The Institutional Good Faith Test for Enforcement of an Internal Revenue Service Summons: United States v. LaSalle National Bank

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THE INSTITUTIONAL GOOD FAITH TEST FOR ENFORCEMENT OF AN INTERNAL REVENUE SERVICE SUMMONS: United States v. LaSalle National Bank

I. INTRODUCTION

The Internal Revenue Service is charged with the responsibility of inquiring into and ascertaining the tax liability of all persons.1 Pursuant to this pervasive inquisitorial duty, the Service has the power to demand that a taxpayer or third party produce any information deemed relevant or material to any tax investigation.2

The purposes for which the summons power may be used are ostensibly limited by the language of section 7602.3 Nevertheless, the parameters of that power have been the subject of incessant litigation.4 The Internal Revenue Service seems determined to expand the scope of its summons power beyond the statutory language. Taxpayers and third parties seem equally determined to resist enforcement whenever and however possible.

In the judicial arena, the need for a swift and effective tax collection system has prevailed. The Supreme Court has consis-

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1 I.R.C. § 7601(a). Historically, this section was not used to interpret the scope of the summons power under § 7602. The Supreme Court, however, has recently used the language of both sections to determine the extent of the summons authority. See United States v. Bisceglia, 420 U.S. 141, 149 (1975). The result is a vastly expanded summons power. Id. at 153-56 (Stewart, J., dissenting). Congress reacted to the specific holding in Bisceglia by placing explicit limits on the use of the summons power when the name of the taxpayer is unknown. See I.R.C. § 7609(f).

2 I.R.C. § 7602(2). The Service is authorized to issue a summons to:
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.

3 I.R.C. § 7602 authorizes use of the summons for the following purposes:
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.

tently whittled away the substantive defenses against enforce-
ment of a summons until only the nebulous concept of improper
purpose retains viability as a basis for successful resistance. Within this category, the criminal purpose defense has been the 
most frequently invoked objection to enforcement of a summons.

The essence of the criminal purpose defense is that an Inter-
nal Revenue Service summons may not be used solely to gather
evidence of criminal tax violations. The utility of the defense,
however, was severely restricted by the Supreme Court's decision in United States v. LaSalle National Bank. In LaSalle, the Court
held that a summons must be issued in good faith prior to a
recommendation for prosecution from the Internal Revenue Ser-
vice to the Justice Department. Furthermore, the subjective in-
tent of an Internal Revenue Service agent is not determinative of
sole criminal purpose; the proper test is institutional good faith.

While purporting to preserve a good faith test for enforcibil-
ity, the Court effectively disposed of the issue by requiring the
party attacking the summons to prove that no valid civil tax
purpose existed. Thus, from a practical standpoint, the criminal
purpose defense will not bar enforcement of a summons unless the
Service has formally recommended criminal prosecution of the
taxpayer. This conclusion as to the current status of the criminal
purpose defense is derived from an analysis of (1) the evolution
of the defense, (2) the compromise holding of LaSalle, (3) the
soundness of the rationale, and (4) the institutional good faith
test.

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\(\text{See, e.g., United States v. Miller, 425 U.S. 435, 442-43 (1976) (taxpayer lacks any}
\text{fourth amendment interest in third-party summons; no reasonable expectation of privacy}
in bank records); Fisher v. United States, 425 U.S. 391, 402, 404, 414 (1976) (attorney must
produce workpapers of taxpayer's accountant; such production in compliance with sum-
mons is not barred by any fifth amendment privilege of the taxpayer or by any attorney-
client privilege); Couch v. United States, 409 U.S. 322, 335-36 (1973) (no fourth or fifth
amendment bar to production of taxpayer's records by accountant); cf. Beckwith v.
United States, 425 U.S. 341, 344 (1976) (absent custodial interrogation, taxpayer has no
right to} \text{Miranda} \text{warnings before interview by tax agents even where the possibility of}
criminal prosecution exists).\)

\(\text{For general discussions of the criminal purpose defense, see Van Wert, Tax Frauds}
\text{and the Government's Right of Access to Taxpayer's Books and Records, 5 Pepperdine L.}
\text{Rev. 403 (1978)}; \text{Stroud, The Criminal Prosecution Defense: A Defense to a Section 7602}
\text{Summons?}, 4 Am. J. Crim. Law 152 (1975-76).}\)

\(\text{See text accompanying notes 24-38 infra.}\)

\(98 \text{ S. Ct. 2357 (1978).}\)

\(\text{Id. at 2366.}\)

\(\text{Id. at 2367-68 & n.19.}\)

\(\text{Id. at 2367.}\)
II. THE EVOLUTION OF THE CRIMINAL PURPOSE DEFENSE

The criminal purpose theory originated in United States v. O'Connor, a lower court case in which the taxpayer's accountant successfully argued that a summons issued in aid of a criminal prosecution should not be enforced. At least one purpose of the summons, issued by a special agent whose assigned investigation of the taxpayer had been completed, was to secure specific information about the sources of the taxpayer's income for use by the Justice Department in a criminal case then pending against the taxpayer. The court held that under the circumstances enforcement of the summons would be contrary to public policy. The rationale of the court was that the statute limited the purposes for which the summons could be used, Congress had not granted unlimited administrative agency power for pretrial discovery in criminal cases, and such power historically was vested in the grand jury.

