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INSTITUTIONAL POSTURE: A MEASUREMENT FOR GOOD FAITH IN AN IRS SUMMONS ENFORCEMENT PROCEEDING

I. Introduction

The Internal Revenue Service (IRS or Service) is authorized to issue administrative summonses1 to taxpayers and third parties pursuant to section 76022 of the Internal Revenue Code (IRC or Code). The summons may be used in two instances: to compel presentation of books and records to verify the content of any return that has been filed; or, to prepare a return where none has been filed.3 Frequent disputes have arisen between the IRS and taxpayers, who claimed that IRS special agents have exceeded their section 7602 summons power.4

1. The extent of an administrative agency's investigatory or inquisitional powers to require disclosure, either through inspection of records or testimony of witnesses, depends upon the grant of power given by statute. The agency is usually held to have the power to demand disclosure of information as to matters within its competency, but compulsion must be exerted only through the judicial process.

Courts are liberal in permitting an administrative agency full exercise of its powers to subpoena records and will generally enforce a subpoena as long as the documents contain evidence which relates to the matter in question and the scope of the subpoena is within constitutional constraints. 1 AM. JUR. 2d Administrative Law §§ 85-91 (1962); 2 AM. JUR. 2d Administrative Law §§ 263-264 (1962).

2. IRC Section 7602. EXAMINATION OF BOOKS AND WITNESSES.

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;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary 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

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

3. Id.

4. Most taxpayers claimed that the § 7602 summonses were being used to gather infor-
In United States v. LaSalle National Bank, the Supreme Court, attempting to resolve a conflict among the circuits concerning the enforceability of the section 7602 summons, formulated a two-pronged test to determine the validity of a section 7602 summons. The Supreme Court also created an "institutional posture" standard to measure the Service's good faith issuance and use of the summons. This Note will, after discussing the procedural and historical background of LaSalle, examine and evaluate the impact of LaSalle and its interpretation by various circuit courts.

II. Procedural Background of the Section 7602 Summons Power

The Examinations Division and the Criminal Investigation Division are the two principal investigative arms within the IRS. Revenue agents from the Examinations Division review tax returns and recommend adjustments to establish a basis for tax liability. Special agents from the Criminal Investigation Division gather evidence required to prove criminal violations and assess penalties for civil fraud, negligence and delinquency. Joint investigations result in an overlap between the responsibilities of each division. In the event that both a revenue agent and a special agent are assigned to an investigation, the revenue agent determines the technical adjustments and correct tax liability and the special agent, who bears primary responsibility, issues the summonses.
The basic IRS summons power is detailed in sections 7601-7611 of the IRC. Section 760116 grants the Treasury Department broad investigative powers. Section 7602,17 which grants general summons power, authorizes the examination of records and witnesses. The accompanying section of the Treasury Regulations specifies which IRS officers and employees are authorized to issue summonses.18 Section 760310 describes the service of the summons, and

of the Internal Revenue Code. Treas. Reg. § 301.7602-1(c) (1973) authorizes both revenue agents and special agents to issue summonses.

16. IRC Section 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS.

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

17. See note 2 supra.


The following officers and employees of the Internal Revenue Service are authorized to issue a summons pursuant to sections 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602

(1) Regional commissioners and district directors.

(2) Inspection: Assistant Commissioner; director and assistant directors, Internal Security Division; regional inspectors; and all internal security inspectors.

(3) Alcohol, Tobacco and Firearms: Assistant regional commissioners.

(4) Intelligence: Director; assistant director; assistant regional commissioners; executive assistants to assistant regional commissioner; chiefs, Review and Conference Staff; reviewer-conferees; chiefs and assistant chiefs of divisions, branches and sections; group supervisors; and special agents of the national, regional and district offices.

(5) International Operations: Director; assistant director; chiefs of divisions, branches and groups; special agents; internal revenue agents; estate tax examiners; revenue service representatives; and assistant revenue service representatives.

(6) Collection: Chiefs and assistant chiefs of divisions; chiefs and assistant chiefs of the Delinquent Accounts and Returns Branches; group supervisors; and revenue officers.

(7) Audit: Chiefs of divisions and branches; group supervisors; internal revenue agents; and estate tax examiners.

19. IRC Section 7603. SERVICE OF SUMMONS.

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(g)(2), or 7602 shall be served by the Secretary, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described
its companion Regulations explain that the power to serve the summons is conferred on the same parties who have issuance power.\textsuperscript{20}

Although the IRS is given broad discretionary authority regarding the issuance of a section 7602 summons, there is no provision in the Code permitting enforcement by the Service of its own summons.\textsuperscript{21} Pursuant to section 7604,\textsuperscript{22} the power to enforce the summons is vested in the federal district court for the district within which the person summoned resides or may be found.

The Tax Reform Act of 1976\textsuperscript{23} added section 7609\textsuperscript{24} to remedy

\begin{verbatim}
with reasonable certainty.

21. See notes 1 and 2 supra.
22. IRC Section 7604. ENFORCEMENT OF SUMMONS.
   (a) Jurisdiction of District Court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data. [Section 7604(a) is substantially the same as the authority granted in § 7402(b).]
   (b) Enforcement.—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(g)(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 the United States 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.

   “Because § 7604(a) contains no provision specifying the procedure to be followed in invoking the court’s jurisdiction, the Federal Rules of Civil Procedure apply. The proceedings are instituted by filing a complaint, followed by answer and hearing. If the taxpayer has contumaciously refused to comply with the administrative summons and the Service fears he may flee the jurisdiction, application for the sanctions available under § 7604(b) might be made simultaneously with the filing of the complaint.” United States v. Powell, 379 U.S. 48, 58 n.18 (1964) (citation omitted).
24. IRC Section 7609. SPECIAL PROCEDURES FOR THIRD-PARTY SUMMONSES. [in part provides]
   (a) Notice—
   (1) In General If—
   (A) any summons described in subsection (c) is served on any person who is a
\end{verbatim}
some difficulties previously encountered with third party summonses. This new section applies to summonses issued after February 28, 1977 and requires that any party identified in the summoned records be given notice of such within three days of service and no later than the fourteenth day prior to the examination of the records. In addition, section 7609 provides the identified party with a statutory right to intervene in any subsequent enforcement proceeding petitioned for by the Service under section 7604.

third-party recordkeeper, and

(B) the summons requires the production of any portions of records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in the description of the records contained in the summons, then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 14th day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain directions for staying compliance with the summons under subsection (b)(2).

