed with the
taxpayer that "when the I.R.S. seeks data beyond that found upon
examination of a taxpayer's return for the purpose of a research pro-
ject, there is no statutory authority that allows issuance of a sum-
mons." When the Service filed an objection to the Magistrate's
recommendation, the district court, while agreeing with the Magis-
trate's reading of section 7602, disagreed with that part of the rec-
ommendation that enforced the summons to the extent necessary to
determine the correctness of a return. Instead, the court completely
denied on ultra vires grounds the Service's petition to enforce the
summons. In addition, the district court in Flagg determined (as
had the district court in First National Bank in Dallas) that the
TCMP summons was unenforceable because of the research purpose
of the investigation. This conclusion, based on the testimony of the
agents responsible for the audits, apparently ignores the institutional
good-faith doctrine and dual-purpose rationale advanced in

118. First National Bank, 635 F.2d at 396.
120. Id., slip op. at 7.
121. Id. at 6.
122. 45 A.F.T.R.2d at 80-622.
123. Id. at 80-621. See supra notes 97-99 and accompanying text.
On appeal, the Eighth Circuit reversed and remanded with instructions to enforce the TCMP summons. Contrary to the conclusion of both the Magistrate and the district court, the appellate court determined that a TCMP summons falls within the authority of section 7602, that the purpose of the TCMP summons is to ascertain the correctness of the return, and that the research data obtained is but one result of a TCMP examination. Although its reasoning is not altogether clear, the court appears willing to enforce the TCMP summons because "[i]n construing the summons authority claimed under section 7602, judicial deference to congressional intent requires that if the claimed authority is necessary for the effective performance of the congressionally imposed responsibilities to enforce the tax laws, 'that authority should be upheld absent express statutory prohibition or substantial countervailing policies.'"

The Eighth Circuit's approach is rife with difficulty. Certainly, a TCMP audit involves a tax determination, but it overstates the case to maintain that tax-determination is its primary purpose. When the Service conducts a normal field audit, its primary, indeed perhaps sole purpose is to determine the correctness of the return. When the Service initiates a special category of audit, however, which is designed specifically to effectuate a research project, it seems unreasonable to conclude that the research purpose of the examination is only a result. Rather, the research program inspired the very creation of the TCMP in the first place.

The court of appeals seems also to have misunderstood the lower court's findings. According to the appellate court, the district court had found that "examination of Flagg's return to determine its correctness, primarily in order to provide data for the TCMP, is not 'a valid reason for a civil tax determination' under 26 U.S.C. § 7602." Such a reading of the district court's conclusion wrongly attributes to the district court the appellate court's own conclusion that TCMP audits were intended to find inaccuracies. The district court had actually found that the TCMP audit did not inherently support the purpose of seeking the correctness of a return, but rather

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124. See supra notes 63-74 and accompanying text.
125. 634 F.2d 1087, 1092 (8th Cir. 1980).
126. Id. at 1088-89.
127. Id. at 1091 (quoting United States v. Euge, 444 U.S. 707, 711 (1980)).
128. Id. at 1089 (citations omitted).
129. Id. at 1088.
that as a research project the audit was beyond the scope of determining tax liability under section 7602.\footnote{45 A.F.T.R.2d at 80-621.} This misreading of the district court’s decision has little substantive effect on the appellate court’s holding. It does exemplify, however, the difficulty courts have experienced in determining the purposes of an examination and in trying to fit the TCMP summonses into section 7602.

The Eighth Circuit also found, in the face of an agent’s testimony and the district court’s determination to the contrary, that the Service had conducted the TCMP examination in furtherance of an investigation into the taxpayer’s tax liability.\footnote{634 F.2d at 1089.} Indeed, neither court, though faced with statements showing both institutional and agent purpose, applied the institutional good faith doctrine expounded in \textit{United States v. LaSalle National Bank.}\footnote{437 U.S. 298 (1978). For a full discussion, see \textit{supra} notes 56-74 and accompanying text. In \textit{Flagg}, the taxpayer’s attorney, having noted the contradictory testimony, apparently anticipated that the court would apply the institutional good-faith doctrine. Therefore, he argued that the agent’s purpose, as a lower echelon employee, was to determine the correctness of the return. The Service’s institutional purpose, he argued, was research-oriented. 634 F.2d at 1089. His argument, partially successful in the district court (which found that the TCMP summonses was research-oriented without reaching the institutional good-faith issue), was ultimately rejected by the court of appeals. \textit{Id.}} Had they done so, they may have determined that the institutional purpose of determining tax liability overrode the single agent’s asserted research purpose. This result would have been entirely reasonable, since a statement of purpose by one agent involved in an audit would not necessarily preclude the existence of other institutional purposes. Clearly, then, the court could have based its decision to enforce the summonses on precedent in the I.R.S. summons area rather than on an unexplained conclusion that failed even to recognize that a TCMP summonses may be issued for research purposes.

The appellate court correctly recognized, however, that TCMP audits increase the effectiveness of the Service and generally reduce the burden on taxpayers.\footnote{634 F.2d at 1091.} Clearly, the Service’s need for accurate statistics is legitimate; and, as Chief Justice Burger has suggested,
even though investigations under sections 7601 and 7602 "unquestionably involve some invasion of privacy, they are essential to our self-reporting system."134 The TCMP enables the Service to determine more efficiently who should and who should not be audited. Such an analysis can save the Service thousands of hours by limiting its audits to returns that are likely to result in a change of tax. Furthermore, taxpayers in the long run will be spared the burden of making themselves available for unnecessary audits. Thus, from the perspective of these benefits, and in the context of the self-reporting nature of the tax system, the exercise of summons power in TCMP summons cases is quite appropriate.