In Boren v. Tucker, the criminal purpose objection was subsequently raised as a defense against enforcement of a summons issued by a special agent to a corporation in an investigation into the individual tax liability of its officers. Although issuance by a special agent implied that criminal charges were being considered, the lower court ordered enforcement and held the taxpayers in civil contempt for their refusal to comply. On appeal, the Ninth Circuit held that the mere possibility of criminal prosecution did not invalidate the summons because the actual amount

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Although O'Connor interpreted § 3614 of the Int. Rev. Code of 1939, 53 Stat. 438, it has been consistently cited by the Court in § 7602 cases. See, e.g., Donaldson v. United States, 400 U.S. 517, 533 (1971).

118 F. Supp. at 249-50. O'Connor did not bar use of the summons only if its sole purpose was that of gathering information for a criminal prosecution; in fact, the court explicitly acknowledged the civil nature of the investigation and then refused to enforce the summons because one of the purposes was to aid a criminal prosecution. See, id. at 250; Van Wert, supra note 2, at 415-16.

118 F. Supp. at 250.

Boren v. Tucker, 239 F.2d 767, 768-69 (9th Cir. 1957).

Determination and investigation of civil tax liability is normally the function of a revenue agent, whereas a special agent is responsible "for the development of evidence pertaining to the potential criminal features of the case and the ad valorem additions to the tax . . . ." 5 INT. REV. MAN. - AD. (CCH) § 9324.2, at 28,080 (11-78). Thus, issuance of a summons by a special agent is an indication that a criminal investigation is under way.

239 F.2d at 768-69.
of tax due varies with the presence or absence of fraud.\textsuperscript{20} While agreeing in theory with the \textit{O'Connor} holding, the court nevertheless distinguished it on its facts.\textsuperscript{21}

Within their respective factual contexts, \textit{O'Connor} and \textit{Boren} are analytically sound decisions.\textsuperscript{22} Read together, the cases stand for the proposition that a summons issued in aid of a pending criminal prosecution is improper, but the mere fact that the summons may uncover evidence of value in a future criminal case will not preclude its enforcement if it retains a valid civil tax purpose.\textsuperscript{23}

In \textit{Reisman v. Caplin},\textsuperscript{24} the Supreme Court stamped its imprimatur on the criminal purpose defense. After dismissing an appeal for an injunction to bar an Internal Revenue summons on the grounds that an adequate remedy was provided at law,\textsuperscript{25} the Court stated that “in any of these procedures . . . the witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution . . . .”\textsuperscript{26} By this unfortunate choice of words, the Court implied that every use of the summons power to investigate possible violations of criminal law was improper.

Less than a year later, the Supreme Court restated the improper purpose doctrine in \textit{United States v. Powell}.\textsuperscript{27} The issue in the case was what criteria should be used to determine if a

\textsuperscript{20} \textit{Id.} at 772 (alternative holding). If no fraud is found, the amount of tax due would be limited to the deficiencies between the amount paid and the amount payable, if any. However, where the deficiencies in tax are the result of fraud, an additional 50\% is assessed as a penalty. I.R.C. § 6653(b).

\textsuperscript{21} 239 F.2d at 772-73.

\textsuperscript{22} When the facts of \textit{O'Connor} and \textit{Boren} are measured against the holdings of all subsequent Supreme Court decisions relating to the criminal purpose defense, including \textit{LaSalle}, the same results obtain. See text accompanying notes 24-39, 63-71 infra.

\textsuperscript{23} See Comment, \textit{Taxpayer Intervention at Summary Proceedings to Enforce an Internal Revenue Service Summons}, 32 Md. L. Rev. 143, 151 (1972).

\textsuperscript{24} 375 U.S. 440 (1964) (unanimous decision).

\textsuperscript{25} \textit{Id.} at 443. The adequate remedy is that in order to enforce a summons when compliance is not forthcoming, the Internal Revenue Service must petition the District Court to order compliance. The Court found this procedure to be sufficient protection for the taxpayer. \textit{Id.} at 445-46.

\textsuperscript{26} \textit{Id.} at 449 (citing \textit{Boren v. Tucker}, 239 F.2d 767, 772-73 (9th Cir. 1956)) (emphasis added).

\textsuperscript{27} 379 U.S. 48 (1964).
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summons is enforceable. The Court rejected any probable cause standard even where assessment of ordinary tax deficiencies was barred by the statute of limitations and the only basis for further investigation was fraud. Using only a statutory analysis, the Court held that the burden on the Service was four-fold: “[to] 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 [its] possession, and that the administrative steps required by the Code have been followed . . . .” Once these threshold requirements are met, the summons is enforceable unless the taxpayer or third party offers substantial evidence that the summons was issued for an improper purpose, which the Court defined as any use of the summons for a purpose adversely “reflecting on the good faith of the particular investigation.” Furthermore, utilization of the judiciary to enforce such a summons constitutes an abuse of the Court’s process.