(b) Right to Intervene; Right to Stay Compliance.—

(1) Intervention.—Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) Right to Stay Compliance.—Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to stay compliance with the summons if, not later than the 14th day after the day such notice is given in the manner provided in subsection (a)(2)—

(A) notice in writing is given to the person summoned not to comply with the summons, and

(B) a copy of such notice not to comply with the summons is mailed by registered or certified mail to such person and to such office as the Secretary may direct in the notice referred to in subsection (a)(1).

25. Section 1205(c) of Pub. L. 94-455, as amended by Pub. L. 94-528, § 2(b), Oct. 17, 1976, 90 Stat. 2483, provided that: "The amendments made by this section [enacting sections 7609 and 7610] shall apply with respect to any summons issued after February 28, 1977."

26. See note 24 supra.

27. Id.

28. Although the Service's summons power is not mentioned in IRC §§ 6103(i) and 7122(a) these sections are essential to any consideration of the topic. Section 6103(i) concerns the procedure and scope of disclosure of information from and about taxpayers to the Department of Justice in cases not related to tax administration.

IRC Section 6103(i). Disclosure to Federal Officers or Employees for Administration of Federal Laws Not Relating to Tax Administration.—[in part provides]

(1) Nontax Criminal Investigation.—

(A) Information from Taxpayer.—A return or taxpayer return information
The Service's internal procedure for formal referrals²⁹ to the Department of Justice is outlined in the Internal Revenue Manual. Cases within the Service are referred by an investigating agent to his immediate supervisor, and are subsequently reviewed by the District Director. The referral is further reviewed by the Regional Counsel's Office before the findings are forwarded to the Department of Justice. The Service's own administrative regulations preclude the further issuance of summonses in criminal cases pending before the Department of Justice, unless prior special clearance has been granted by that department.³¹

III. The Historical Background of LaSalle

The scope of the Service's summons power has evolved from the

shall, pursuant to, and upon the grant of, an ex parte order by a Federal district court judge as provided by this paragraph, be open, but only to the extent necessary as provided in such order, to officers and employees of a Federal agency personally and directly engaged in and solely for their use in, preparation for any administrative or judicial proceeding (or investigation which may result in such a proceeding) pertaining to the enforcement of a specifically designated Federal criminal statute (not involving tax administration) to which the United States or such agency is or may be a party.

See also, Benedict & Lupert, Federal Income Tax Returns — The Tension Between Government Access and Confidentiality, 64 CORNELL L. REV. 940, 954-64 (1979). IRC Section 7122(a) authorizes the IRS to negotiate a settlement in any civil or criminal tax case prior to referral to the Department of Justice. After referral the Service loses this power and the authority to make a compromise settlement shifts to the Department of Justice.

IRC Section 7122. COMPROMISES. [in part provides]

(a) Authorization.—The Secretary may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense.

29. Formal referrals are made not only in cases where the alleged evasion rises to a level that necessitates criminal prosecution and therefore an inter-agency referral from the IRS to the Department of Justice, but intra-agency referrals are necessary from the Examination Division to the Criminal Investigation Division to assess civil fraud penalties. For a discussion of civil tax penalties, and in particular with regard to the civil fraud penalty see Comment, Civil Tax Penalties: Changes and Recommendations, 5 PEPPERDINE L. REV. 465, 486-98 (1978).

30. IRM ¶ 9621-31, reprinted in IRM 5 Administration (CCH).

31. IRM ¶ 9363.6. Criminal Cases Pending with Justice

No summons shall be issued in connection with a criminal case pending with the Department of Justice either to obtain further information from the taxpayer or a witness or to uncover assets to apply against assessed liabilities unless clearance is first obtained from that Department through the District Counsel, and the Chief Counsel.
In Powell, a taxpayer challenged an administrative summons that was issued to secure the production of records relating to tax returns that had previously been audited, and for which the three year statute of limitations had expired. The Third Circuit refused to enforce the summons absent a sufficient showing of probable cause that a fraud had been committed. The Supreme Court reversed, holding that the IRS need not meet any standard of probable cause to obtain enforcement of its summons, either before or after the three-year statute of limitations on ordinary tax liabilities has expired. It 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 Service's possession, and that the administrative steps required by the Code have been followed.

In Donaldson, a taxpayer challenged a third party summons arguing that, if use of the summons could lead to a recommendation that the taxpayer be criminally prosecuted, the summons should not be enforced. The Supreme Court first acknowledged that if the sole objective of an investigation was to obtain evidence for use in a criminal prosecution, then the purpose was not a legitimate one and enforcement may be denied. Second, after reviewing the Service's internal structure and procedure, the Supreme Court found that Congress had authorized the use of the summons in investigating possible future criminal conduct. Furthermore, the Court stated that the statute did not suggest that civil and criminal purposes be distinguished when the special agent entered the investigation. The Court held that a section 7602 summons could be issued in aid of an investigation as long as it was issued in good

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33. 400 U.S. 517 (1971).
34. Once a return is filed IRC § 6501 provides for a three-year statute of limitations after which no examination may be initiated. However, in cases of fraud or other criminal prosecutions IRC § 6531 provides a six-year statute of limitations.
35. 379 U.S. at 50.
36. Id. at 57-58.
37. 400 U.S. at 532.
38. Id. at 533.
39. Id. at 535.
40. Id.
faith and prior to a recommendation for criminal prosecution.\textsuperscript{41}

Donaldson created considerable confusion in the lower federal courts as to the proper standard for determining the validity of a section 7602 summons. Judicial interpretations of the concept of "prior to a recommendation for criminal prosecution" took three forms:\textsuperscript{42} 1) before the agent formed a firm purpose to recommend prosecution,\textsuperscript{43} 2) before an intra-agency referral,\textsuperscript{44} or 3) before a formal referral by the IRS to the Department of Justice.\textsuperscript{45} Courts were also split in their determination of when the "sole objective" of an investigation was to obtain evidence for use in a criminal prosecution and was therefore a misuse of the summons power.