In short, although the appellate court in Flagg recognized the beneficial impact of TCMP audits on our tax enforcement system, its finding that the Service and the agent both had a civil-tax-determination purpose for issuing the summons was too conclusory to be useful in future cases concerning Service or agent purposes. Similarly, the court's failure to recognize the research purpose behind the TCMP summons simply eluded the realities of the TCMP process, which was confronted more usefully by the Fifth Circuit in First National Bank in Dallas: A summons should be issuable for both tax-determination and other purposes. Nonetheless, the Eighth Circuit's interpretation cannot be considered totally unreasonable in light of the narrow statutory language of section 7602 and in view of the court's perception of the Service's massive responsibility for enforcing the tax laws.

VI. CONCLUSION: THE NEED FOR STATUTORY REFORM

In explaining its construction of section 7602, the Flagg court stated "that if the claimed authority is necessary for the effective performance of the congressionally imposed responsibilities to enforce the tax laws 'that authority should be upheld absent express statutory prohibition or substantial countervailing policies.'"135 Applying this liberal standard for summons enforcement to a TCMP case, one can conclude (1) that the TCMP is necessary to the Service's effective performance of its responsibilities; (2) that no express provision in section 7602 prohibits enforcement of TCMP summons;136 and (3) that burdens imposed on individual taxpayers au-

135. 634 F.2d at 1091 (quoting United States v. Euge, 444 U.S. 707, 711 (1980)).
136. For the text of section 7602, see supra note 3.
icted under the TCMP are outweighed by the great benefits the program provides both to the Service and to the entire taxpaying population. This construction implies no inherent statutory limitations on the Service's summons power. Any such limitations have developed only through court rules; thus, a judicial directive supporting summons enforcement “absent express statutory prohibition” is useless, since section 7602 contains no such prohibitions.

Because section 7602 provides neither useful nor practicable limitations on summons authority, statutory amendment could do much to alleviate current confusion and provide explicit guidelines for the Service, the courts, and individual taxpayers. Since, for example, it is frequently difficult to determine the purpose of an issued summons, section 7602 could provide that a summons is valid as long as at least one of its purposes is to ascertain the correctness of a return. This approach, derived from the decisions in United States v. LaSalle National Bank and United States v. First National Bank in Dallas would help assure that the Service could not issue “research” summonses arbitrarily. If Congress believes that summonses for research purposes should be beyond the scope of section 7602, the statute should be drafted so as to prohibit them explicitly.

Section 7602 could also be redrafted so that a summons could be issued for any institutional good-faith purpose, as suggested by the court in United States v. Powell. This approach would be enhanced by including examples of institutional good faith, in order to avoid creating a new series of interpretive difficulties. Perhaps a better approach would be to provide in section 7602 that summonses may be issued for the purpose of ascertaining the correctness of a return and furthering research projects whose primary objective is to alleviate the burdens of enforcement placed on taxpayers and the Internal Revenue Service. Such an amendment would bring the TCMP summons clearly within the bounds of section 7602, thereby

137. Because the Service's responsibility is to enforce the tax laws and ascertain and collect taxes, any summons it issues will be for these purposes—either directly or indirectly. Therefore, empowering the Service to issue a summons to ascertain the correctness of tax returns is, in effect, to give it unlimited statutory authority. That is, whether the Service is engaged in a criminal investigation or a research project, it will always be engaged in a tax-liability determination.


140. 379 U.S. 48 (1964). For a discussion of Powell, see supra notes 51-55 and accompanying text.
advancing the goals of increased enforcement efficiency and reduction of administrative costs. In the long run, this amendment would reduce the enforcement burdens currently borne by taxpayers. It is also sufficiently flexible to withstand the test of time, so that future I.R.S. research projects could be executed effectively. Most important, such an amendment would not mislead taxpayers and would help clarify current misunderstandings and doubts.

The TCMP is relatively new and was not contemplated by the enactment of section 7602. Only two circuit courts have addressed the TCMP summons issue, and no TCMP case has yet reached the Supreme Court. In an attempt to avoid the problem raised in First National Bank in Dallas and Flagg, the Service recently changed its definition of the TCMP from a "scientific research system for measurement and evaluation of taxpayer compliance characteristics" to "a random selection system to determine the correct tax liability." Yet the steps of the audit and the uses of the TCMP remain the same, even with the inclusion of the apparently magic words, "determine the correct tax liability."

Apparently the Service, faced both with a statute that limited its summons-issuing power and with a TCMP definition that made any summons it issued appear beyond the statute's scope, simply changed the program's definition in order to make it fit the statute's requirements. Such a transparent attempt to circumvent statutory requirements and judicial rules should not, as a matter of public policy, affect substantive argument on the issue: The Service is neither a legislative nor a judicial body. In short, if TCMP summonses are to be enforced—and this note suggests substantial reasons for such enforcement—they should be enforced with a sounder legal basis than a post hoc definitional change contrived by the Service itself.

Perhaps the best reason for enforcing TCMP summonses is the program's benefits for our tax-enforcement system. Because the TCMP has enabled the Service to use its limited resources more effectively, courts should not participate in activity that might set the tax-enforcement system back in its progress by refusing to enforce summonses necessary to its operation. Nevertheless, if courts are to enforce such apparently ultra vires summonses, the Service's enlarged summons power must be recognized statutorily. Such statu-

141. Both Flagg and First National Bank have been denied certiorari by the United States Supreme Court. 101 S. Ct. 1977 (1981); 101 S. Ct. 3051 (1981).
143. Id. (Aug. 27, 1980).
tory reform not only would serve the public interest by alleviating current confusion but also would provide an honest and realistic assessment of the summons power, so that summonses necessary to programs such as the TCMP could be enforced pursuant to express statutory guidelines.

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