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28 Id. at 51. The actual holding contains a caveat: “the Government need make no showing of probable cause to suspect fraud unless the taxpayer raises a substantial question that judicial enforcement . . . would be an abusive use of the court’s process . . . .” Id. (emphasis added). No subsequent cases were found in which such a standard was imposed. One situation in which the Court has implied that probable cause and a search warrant would be required in place of a summons is where the Service seeks to obtain an individual taxpayer’s personal business records directly from him. See Andresen v. Maryland, 427 U.S. 463, 473-74 (1976). The importance of the caveat to the criminal purpose defense, however, is that if the taxpayer can make a substantial showing of improper criminal purpose, then Powell implies that the Service should be required to meet the probable cause standard before the summons could be enforced, whether directed to the taxpayer personally or to a third party.

29 379 U.S. at 57. The summons may still serve a noncriminal purpose because no statute of limitations applies to civil fraud. See I.R.C. § 6501(c).

30 There were no constitutional issues raised in Powell. In light of subsequent Court decisions, there appear to be no such issues which would act as a complete bar to enforcement of a third-party summons. See note 5 supra.

31 379 U.S. at 57-58.

32 The burden placed on the Service is minimal: it is met by filing an affidavit with the petition for enforcement alleging that each of the four requirements has been met. The format may be virtually verbatim from the language of the Court, with the addition of such facts as the name of the taxpayer or business under investigation. See, e.g., Donaldson v. United States, 400 U.S. 517, 520 (1971); United States v. Morgan Guar. Trust Co., 572 F.2d 36, 37 (1978); cf. Miller, ADMINISTRATIVE AGENCY INTELLIGENCE-GATHERING: AN APPRAISAL OF THE INVESTIGATIVE POWERS OF THE INTERNAL REVENUE SERVICE, 6 B.C. INDUS. & COM. L. REV. 657, 680-81 (1965) (the burden of proof of impropriety or absence of administrative requirements is on the taxpayer or third party, not the Service).

33 379 U.S. at 58. As specific examples of bad faith, the Court cited harassment or pressure to settle a collateral dispute.

34 Id. It may be noted that in a companion case, the Powell criteria were made appli-
With the good faith element interjected into the concept of improper purpose, the Supreme Court subsequently felt compelled to clarify the ambiguous Reisman dictum.\footnote{Donaldson v. United States, 400 U.S. 517, 531-32 (1971). Having denied the right of the taxpayer to intervene in an enforcement proceeding against his employer, the Court had no need to consider his substantive defense.} Using the organizational structure of the Internal Revenue Service as its reference point,\footnote{Id. at 534-35. Of significance to the Court was the fact that the Service is organized in such a manner that responsibilities for civil and criminal investigations are intertwined.} the Donaldson Court concluded that a summons issued by a special agent has a dual criminal and civil purpose.\footnote{Id. at 535. But see United States v. Friedman, 388 F. Supp. 963, 969-70 (W.D. Pa. 1975), aff'd, 532 F.2d 928 (3d Cir. 1976); Comment, Constraints on the Administrative Summons Power of the Internal Revenue Service, 63 Iowa L. Rev. 526 (1977).} To deny enforcement of such a summons would unnecessarily hamper the legitimate investigatory power of the Service. The Reisman dictum was restricted to pending criminal prosecutions or investigations solely for criminal purposes.\footnote{400 U.S. at 533.} The Court then formulated a two-prong test for enforcement of an Internal Revenue summons: it must be “issued in good faith and prior to a recommendation for criminal prosecution.”\footnote{Id. at 536.}

Absent any concrete guidelines from the Court, its attempt at clarification led only to confusion and conflict in the lower courts revolving around two issues: (1) at what stage of the Internal Revenue Service procedure the determinative recommendation occurs,\footnote{See, e.g., United States v. Hodge & Zweig, 548 F.2d 1347, 1351 (9th Cir. 1977) (crucial recommendation is from the Service to the Justice Department); United States v. Lafko, 520 F.2d 622, 624-25 (3d Cir. 1975) (determinative recommendation is within the hierarchy of the Service; reversing district court holding that Donaldson meant a recommendation from the Justice Department to the Service); United States v. Billingsley, 469 F.2d 1208, 1209 (10th Cir. 1972) (referral by the Service to Justice is determinative; reversing district court holding that recommendation by special agent to his superiors precluded enforcement).} and (2) whether the criminal purpose defense raises a question of good faith.\footnote{Compare United States v. Zack, 521 F.2d 1366, 1368 (9th Cir. 1975) with United States v. Morgan Guar. Trust Co., 572 F.2d 36, 41 (2d Cir. 1978).} Courts concerned with pinpointing the exact moment when the prohibitive recommendation occurred generally disregarded the good faith element in the Donaldson test. The underlying premise of these cases was that the summons could not be chal-
lenged on criminal purpose grounds unless prosecution was pending or had been recommended. Other courts, however, insisted that the good faith element must be considered even if no recommendation for prosecution had been made.