Most courts agreed with Donaldson that a summons may be utilized when a proper civil purpose exists even though there is a possibility that the investigation will lead to criminal prosecution. Moreover, most of the courts that have faced the issue have concluded that a pending non-tax criminal proceeding at the time of issuance of the summons does not mean that the summons was issued for the improper purpose of obtaining evidence for use in a criminal prosecution. On the other hand, the courts have applied widely divergent tests in determining whether a summons has been issued "solely for criminal prosecution." The Seventh Circuit considered the personal motivation of the agent as the correct legal test to determine whether a summons was issued solely for criminal prosecution; the Second Circuit rejected this test as not representative of the Service's appropriate interest in the determination of civil liability. The District of Columbia, Third and Sixth Circuit Courts of Appeals have concluded that a sole criminal prosecution purpose may exist when a Special Agent has formed a firm purpose to recommend prosecution, while the Ninth and Tenth Circuits have held that the purpose does not become solely for criminal prosecution until the Service refers the case to the Department of Justice for criminal prosecution.\textsuperscript{46}

The diversity among the circuits as to the circumstances under

\textsuperscript{41} Id. at 536.
\textsuperscript{42} Nuzum, LaSalle National Bank and the Judicial Defense to the Enforcement of an Administrative Summons, 32 Tax Law. 383, 387-90 (1979). This article contains a valuable discussion of judicial defenses and developments leading to the LaSalle decision and its effect on the Powell standards.
\textsuperscript{43} United States v. Friedman, 532 F.2d 928, 932 (3d Cir. 1976); United States v. Wall Corp., 475 F.2d 893, 895 (D.C. Cir. 1972).
\textsuperscript{44} United States v. Haddad, 527 F.2d 537, 538 (6th Cir. 1975), cert. denied, 425 U.S. 974 (1976); United States v. White, 477 F.2d 757, 761 (5th Cir. 1973), aff'd per curiam on rehearing en banc, 487 F.2d 1335 (1973), cert. denied, 419 U.S. 872 (1974).
\textsuperscript{45} United States v. Hodge and Zweig, 548 F.2d 1347, 1351 (9th Cir. 1977).
\textsuperscript{46} Nuzum, supra note 42, at 389-90 (footnotes omitted).
which a section 7602 summons will be valid induced the Supreme Court to supplement Donaldson with LaSalle.  

IV. United States v. LaSalle National Bank and the Institutional Posture Standard

In LaSalle, the Supreme Court reversed a Seventh Circuit decision which had denied enforcement of an IRS summons issued by a special agent. The Seventh Circuit had affirmed the district court's finding that the summons was issued "solely for the purpose of unearthing evidence of criminal conduct." The special agent had requested to be assigned to the case because of information he had received from an informant involved in an unrelated investigation. The taxpayer's return disclosed rental property which the IRS determined was held in trust by the LaSalle National Bank. The special agent issued two section 7602 summonses to the trustee bank requesting verification of income and expenses relating to the trust. A bank vice president appeared in response to the summonses, but refused to comply with the summonses.

The Service initiated an enforcement proceeding in the district court to compel the bank to comply with the summonses. Although the special agent had made no recommendation or report about the case to his superiors, the district court held that the summonses could not be enforced because at the time of their issuance, the agent's intent was to use them improperly, "solely for the purpose of obtaining evidence for use in a criminal prosecution." The Seventh Circuit affirmed, finding that the summonses had been

47. 437 U.S. at 299.
48. United States v. LaSalle Nat'l Bank, 554 F.2d 302 (7th Cir. 1977).
49. 437 U.S. at 299 (citing United States v. LaSalle Nat'l Bank, 76-1 U.S. Tax Cas. (CCH) ¶ 9407, at 84,073 (N.D.Ill. 1976)).
50. Id. at 304 (citing United States v. LaSalle Nat'l Bank, 76-1 U.S. Tax Cas. ¶ 9407, at 84,072).

The special agent had told one of the taxpayer's attorneys that the investigation "was strictly related to criminal violations of the Internal Revenue Code." Thereafter, the taxpayer contended that although he bore the burden of proving that enforcement of the summons would be an abuse of process, he did not have to show that the summons served no civil purpose. The taxpayer argued that his burden was to show that the summonses had not been issued in good faith because their sole purpose was to gather evidence for a criminal prosecution. The district court agreed and focused on the agent's personal motivation and found that the absence of a formal referral for criminal prosecution was irrelevant. Id. at 303-04.
51. 554 F.2d at 302.
issued in bad faith. The Supreme Court granted certiorari.

At the outset, the Supreme Court distinguished Donaldson from LaSalle by stating that in Donaldson the issue was the mere potentiality of criminal prosecution whereas in LaSalle the district court found that the special agent was investigating with the sole intent of unearthing evidence of criminal conduct. The Court determined that the question presented in LaSalle was "whether this finding necessarily leads to the conclusion that the summonses were not issued in good-faith pursuit of the congressionally authorized purposes of § 7602." The Court acknowledged that Congress had created a law enforcement system in which criminal and civil elements were "inherently intertwined." In view of the fact that tax fraud investigations were not categorized into civil and criminal components, any limitation upon the section 7602 summons power must reflect this statutory premise.

The Court recognized, however, that although the criminal and civil aspects of a tax fraud case begin to diverge upon the recommendation of criminal prosecution to the Department of Justice, the separation is never total, and the government does not of necessity sacrifice its interest in civil tax liability upon commencement of a criminal prosecution. Prior to a recommendation to the Department of Justice, the IRS must use its summons authority according to the good faith standard set forth in Powell. Good faith, as defined by the Supreme Court, is not determined by looking at the agent's personal intent or motivation but rather "by an

52. The Seventh Circuit approved the district court's factual findings and its application of Donaldson. Id. at 309.
54. 437 U.S. at 307.
55. Id. at 308.
56. Id. at 309.
57. Id. at 311-12. However, there is a policy to restrain the IRS summons authority upon formal referral for criminal prosecution to the Department of Justice. This is in keeping with the policy that the summons power of § 7602 is not available to broaden the scope of criminal discovery. Id. See note 31 supra.
58. The Powell criteria are: (1) that the investigation will be conducted pursuant to a legitimate purpose; (2) that the inquiry may be relevant to the purpose; (3) that the information sought is not already within the Service's possession; and (4) that the administrative measures required by the Code have been followed. 379 U.S. at 57-58. See note 36 supra and accompanying text.
examination of the institutional posture of the IRS.”

The Court in *LaSalle* found that the burden of disproving the existence of a valid civil tax purpose was on those opposing enforcement and although the burden was heavy, the good faith test should remain the standard. The Service’s good faith would be subject to question where there was an unnecessary delay before referral or where the Service was being used as an information gathering agency.

The language employed by the Supreme Court in its discussion of good faith is of great importance. In its analysis the Court discussed the *use* of a section 7602 summons but did not narrow its discussion to the *issuance* of the summons. Presumably, *use* is broader than *issuance*, and *could include issuance as well as enforcement.* Arguably, if use includes both issuance and enforcement, the institutional posture of the agency should be examined in both instances.

The distinction between the Court’s interpretation of the terms *use* and *issuance* further emerges in the language of the two-pronged test established in *LaSalle*:

First, the summons must be *issued before the Service recommends to the Department of Justice* that a criminal prosecution, which reasonably would relate to the subject matter of the summons, be undertaken. Second, the Service *at all times must use the summons authority in good-faith pursuit of the congressionally authorized purposes of § 7602*. This second prerequisite requires the Service to meet the *Powell standards of good faith*. It also requires that the Service not abandon in an institutional sense . . . the pursuit of civil tax determination or collection.

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59. 437 U.S. at 316.

An examination of institutional posture is in essence a good faith inquiry, the purpose of which “is to determine whether the agency is honestly pursuing the goals of § 7602 by issuing the summons.” *Id.*

60. *Id. at 317. See note 28 supra and note 91 infra.*

61. *Id. at 312-18.*

62. For example, if the IRS made a formal recommendation to the Department of Justice after issuance of a § 7602 summons, but prior to enforcement of the summons, the recommendation might indicate a change in institutional posture and preclude enforcement, even though the original issuance is found to have been made in good faith. *See United States v. Marine Midland Bank, 585 F.2d 36 (2d Cir. 1978).* *Marine Midland* examines the good faith use of a § 7602 summons in the context of an intra-agency referral. *See* notes 127-31 *infra* and accompanying text.

63. 437 U.S. at 318 (emphasis added).
In applying the above test to the facts presented in *LaSalle*, the Court determined first, that no recommendation had been made to the Department of Justice, thereby satisfying the first prong, or objective test. The Court then applied the *Powell* criteria and decided that these did not preclude enforcement.  

The Court found however, that the lower courts had not considered whether the Service had abandoned its pursuit of the taxpayer's civil tax liability in an institutional sense. On the record presented, the Court was unable to conclude that such an abandonment had occurred and therefore reversed the Seventh Circuit with instructions to remand the case to the district court.

The steps which the Court took in applying its own test to the facts in *LaSalle* demonstrate the approach to be taken in an enforcement proceeding. These steps require a district court to proceed through the two-pronged test enunciated in *LaSalle* even though the objective test or the *Powell* criteria have already been satisfied.

In a terse dissent, four Justices disagreed with the majority as to the scope of a section 7602 summons and argued that the statute itself contained no limitations on the focus of the inquiry, whether civil or criminal. In addition, the dissent argued that “[t]he elusiveness of ‘institutional good faith’ as described by the Court can produce little but endless discovery proceedings and ultimate frustration of the fair administration of the Internal Revenue Code.”

Justice Stewart, writing in dissent, predicted the difficulty to be encountered in trying to ascertain the institutional posture of the Service and called instead for an objective test such as that suggested by Judge Friendly's analysis of *Donaldson* in *United States v. Morgan Guaranty Trust Co.* Judge Friendly's objective test, that the summons be issued prior to criminal recommendation, is

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64. See notes 31 and 57 supra and accompanying text.

65. 437 U.S. at 318-19.

66. The Supreme Court was divided five to four in the *LaSalle* decision. The dissenting opinion was written by Justice Stewart, and was joined by The Chief Justice, Justice Rehnquist and Justice Stevens.

67. 437 U.S. at 320.

68. 572 F.2d 36 (2d Cir.), cert. denied, 439 U.S. 822 (1978). The Second Circuit called for “an objective test,” prior to a recommendation for criminal prosecution, “that would avoid a need for determining the thought processes of special agents. . . .” *Id.* at 41.
substantially the first prong of the majority's test in *LaSalle.*

The immediate result of *LaSalle* is that the Supreme Court has reduced the challenges taxpayers can raise to IRS summonses by eliminating consideration of the agent's personal motivation for and objective in gathering evidence. The Supreme Court has shifted the focus of the good faith inquiry from the individual agent, regarded as the proper inquiry by the Seventh Circuit, to the Service as an institution. Further, the Supreme Court specified that the recommendation after which a summons may not be issued is the formal referral from the IRS to the Department of Justice, thus agreeing with the interpretations of the Ninth and Tenth Circuits. However, the extensive discovery proceedings anticipated by the dissenters in *LaSalle,* is illustrated by the subsequent decisions of the Third Circuit.

A. Third Circuit

The Third Circuit's interpretation of *LaSalle* requires an examination of the *Genser* trilogy. In *Genser I,* the defendants were

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69. One of the major difficulties with an objective test based upon formal referral from the IRS to the Department of Justice is that "[a]lthough the act of recommending prosecution to the Department of Justice provides a clear, concise, objective standard for determining if an IRS summons is invalid, the triggering of this standard is very late in the investigative chain." *Note, Proper Standard for Enforcing an IRS Section 7602 Summons: United States v. LaSalle,* 20 B.C. L. Rev. 741, 756 (1979).

70. The material in this paragraph is suggested by Saltzman, *Supreme Court's LaSalle Decision Makes It Harder to Successfully Challenge a Summons,* 49 J. Tax. 130, 133-34 (1978).

71. *See note 46 supra and accompanying text.*

72. *Saltzman, supra note 70, at 133-34.*


74. 582 F.2d 292.