A comparison of *United States v. Morgan Guaranty Trust Co.* with *United States v. Wall Corp.* illustrates the extent of disagreement in the lower courts. After reviewing the evolution of the criminal purpose defense in *Morgan Guaranty*, the Second Circuit Court strongly argued that *Donaldson* imposed an objective test for enforcement of a summons in aid of a criminal investigation: the only necessary inquiry being whether in fact a recommendation had been made for criminal prosecution. In its opinion, the good faith element was wholly inapplicable to the issue of improper criminal purpose. This interpretation is diametrically opposed to the analysis of the District of Columbia Circuit Court in the *Wall Corp.* case:

Our inquiry is not ended upon a determination that prosecution has neither been instigated nor recommended, since *Donaldson* also requires that a summons be issued "in good faith." Thus, if it can be shown that the investigating agent had already formed a firm purpose to recommend criminal prosecution even though he had not as yet made a formal recommendation, issuance of the summons would presumably be in bad faith. Similarly, if the civil liability were already determined, the summons would appear to be solely for a criminal purpose.

In spite of their obvious theoretical conflict, these two cases have much in common: (1) both assumed that the good faith test would require probing the mental processes of the special agent; (2) neither offered any real protection to the taxpayer; and (3)
the Supreme Court rejected both extremes in the LaSalle case.

III. THE COMPROMISE OF LaSalle

An Internal Revenue Service special agent issued two summons to the LaSalle National Bank for all documents and correspondence pertaining to certain trusts administered by the bank on behalf of the taxpayer. When the bank refused to comply, the Service petitioned the district court for enforcement. In response, the bank invoked the criminal purpose defense as grounds for denial of enforcement, arguing that it did not have to establish that a particular summons could serve no civil purpose, but only that the special agent’s investigation was “solely for the purpose of gathering evidence for use in a criminal prosecution.”

At the hearing, the special agent testified that he had specifically requested assignment to investigate the taxpayer on the basis of information received from extraneous sources, but that no other law enforcement agency had suggested the investigation. He further stated that his objective was to investigate possible criminal tax violations; that no revenue agent was jointly assigned to the investigation; and that at the time of the enforcement petition, he had not concluded that criminal charges should be filed nor made any such recommendation to his superiors. In its petition for enforcement, however, the Service alleged that the documents contained information necessary to establish the civil tax liability of the taxpayer and that the Service did not already possess such information.

Although acknowledging the inherent probability that a criminal investigation has concurrent civil tax aspects, the district court nevertheless found that the special agent’s sole interest was to gather evidence for a criminal prosecution. Applying

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81 98 S. Ct. at 2359-60.
82 The Internal Revenue Service has no authority to enforce its own summons but must rely on the courts to do so. See I.R.C. § 7402(b).
83 98 S. Ct. at 2360 (quoting Brief for Respondents at 77).
84 98 S. Ct. at 2359 (citation omitted).
85 Id. at 2359-60 (citations omitted).
86 Id. at 2360 (citation omitted). These allegations were necessary to meet the Powell criteria for enforcement of a summons. See text accompanying note 30 supra. The allegations as to a civil purpose, however, were discounted by the district court. See 98 S. Ct. at 2360-61 (by implication).
87 98 S. Ct. at 2361.
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the improper purpose dictum from Reisman v. Caplin, and the two-prong test of Donaldson v. United States, the court held that when an Internal Revenue Service investigation focuses upon a criminal prosecution as its end goal, a summons issued in aid of such investigation is not in good faith, even though no formal recommendation for prosecution has been made. The lower court therefore refused to enforce the summonses.

On the grounds that the district court's finding of sole criminal purpose was one of fact which was not clearly erroneous and that such finding was consistent with the legal test articulated in Donaldson, the Seventh Circuit affirmed the denial of enforcement. In a 5-4 decision, the Supreme Court reversed and remanded the case on the grounds that the lower courts had not applied the proper legal standard for determining whether an investigation is conducted solely for criminal purposes.

In granting certiorari, the Supreme Court specifically intended to resolve the conflicts over the meaning of the Donaldson test as applied to the criminal purpose defense. Its decision leaves no doubt that the test is bifurcated and that both elements apply when the issue of improper criminal purpose is raised. The determinative point in time contemplated by the test is when the formal recommendation for criminal prosecution is made by the Internal Revenue Service to the Justice Department. Prior to such recommendation, the test is one of institutional good faith.

Relying on isolated provisions of the present Internal Revenue Code, the historical precursors of the summons power, and
the organizational structure of the Service, the Court reiterated the dual purpose doctrine: the civil and criminal purposes of section 7602 are inherently inseparable by Congressional design. Thus, reasoned the Court, it necessarily follows that any investigation into possible criminal tax violations has an underlying civil purpose (the determination of the applicability of the 50% civil tax penalty) unless and until the Internal Revenue Service abandons or otherwise completely settles the tax penalty issue.

Even the fact that a criminal case is being prosecuted by the Justice Department does not dispose of the civil aspects of the investigation. Thus, prohibiting use of the summons after a recommendation to the Justice Department is not mandated by the dual purpose analysis: it is a precautionary measure imposed by the Court to preserve the traditional accusatory function of the grand jury and to prevent circumvention of the limitations placed on the government’s discovery rights in a criminal proceeding.

The dual purpose analysis, however, is the underlying premise of the Court’s refusal to allow the summons to be used in aid of a solely criminal investigation. The good faith test is met only if it is determined that the summons was issued in honest pursuit

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69 Id. at 2363 n.12. The Court’s point in reviewing the organizational structure of the Service was that special agents are not only responsible for criminal investigations but also for civil fraud violations of the Code.

70 Id. at 2363.

71 Id. at 2365.

72 Id.

73 Id. Since their original articulation in O’Connor, these are the only reasons cited for refusal to enforce a summons when a criminal prosecution is pending. See United States v. Morgan Guar. Trust Co., 572 F.2d 36, 42 (2d Cir. 1978).

None of the cases include any analysis of the comparative scope of the Internal Revenue Service summons power and the grand jury subpoena power or the Justice Department’s expanded pretrial discovery rights in criminal cases. The premise, however, is that constitutional safeguards exist in the latter contexts which do not apply to administrative agency summonses. Cf. Abel v. United States, 362 U.S. 217, 226 (1960) (dictum). The Court has, however, analogized the scope of the IRS summons power to that of the grand jury. United States v. Powell, 379 U.S. 48, 57 (1964) (dictum). Nevertheless, the Court has consistently stated that administrative agency summons power may not be used solely for criminal purposes. Conversely, the grand jury subpoena power may not be used as a subterfuge to gather evidence solely for civil proceedings. Compare United States v. Kordel, 397 U.S. 1, 11-12 (1970) (dictum) with United States v. Proctor & Gamble Co., 356 U.S. 677, 683-84 (1958).

For the scope of the government’s pretrial discovery, see Moore, CRIMINAL DISCOVERY, 19 HASTINGS L. J. 865 (1968); Note, PROSECUTORIAL DISCOVERY UNDER PROPOSED RULE 16, 85 HARV. L. REV. 994 (1972). For role of the grand jury in tax cases, see Morvillo, Grand Juries and Their Use in Criminal Tax Controversies, N.Y.U. 35TH ANN. INST. ON FED. TAX. 249 (1977).
of a statutorily-authorized purpose.\textsuperscript{74} Section 7602 on its face limits use of the summons to determination and collection of civil tax.\textsuperscript{75} While the interrelated civil and criminal tax enforcement provisions of the Code imply that the summons may be used when a \textit{dual} purpose exists, there is no authority for such use if the civil tax element disappears altogether. Absent an express, affirmative grant of such authority, the Court would not permit the summons to be used exclusively for criminal purposes.\textsuperscript{76}

While theoretically preserving the criminal purpose defense prior to a recommendation for prosecution, the Court acknowledged that it would seldom have any practical applicability because a solely criminal investigation would be "an extraordinary departure from the normally inseparable goals of examining whether the basis exists for criminal charges and for the assessment of civil penalties." The Court rejected the argument that such a departure may be established by probing the subjective intent of the issuing agent.\textsuperscript{77} By referring to the standard procedures set forth in the Internal Revenue Service Manual for reviewing a special agent's recommendation,\textsuperscript{78} the Court concluded that the motives of the special agent do not substantially determine the ultimate outcome of the investigation. In the Court's opinion, the established bureaucratic process provides the taxpayer with sufficient protection from the poor judgment of the investigating agent.\textsuperscript{79}

The Court underscored its decision with two policy considerations: (1) the legitimate tax enforcement function of the Service

\begin{itemize}
\item \textsuperscript{74} 98 S. Ct. at 2367.
\item \textsuperscript{75} See note 3 supra.
\item \textsuperscript{76} 98 S. Ct. at 2367 n.18.
\item \textsuperscript{77} Id. at 2366.
\item \textsuperscript{78} Id. at 2367. The Court specifically noted, however, that the subjective intent of the agent may be important where other issues of bad faith are raised such as harassment. Id. at 2367 n.17. For extraordinary circumstances under which bad faith harassment may be alleged, see United States v. Fensterwald, 553 F.2d 231, 232 (D.C. Cir. 1977) (taxpayer previously served as counsel to senate committee investigating the IRS); United States v. Church of Scientology, 520 F.2d 818, 822, 825 (9th Cir. 1975) (allegations of harassment were not sufficient to allow immediate discovery but were enough to require a limited hearing to determine if discovery should be allowed).
\item \textsuperscript{79} 98 S. Ct. at 2366-67. Even if a special agent recommends criminal prosecution, that decision is not made final until it has been reviewed by supervisors on at least two different levels within the Service. In addition, the possibility that the Service will pursue penalties for civil fraud remains.
\item \textsuperscript{80} Id. at 2367.
\end{itemize}
should not be obstructed by the personal motivation of one lower-echelon employee; and (2) judicial inquiry into the mental processes of individual agents would result in unwarranted delay in the enforcement procedures.\textsuperscript{81}