*Genser I* was not an enforcement proceeding but dealt instead with the suppression of evidence obtained from a summons with which a third party had voluntarily complied. The summonses were issued prior to the effective date of IRC § 7609 which otherwise would have required that notice be given to the taxpayer and would have given the taxpayer a statutory right to intervene. *Id.* at 305-06. Furthermore, the fact that the summonses were already voluntarily complied with by the third parties foregoing the necessity of an enforcement proceeding does not preclude the remedy of suppression. The court in *Genser I* stated that a "summons is no less illegal merely because it escapes detection at the investigatory stage. The prophylactic principles
convicted by a jury for tax evasion and among the claims they asserted was that the government had procured some of its evidence illegally through a section 7602 summons. The defendants argued that the district court erred in not granting an evidentiary hearing to establish that the summonses were issued after the government had formed an intention to prosecute.\textsuperscript{75}

The Third Circuit in \textit{Genser I}, initially found that in enforcement proceedings, it was necessary for the IRS to make a preliminary showing of good faith based upon \textit{Powell}.\textsuperscript{76} Upon such a showing, the burden would shift to the party opposing enforcement of the summons. After examining the record, the court found that there was no indication as to the dates of the summonses and the parties on whom they were served. The court remanded the proceeding to the district court in order to conduct an evidentiary hearing to determine whether the IRS summonses were issued in good faith and prior to a recommendation for prosecution, as outlined in \textit{LaSalle}. In making this determination to examine IRS posture only at the time of issuance, the court of appeals was confining itself to the facts of \textit{Genser}. The summonses had already been voluntarily complied with, and therefore no enforcement proceedings had been held, making it unnecessary to consider IRS posture at the time of enforcement.\textsuperscript{77}

On remand, the district court conducted an evidentiary hearing in accordance with the court of appeals' instructions. The district court concluded that none of the summonses employed during the investigation were issued "solely for a criminal purpose."\textsuperscript{78}

The defendants challenged the district court's ruling on the grounds that the court had denied the defendants adequate discovery, and that the court had misconstrued the substantive require-
ments of LaSalle. This challenge led to Genser II, where the Third Circuit found that testimony and documents presented at the evidentiary hearing were necessary to “explore the reaches of LaSalle.” The hearing revealed that by the time the special agent substantially had completed his investigation, he had issued 106 summonses. During the next six months, while writing his final report, he issued nine more. One month after the special agent had filed his final report recommending prosecution, another agent assigned to the case issued one more summons. Approximately six weeks after the special agent had filed his final report, the Office of Regional Counsel formally referred the case to the Department of Justice. The IRS issued no summonses after that referral. Technically, all of the summonses that had been issued satisfied the first prong, objective test of LaSalle, because the summonses were issued prior to the official referral.

As to the validity of the summonses, the court in Genser II stated that the existence of a general civil purpose for the investigation did not end judicial inquiry. The Third Circuit refused to make the existence of a continuing civil purpose dispositive because this “would impose an impossible burden of proof on the taxpayer.” The court deemed it necessary to concentrate on the purposes of individual summonses rather than on the purpose of the general investigation. This, however, does not require a district court to correlate each summons to a civil purpose. An examination of this nature would require inquiry into the intent of the individual agent and under LaSalle, would not be binding on the IRS as an institution. Therefore, the court concluded that “summonses is-

79. 595 F.2d 146.
80. Id. at 148.
81. [The special agent] substantially completed his investigation in March 1975. By that time he had issued a total of 106 summonses under section 7602. During the next six months, while writing his final report, he issued nine more summonses.

On October 31, 1975, approximately one month after [the special agent] filed his final report recommending prosecution, another agent assigned to the case issued the 116th and final summons. Although the record is unclear, [the special agent’s] recommendation must have been reviewed by the district chief of the [Criminal Investigation Division] sometime between September and November 1975, because it reached the Office of Regional Counsel in November or December of that year. The Office of Regional Counsel formally referred the case to the Justice Department for prosecution on December 12, 1975. Id. at 148-49.
82. Id. at 150.
sued by an investigating agent before that agent recommended prosecution would be virtually unassailable. 83 Nevertheless, the court went on to curtail what had been stated previously in reference to the insufficiency of a general civil purpose. The Third Circuit, in Genser II, concluded that even in a case where an agent issued summonses after having recommended prosecution, the taxpayer would still have the burden of proving not only a pre-existing institutional commitment to prosecute but also a failure of the summons to advance any civil purpose. 84 This additional requirement means that unless the taxpayer can prove that there was no civil purpose to the summons, the IRS can assert a continuing, general interest in making a civil tax assessment, which would be sufficient to show that the civil objective had not been abandoned. 85

Genser II also set forth guidelines for “minimum” discovery which expanded the narrow scope of discovery usually afforded to the party opposing an enforcement proceeding. The Third Circuit stated that the taxpayer was permitted to learn the identities of the examining agents, the nature of any contacts between these agents and officials from the Department of Justice, and the chronology of the investigation, including the dates of any intra-agency recommendation or formal referrals for prosecution. If upon securing this information the taxpayer demonstrated: 1) that the summonses were issued after the investigating agents had recommended prosecution, 2) that the examination had been inordinately delayed, or 3) that IRS personnel had been in contact with the Department of Justice, a district court could permit further limited discovery. 86

83. Id. at 151.
84. Id.
85. The validity of the summons also assumes that the summons does not otherwise appear to be deficient or illegal.
86. The taxpayer was entitled to discover the identities of the investigating agents, the date the investigation began, the dates the agent or agents filed reports recommending prosecution, the date the district chief of the . . . Criminal Investigation Division reviewed the recommendation, the date the Office of Regional Counsel referred the matter for prosecution, and the dates of all summonses issued under . . . § 7602. Furthermore, the taxpayer should be entitled to discover the nature of any contacts, relating to and during the investigation, between the investigating agents and officials of the Department of Justice.
In *Genser II*, the Third Circuit was troubled by the special agent's five-month delay before filing his report and by the failure of the district court to ascertain at what point the IRS, as an institution, had decided to initiate criminal prosecution. This concern was heightened by the fact that the special agent had continued to issue summonses during the period that he was writing his final report recommending prosecution. The Third Circuit was also disturbed because the district court had not determined whether the summonses issued after an institutional commitment to prosecute served no civil purpose. The court emphasized that an illegal summons could not be made valid by a general civil purpose and remanded the case for additional proceedings to determine the Service's institutional posture.87

On remand, the district court concluded that all of the IRS summonses were valid and that there had been no inordinate or extraordinary delay in the investigation. The district court, however, refused to find that "no summons was issued after the IRS formed an institutional commitment to recommend prosecution."88