In lieu of a subjective test, \textit{LaSalle} shifts the focus of inquiry into improper criminal purpose at the pre-recommendation stage to the institutional policies of the agency. Thus the issue is whether the Service, as an institution, has abandoned these policies in the particular investigation. The burden is on the party opposing the summons to show such an abandonment. In particular, the Court expressly imposed upon those parties the onerous burden of proving a negative: that there is no valid civil tax purpose to the summons.\textsuperscript{82}

Although the Court thus severely restricted the criminal purpose objection, it addressed a stern warning to the Service:

\begin{quote}
We shall not countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution. Such a delay would be tantamount to the use of the summons authority after the recommendation . . . . Similarly, the good-faith standard will not permit the IRS to become an information gathering agency for other departments, including the Department of Justice, regardless of the status of criminal cases.\textsuperscript{83}
\end{quote}

In a brief but stinging opinion, four dissenting justices castigated the position of the majority.\textsuperscript{84} The dissent found no valid statutory or constitutional reason for imposing the good faith requirement on the use of an Internal Revenue Service summons for criminal investigation purposes. Instead, the only standard acceptable to the dissent was the objective test enunciated in \textit{Donaldson}. Thus the sole question should be whether the summons was issued prior to a recommendation for prosecution. If so, the summons should be enforced without regard to any inquiry into its civil or criminal purposes. From the dissent’s perspective, the institutional good faith test is untenable: its end result will be infinite discovery attempts by the taxpayer and third parties.

\begin{itemize}
\item\textsuperscript{81} Id.
\item\textsuperscript{82} Id.
\item\textsuperscript{83} Id. at 2367-68.
\item\textsuperscript{84} Id. at 2369-70.
\end{itemize}
which will unduly interfere with the legitimate tax enforcement duties of the Service. 85

IV. THE SOUNDESS OF THE RATIONALE

The Court's use of the language of section 7602, the legislative history, and the internal organization of the Service to resolve the issue of improper criminal purpose is entirely consistent with its approach to any issue of the scope of an administrative agency's summons power: the point of departure is always the statutorily-authorized purpose. 86 If a summons is issued within the parameters of the statute, it will generally be enforced.

Although commentators have vociferously criticized the Court's dual purpose analysis, 87 it may be argued that Congress has at least acquiesced in this interpretation. In the Tax Reform Act of 1976, Congress specifically reacted to the Court's holding in Donaldson that a taxpayer could not intervene in an enforcement proceeding as a matter of right. 88 Notably absent from the comprehensive provisions of the Act was any change in the language of section 7602 which would have evidenced any disagreement with the Court's determination that a summons could be issued in aid of an investigation of criminal tax violations so long as it retained a valid civil tax purpose. Furthermore, in the legislative history of the Act, there is no indication that Congress disapproved of the prohibition against using the summons solely

85 Id. at 2369. But see text accompanying notes 99-105 infra.
86 In the leading Supreme Court case concerning the scope of administrative agency summons power, the Court said: "It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command," Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 209 (1946) (dictum). For a general discussion of the scope of administrative agency subpoena powers, including the IRS, see 3 B. Mezines, J. Stein, J. Gruff, ADMINISTRATIVE LAW §§ 19.02-20.05 (1979). For an analysis of the IRS summons power in the context of the leading administrative law cases, see Miller, supra note 32, at 668-78.

Congress added I.R.C. § 7609(b) which gives a taxpayer the right to intervene in a summons enforcement proceeding and to stay compliance by a third party. These provisions apply only when a summons is issued to certain third parties: banks, savings and loan associations, credit unions, credit card issuers, stock brokers, attorneys, and accountants. See I.R.C. § 7609(a). These changes in the Code, however, would not alter the result in Donaldson where a summons is issued to an employer. See 400 U.S. 517, 518-19 (1971).
for criminal purposes. In fact, the Committee reports explicitly indicate that Congress did not intend to affect the substantive defenses of the taxpayer against enforcement of the summons, although the taxpayer-intervenor may now raise certain procedural defenses previously reserved to the third party.8

The Court's stated rationale for refusal to consider the special agent's subjective intent is not so easily supported. The agent's investigation is more than a cursory examination of the facts to determine the possibility of fraud. Its function is to develop sufficient evidence to determine whether criminal prosecution is warranted.0 Although multiple layers of review exist, the purpose of that review is to determine the adequacy of the known facts to support a legal theory of fraud. If at any stage of the review process the facts are deemed insufficient, the criminal investigation is not necessarily dropped. The case may instead be returned to the agent for further investigation.2

It is difficult to perceive any protection for the taxpayer from the overzealousness of a special agent in this procedure. If his subjective intent may not be probed, any experienced agent with a passing knowledge of the case law in this area will conduct a


When a summons is attacked on procedural grounds, the result is rarely complete denial of enforcement. Instead, the courts tend to narrow the scope of the inquiry and/or require the government to reimburse the respondent. Note, IRS SUBPOENA POWER TO INVESTIGATE UNKNOWN TAXPAYERS, 50 N.Y.U. L. Rev. 177, 179-85 (1975). See Note, IRS ACCESS TO BANK RECORDS; PROPOSED MODIFICATIONS IN ADMINISTRATIVE SUBPOENA POWER, 28 Hastings L.J. 247, 270-71 (1976); Constraints on the Administrative Summons Power of the Internal Revenue Service, 63 Iowa L. Rev. 526, 531-33 (1977). The latter remedy has apparently been superseded by a new provision in the Internal Revenue Code providing for reimbursement of the reasonable costs incurred in complying with a third-party summons. See I.R.C. § 7610(a).


11 See, e.g., United States v. Lafko, 520 F.2d 622, 623-24 (3d Cir. 1975); Bacon, supra note 91 at 200.
meticulous investigation before he makes a recommendation for prosecution.\textsuperscript{93}

The policy considerations cited by the Court to bolster its argument are likewise subject to criticism. The viability of the tax system may hinge upon swift and efficient enforcement which will not tolerate obstructive or dilatory tactics by the taxpayer, but it is not the taxpayer's motives which are at issue in this case. Why should the taxpayer suffer an unnecessary invasion of his privacy with the concomitant probability of damage to his business and personal reputations merely because the special agent's investigation retains some trace of a valid civil tax purpose? The more reasonable approach would have been to place the responsibility for frustration of the legitimate goals of the Service squarely on its own shoulders when one of its employees acts imprudently. The occasional inability of the Service to build a criminal or civil fraud case against a taxpayer might have had the laudable effect of containing hasty, ill-advised investigations before the taxpayer sustained any irreversible damage.

While expediency was the articulated basis for the restriction on judicial inquiry into the subjective intent of the special agent, it may be noted that the courts have been consistently reluctant to probe into the thought processes of administrative agency decisionmakers absent an absolute necessity to do so.\textsuperscript{94} The mental processes privilege, originally formulated by the Supreme Court in the context of judicial review of formal agency actions, has been extended by the lower courts to informal decisions as well. In particular, the privilege has been held to bar taxpayer access to Internal Revenue Service documents which relate to the purely deliberative processes of agency personnel\textsuperscript{95} and to allow an agent to refuse to answer questions concerning his mental impressions, conclusions, and opinions.\textsuperscript{96}

\textsuperscript{93} Agents are well informed of the practical ramifications of the court decisions on the conduct of investigations. It is obviously in the best interest of the Service to update its directives to the agents so that investigatory methods maximize the information-gathering powers granted by the courts. See \textit{5 INT. REV. MAN. - AD. §§ 261-267.51, at 28,801-06 (12-78).}


\textsuperscript{96} ISI Corporation v. United States, 503 F.2d 558, 559 (9th Cir. 1974).
V. THE INSTITUTIONAL GOOD FAITH TEST

The Supreme Court cited no authority for its conclusion that the proper legal standard must be based upon the good faith of the Service as an institution. Thus, the conceptual origins of the institutional good faith test are unknown. The idea of institutional good faith, however, is a logical corollary of the theory of institutional decisions articulated by Professor Kenneth Culp Davis in his treatise on administrative law: "Decisions are and must be anonymous, for they are in truth an institutional product. The superior officers never see the bulk of the cases, but the cases reflect the views of those officers through their instruction and supervision and advice and check, and sometimes through their direct consideration." 7

The institutional good faith test is arguably an objective standard. As an analytical methodology for determining whether a summons issued prior to a recommendation for prosecution is for an improper criminal purpose, it is a relatively simple approach. As a point of departure, it requires the courts to refer to the established rules, regulations, and internal procedures of the Service. The posture of the agency in a particular case must then be measured against applicable institutional guidelines. If the Service has substantially deviated from its standard procedures or arbitrarily disregarded existing rules or regulations, the court may conclude that the summons was issued in bad faith. 8

The simplicity of the approach is deceptive, however, because the Court left one major question unanswered: How is the institutional posture of the Service to be determined? If the test is intended to be objective, then the answer must be that the position of the Service is ascertainable from its records: the special agent’s notes and reports, correspondence in the taxpayer’s file, internal memoranda, and the like. This is precisely what may have prompted the dissent to express concern that the majority’s approach would lead to “endless discovery proceedings." 9

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8 Cf. Center on Corporate Responsibility, Inc. v. Shultz, 368 F. Supp. 863, 867-78 (D.D.C. 1973) (taxpayer entitled to refund and injunctive relief compelling IRS to grant an exemption from tax). Shultz is an excellent example of the analytical methodology suggested by the institutional good faith test of LaSalle. The district court painstakingly compared the manner in which the taxpayer’s request for an exemption was handled by the IRS at all levels with the applicable regulations, procedures, and rulings published by the IRS.
9 98 S. Ct. at 2369.
The lower courts, however, have severely restricted the discovery rights of the taxpayer in enforcement proceedings. While some disagreement exists, the prevalent attitude is that an enforcement proceeding is summary in nature. Unless the taxpayer raises a substantial question that the summons has been issued for an improper criminal purpose, the courts have generally denied any discovery. Mere allegations of improper purpose are not enough; the pleadings must be supported by sufficient facts from which improper purpose may be inferred. If the taxpayer cannot meet this threshold requirement, the summons is enforced. To determine the sufficiency of the supporting facts, some courts have determined that a limited evidentiary hearing should be held prior to discovery by the taxpayer or third party. Even if the facts cast suspicion upon the motivation of the Service, where the court determines that discovery would serve no useful purpose, the taxpayer has been denied access to the agency files.