The defendant appealed contesting the validity of the summonses on the ground that the Service's institutional commitment to recommend prosecution was sufficient to render the summonses invalid. In *Genser III*, the Third Circuit disagreed, stating:

The district court's statement about the Service's institutional commitment, standing alone, offers no support to the appellants' contention. It is not just an institutional commitment to recommend prosecution that renders a summons issued under § 7602 invalid; rather, it is the absence of a civil purpose for that summons that triggers the LaSalle rule.89

Where this information or other evidence introduced by the taxpayer reveals (1) that the IRS issued summonses after the investigating agents recommended prosecution, (2) that inordinate and unexplained delays in the investigation transpired, or (3) that the investigating agents were in contact with the Department of Justice, the district court must allow the taxpayer to investigate further. In proper cases, this investigation could include the opportunity to examine the IRS agents or officials involved, or to discover documents. Such examination/discovery, however, should be carefully tailored to meet the purpose of the inquiry. On the other hand, where this information indicates that none of these three conditions are present, the district court need inquire no further.

*Id.* at 152.


88. 602 F.2d at 71 (quoting the unreported district court decision).

89. *Id.*
Thus, having found no inordinate delay, the district court was not obligated to examine the individual summonses. The Third Circuit, concluding that the taxpayer had failed to disprove the actual existence of a valid civil tax purpose, affirmed the district court’s grant of enforcement.

The Third Circuit in *United States v. Serubo*, decided shortly after *Genser III*, confronted the problem created when the IRS is used as an information-gathering agency. The Supreme Court in *LaSalle* had stated that “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.”

In *Serubo*, the special agent had received information from other government agencies concerning the illegal activities of the taxpayer. The special agent initiated a joint civil-criminal investigation on June 6, 1974, and from then until April 23, 1975, issued twenty-two section 7602 summonses to third parties. The Third Circuit designated this period as Phase I. During Phase I the special agent had not decided whether to recommend prosecution and did not transmit any evidence to other government agencies. However, on April 23, 1975, after receiving authorization, the IRS began to disclose information to the Department of Justice, which had already begun its own investigation of the taxpayer. Thereafter, during the period designated by the court as Phase II, the two investigations were coordinated by an attorney from the Department of Justice. Between June 10, 1975 and January 22, 1976 thirteen more administrative summonses were issued. The special agent did not recommend criminal prosecution until January 27, 1977. The taxpayer, at trial, sought suppression of the evidence thus obtained.

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90. 604 F.2d 807 (3d Cir. 1979).
92. 437 U.S. at 317.
93. 604 F.2d at 809.
94. Id. at 810.
95. Id.
96. This is similar to the situation in *Genser I*. See note 74 supra.
At the outset the Third Circuit referred to the “gloss” it had placed upon the LaSalle test in Genser II. In Genser II, the Third Circuit had held that the test of validity was not the existence of a general civil purpose, but rather the purposes of the individual summonses. However, because LaSalle required institutional abandonment of a civil purpose, the summonses issued before the agent recommended criminal prosecution were presumed valid. In Serubo, the summonses issued during Phase I would be presumed valid and would not require individual examination. However, those summonses issued during Phase II, when IRS agents were acting under the supervision of the Department of Justice, required “individual determination of non-criminal purpose.” Because the trial court did not pursue that inquiry and denied further discovery, the court found it necessary to remand the proceeding.

In United States v. Garden State National Bank, the Third Circuit was asked to determine what were the proper circumstances for the issuance of a section 7602 summons. In the district court, Judge Biunno had criticized IRS administrative appeal procedures as being in bad faith, and remarked, that once a special agent had been assigned to a case, the IRS did not institutionally engage in compromise negotiations until after the Service decided not to refer the case to the Department of Justice. The district court held, however, that the taxpayer had not requested a conference and concluded that the LaSalle burden was not met.

The Third Circuit affirmed the enforcement of the summons.
but observed that "the refusal of the Service to enter into compro-
mise negotiations, standing alone, does not amount to 'bad
faith.'"\textsuperscript{104} The Third Circuit rejected the notion that enforcement
should be predicated either solely upon the basis of a request or
lack of a request for a compromise conference or wholly upon the
availability or unavailability of compromise negotiations.\textsuperscript{105} The
court stated that within the context of \textit{Garden State}, where it was
undisputed that neither a formal nor an intra-agency recommenda-
tion for prosecution was ever made, "the taxpayer bears an almost
impossible burden to resist enforcement of the summons."\textsuperscript{106}

In order to clarify section 7602 summons enforcement procedure,
the Third Circuit delineated three discrete time periods with re-
spect to the time that a section 7602 summons can be issued: the
first, after formal recommendation, in which case "\textit{LaSalle conclu-
sively} precludes further issuance of IRS summonses";\textsuperscript{107} the sec-
ond, during intra-agency referral, in which case "\textit{LaSalle imposes a
'heavy' burden on the taxpayer to prove bad faith}";\textsuperscript{108} and the
third, where no recommendation has been made, in which case the
Third Circuit regards the summons as "virtually unassailable."\textsuperscript{109}

The summons in \textit{Garden State} was issued prior to any recom-
mendation by the special agent, thereby falling within the Third
Circuit's third time frame. Under these circumstances, the court
found it necessary to examine institutional posture only at the
time the summons was issued. However, the fact that the Third
Circuit distinguished two additional time frames indicates not only
the varying burdens upon the taxpayer, but also indicates that in-
titutional posture ought to be examined at different points in time

\textsuperscript{F.2d at 64. The Court found}
that [the taxpayer's] showing falls far short of defeating the presumption of validity
of a pre-recommendation summons. He has not carried the "heavy" burden imposed
by \textit{LaSalle}, let alone the virtually insurmountable burden imposed by \textit{Genser II}. Ac-
cordingly, since [the taxpayer] has failed to mount an effective challenge to the Gov-
ernment's \textit{Powell} showing or to the institutional "good faith" of the Service, the . . .
subpoenas were properly enforced.