By requiring the taxpayer to disprove the existence of any valid civil tax purpose, the Supreme Court effectively foreclosed the possibility of discovery in the ordinary case. Unless the taxpayer already possesses firm facts to indicate that no civil tax penalty could attach under any circumstances, he will be unable to meet the threshold requirements. Thus, the only time he could have access to the information he needs to establish institutional bad faith would be when he doesn’t need that information at all. Assuming arguendo that the taxpayer gets by the discovery

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103 See, e.g., United States v. Church of Scientology, 520 F.2d 818, 824 (9th Cir. 1975); United States v. Salter, 432 F.2d 697, 700 (1st Cir. 1970). But see Pierson v. United States, 428 F. Supp. 384, 390 (D. Del. 1977) (taxpayer may obtain discovery upon a showing of relevance unless documents or information sought is subsequently determined to be privileged).


barrier, the probability of the records revealing an abandonment of the civil fraud penalty is virtually nil. Knowing that it must preserve some trace of potential civil tax liability in order to use the summons power for criminal investigation purposes, the Service has no incentive to abandon the possibility of collecting that penalty. While the statute of limitations for assessment of ordinary tax deficiencies is three years, there is no limitation for collection of taxes due in case of fraud, willful attempt to evade taxes, or failure to file a return. In contrast, the limitation for prosecution of criminal tax violations is six years. Thus in any case in which fraud is suspected, the standard procedure is to set aside the civil aspects of the case until the criminal investigation is completed. Even if the investigation fails to uncover sufficient evidence to sustain a criminal conviction, the possibility of civil tax fraud remains because of the differences in the burden of proof the government must meet. Under the circumstances it is difficult to imagine any situation in which the Service would entirely dispose of the civil tax issue before completion of the special agent's investigation into potential criminal liability.

VI. CONCLUSION

For all practical purposes the LaSalle decision limits the criminal purpose defense to post-recommendation cases. Except in extraordinary situations, the court's inquiry need go no further than determination of one fact: Has there been a formal recommendation of prosecution from the Internal Revenue Service to the Justice Department? For the ordinary taxpayer facing a criminal tax investigation, the burden of disproving the existence of any civil tax liability makes the institutional good faith test illusory.

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106 I.R.C. §§ 6501(a), 6501(c).
107 Id. § 6531.
108 See, e.g., 5 INT. REV. MAN. - AD. (CCH) § 9324.31, at 28,082-83 (11-78).
109 The government need only show civil fraud by clear and convincing proof whereas criminal fraud must be established beyond a reasonable doubt. Comment, Civil Tax Penalties: Changes and Recommendations, 5 PEPPERDINE L. REV. 465, 486 (1978).
110 There may be two circumstances under which the civil tax issues might be deemed completely settled: (1) the taxpayer and the IRS have entered into a closing agreement allowing the IRS to collect a deficiency after the statute of limitations has expired in return for dropping the fraud penalty; or (2) the taxpayer has protested assessment of an alleged deficiency in court proceedings, the IRS raised a defense of fraud, and the taxpayer won. See Nash, Effective Internal Revenue Service Appellate Division Practice, N.Y.U. 35TH ANN. INST. ON FED. TAX. 325, 342-43, 345 (1977).
If the good faith element of the *Donaldson* test provides no viable protection for the taxpayer, why did the majority insist that it is applicable when the issue of sole criminal purpose is raised? Beyond its concern with the possibility of delay at the higher levels of review merely to build a stronger case against the taxpayer, the Court unequivocally put the Service on notice that it would not tolerate abuse of the legitimate summons power for non-tax purposes. The Court thus implicitly recognized the inherent danger in allowing the Internal Revenue Service to use its summons power to gather information for other agencies. With financial overtones to virtually every private endeavor, the Service is in a unique position to act as a central data collection agency for the rest of the government. With no good faith limit on the summons power, it could be used to circumvent the statutory and constitutional limitations placed on other agencies by Congress and the Court.

While the institutional good faith test severely restricts the utility of the criminal purpose defense, the Court's tenacious refusal to dispense with this requirement may be viewed as a compromise between the legitimate criminal tax enforcement function of the Service and the dangers of an unlimited summons power. By retaining the good faith element—albeit in an ambiguous, elusive form—the Court reserved the right to invoke the doctrine as deemed necessary in the future to prevent gross abuses of the summons power solely for the purpose of criminal prosecution.\[11\]

*Dorothy J. Cramer*

\[11\] 98 S. Ct. at 2368 n.20.