\textit{Id. at 74.}
\textsuperscript{104} \textit{Id. at 73.}
\textsuperscript{105} \textit{Id. at 66 n.7.}
\textsuperscript{106} \textit{Id. at 67.}
\textsuperscript{107} \textit{Id. at 69-70.}
\textsuperscript{108} \textit{Id. at 70.}
\textsuperscript{109} \textit{Id.}, (quoting \textit{Genser II}, 595 F.2d at 151).
with respect to the status of contemplated criminal prosecution. The greatest difficulties arise when a case is within the second time frame, that is, at some stage of intra-agency referral. Under this circumstance, the determination of institutional posture at time of issuance alone might be insufficient and should perhaps be examined at the time the enforcement proceedings are brought, or at the time enforcement of the summons is to be ordered.\(^{110}\)

In *United States v. Amerada Hess Corp.*,\(^{111}\) the Third Circuit strictly applied what it termed the "LaSalle-Genser" rule. In the course of a civil audit of the corporation, a revenue agent obtained additional information which led him to make a fraud referral to the Criminal Investigation Division of the IRS. Representatives of the corporate taxpayer were told that if the corporation preferred, the civil audit would be suspended during the special agent's criminal investigation; but, in the event that the corporation wanted to have the civil audit continue, the documents requested by the revenue agent would be separately identified from those documents requested by the special agent.\(^{112}\)

Thereafter, the special agent issued two summonses which the corporation attempted to resist claiming that they were issued for an improper criminal purpose. During the enforcement proceedings a hearing was ordered during which the special agent testified that the revenue agent's audit was suspended at the time the summonses were issued but that the information sought by the summonses was necessary to determine the corporation's tax liability and that he had not yet decided whether or not to recommend prosecution. The corporation argued that "the IRS had made an institutional decision to divide its investigation into separate civil and criminal segments, and that as a matter of law any summonses issued at the behest of the special agent conducting the criminal segment must be improper."\(^{113}\) In response, the Third Circuit stated that

the IRS has, in all cases, made an institutional decision to divide its investigations into civil and criminal segments. The very existence of separate Ex-

\(^{110}\) This is suggested by *United States v. Marine Midland Bank*, 585 F.2d 36 (2d Cir. 1978). See notes 127-31 infra and accompanying text.

\(^{111}\) 619 F.2d 980 (3d Cir. 1980).

\(^{112}\) *Id.* at 983.

\(^{113}\) *Id.* at 985.
aminations and Criminal Investigation Divisions demonstrates such a decision. But the fact that summonses are issued for criminal enforcement purposes is not dispositive. The use of summonses after the abandonment of a civil purpose is the evil against which the LaSalle-Genser rule guards. It is undisputed that Amerada's civil liability is still an open question.\textsuperscript{114}

In \textit{United States v. First National State Bank},\textsuperscript{115} the Third Circuit enforced two section 7602 summonses, reversing and affirming in part a district court decision.\textsuperscript{116} Although in \textit{First National State Bank} the agent had not yet recommended prosecution, the Service sent a letter to the taxpayer from the Deputy Commissioner indicating that the taxpayers were the subject of a current criminal investigation. The taxpayer contended that "the attitude of the Deputy Commissioner is indicative of the institutional posture of IRS."\textsuperscript{117} The court, in rejecting the taxpayers' argument, pointed out that the Deputy Commissioner's reply was a standard form letter and that these letters prove no more than that there was a criminal investigation as of the time they were both written, June 27, 1979. They do not imply that there was a criminal investigation under way when the summonses were served, August 10, 1978, or when enforcement was sought, December 19, 1978.\textsuperscript{118}

Judge Garth, writing for the court, emphasized that criminal and civil investigations were almost always intertwined and that by proving the existence of a criminal investigation, the taxpayer does not sustain the burden of negating a civil investigation. Finally, the court stated that a notation by an IRS official on a letter to the United States Attorney stating "I would hope that this case will result in prosecution" did not show the Service's institutional posture but was merely the attitude of the official.\textsuperscript{119}

In spite of the fairly liberal discovery outlined in \textit{Genser II}, the

\begin{footnotes}
\item[114] \textit{Id.} (citation omitted) (emphasis added).
\item[115] 616 F.2d 668 (3d Cir. 1980).
\item[116] \textit{United States v. First Nat'l State Bank}, 469 F. Supp. 612 (D.N.J. 1979). The district court decision discussed the difficulties in trying to ascertain "institutional posture" and stated that the "net practical effect may be that the forecast of the minority in \textit{LaSalle} (which would not have allowed any inquiry so long as the summons is issued before referral) will become a reality. . . ." \textit{Id.} at 618.
\item[117] 616 F.2d at 672.
\item[118] \textit{Id.} (footnote omitted).
\item[119] \textit{Id.} at 673.
\end{footnotes}
emerging Third Circuit test generally confines its examination of institutional posture to the time the summons was issued. This inquiry is accompanied by a strict application of the LaSalle test requiring the taxpayer to show that the summons is without any civil tax purpose.\(^{120}\)

**B. Second Circuit**

In *United States v. Morgan Guaranty Trust Co.*,\(^ {121}\) the Second Circuit employed an objective test in examining the validity of a section 7602 summons.\(^ {122}\) The court found the section 7602 summonses issued by the special agent to be valid as long as they were issued prior to a recommendation to the Department of Justice for criminal prosecution. The court noted that even allowing limited discovery on the issue of bad faith would require the taxpayer to make a "substantial preliminary showing" of misuse.\(^ {123}\)

After the Supreme Court denied certiorari, the case was remanded to the district court\(^ {124}\) in order to resolve the enforcement proceedings. Although the Second Circuit had required enforcement, the intervenors argued that LaSalle required a different result. The district court observed that the LaSalle court had rejected a single objective test and instead recognized that in the absence or delay of a formal recommendation to the Department of Justice, it was incumbent upon the taxpayer to demonstrate an institutional posture on the part of the Service tantamount to abandonment of all civil proceedings in order to render a section 7602 summons invalid.\(^ {125}\) The district court noted that a factual inquiry was necessary to determine institutional posture and that the Second Circuit preferred to satisfy this inquiry with affidavits


\(^{121}\) 572 F.2d 36 (2d Cir. 1978), cert. denied, 439 U.S. 822 (1978). This case was decided while LaSalle was pending before the Supreme Court. *Id.* at 39.

\(^{122}\) The objective test was the Second Circuit's interpretation of Donaldson, which was favored by the LaSalle dissent. See notes 68-69 *supra* and accompanying text.

\(^{123}\) *Id.* at 42-43 n.9.


\(^{125}\) *Id.* at 86,356.
rather than with a full evidentiary hearing wherever possible. The district court found the affidavits submitted by the special agent, in which he indicated that neither he nor the Service had yet recommended criminal prosecution, to be sufficient and granted enforcement.

In United States v. Marine Midland Bank, the Second Circuit was asked to determine at what point the IRS institutionally abandons its pursuit of civil tax liability and collection. In Marine Midland the court found that some time after issuance of the section 7602 summonses the IRS had recommended criminal prosecution to its Regional Counsel's Office. Noting that after LaSalle a taxpayer's ability to resist a summons where no recommendation had been made to the Department of Justice was limited, the Second Circuit determined that the taxpayer was entitled to some assistance from the government in establishing its own institutional posture. The court remanded the proceeding for a determination as to "the point to which criminal recommendations have gone and the extent to which civil collection efforts are continuing at the time of consideration of applications for enforcement orders." (emphasis added). The Second Circuit decided that an IRS affidavit would be sufficient to establish institutional posture.

The factual circumstances of Marine Midland mirror the second time frame outlined in Garden State, that is, where some type of intra-agency referral has been made. The Second Circuit's decision to examine institutional posture at time of enforcement indicates that good faith issuance alone is insufficient to support the validity of a section 7602 summons in light of an intra-agency referral.

On remand, the government argued that the Second Circuit incorrectly directed the district court to discern the Service's institutional posture at time of enforcement rather than at time of issuance. Although the district court acknowledged that precedent seemed to indicate time of issuance to be the significant date, the Second Circuit had specifically indicated its concern with institu-

126. Id. at 86,356 n.5.
127. 585 F.2d 36 (2d Cir. 1978).
128. Id. at 39.
129. See note 108 supra and accompanying text.
tional posture at time of enforcement. The district court stated that the affidavit of the District Counsel of the IRS did not provide particulars of the agent's activities or any information from which the district court could determine whether the Service had abandoned its civil tax goals. The affidavit had stated that the revenue agent was assigned to the audit in October 1975 but that no income tax deficiencies had been assessed, and as of December 15, 1978, the audit was not complete. The district court rejected the taxpayer's request for an evidentiary hearing and instead called for an affidavit from the revenue agent setting forth the extent to which his investigation had progressed as of the date that the enforcement proceedings were submitted for consideration by the district court. 131

In United States v. Chemical Bank, 132 the Second Circuit distinguished Marine Midland, wherein it was conceded that a criminal prosecution was under way, from a situation where the Department of Justice was coordinating an ongoing investigation. After examining the procedures used to coordinate such an investigation, the Second Circuit determined that the Service's participation did not make it an information-gathering agency and did not violate the good faith use of the section 7602 administrative summons. Furthermore, based upon a government affidavit, it was determined that no evidence was transmitted from the IRS to the Department of Justice. In response to the taxpayer's allegation that IRS abandonment should be inferred because the audit had been in progress two and one-half years before the summons was issued and during that period no assessments or determinations of civil liability were made, the court replied that lengthy examinations were not unusual and the Service's continuing investigation of the taxpayer raised no presumptions. 133

In Chemical Bank, the Second Circuit did not find that a recommendation for prosecution had been delayed. However, in United States v. Chase Manhattan Bank, 134 the Second Circuit questioned the motive for a delay in recommending criminal prosecution in an examination initiated on the basis of information pro-

131. Id. at 88, 148.
132. 593 F.2d 451 (2d Cir. 1979).
133. Id. at 458 n.7.
134. 598 F.2d 321 (2d Cir. 1979).
vided from the FBI which was pursuing its own investigation. Although it was undisputed that the Service had not furnished any information to the FBI, the Second Circuit found it necessary to remand the proceeding for limited discovery to determine the nature of the delay in the taxpayer's "imminent" indictment. On remand, the district court found that both the FBI and the Department of Justice investigations against the taxpayer had been closed two months prior to the issuance of the summons. The summons was therefore enforced by the district court and affirmed on appeal.

In both Chemical Bank and Chase Manhattan, the Second Circuit focused its consideration on the use of the summons and the extent to which any parallel or joint investigation had progressed at the time of the proceedings. No special emphasis was placed upon institutional posture at the time of issuance or enforcement. In United States v. O'Henry's Film Works, Inc., the Second Circuit rejected a taxpayer's argument that the IRS institutionally acted in bad faith. The taxpayer contended that the affidavits prepared for the initial enforcement proceeding did not represent the present purpose of the IRS because of the lapse of time between the preparation of the affidavits and the actual proceedings. The Second Circuit, however, stated that the timing of the affidavits standing alone was insufficient to create a substantial preliminary showing of institutional bad faith which would justify discovery on the issue of the Service's purpose. The O'Henry court was

135. Id. at 327.

The limited discovery was to be "either in the form of affidavits from other government officials or in the form of limited interrogatories to those who have already offered affidavits . . . to determine if the non-tax criminal indictment of the taxpayer is being held up pending, or is in any improper way connected to, compliance with the summons sought to be enforced." Id. at 327-28.


137. United States v. Chase Manhattan Bank, 80-1 U.S. Tax Cas. (CCH) ¶ 9355 (2d Cir. 1980).

138. 598 F.2d 313 (2d Cir. 1979).

139. The Second Circuit, however, did not enforce the summons in O'Henry on fifth amendment grounds. For a discussion of this constitutional defense, see Kenderdine, The Internal Revenue Service Summons to Produce Documents: Powers, Procedure, and Taxpayer Defenses, 64 MINN. L. REV. 73, 89-99 (1979); Comment, Use of the Summons, Intervention, and Constitutional Rights, 2 HOFSTRA L. REV. 135, 158-84 (1974).

140. 598 F.2d at 320.
concerned that requiring the government to submit a series of updated affidavits attesting to its institutional posture would create "endless discovery proceedings" envisioned by the dissent in *LaSalle*.

In any event, *O'Henry* makes it clear that the taxpayer must make a substantial preliminary showing of either institutional bad faith, or misuse of the summons power, or at least establish that a recommendation for criminal prosecution has been made at some level. This level may even be only within the IRS in order to invalidate the summons. Absent any of these circumstances, the summons would be on a par with *Garden State's* third time frame which the Third Circuit regards as "virtually unassailable." However, unlike the Third Circuit's broader discovery rule outlined as "minimum" in *Genser II*, the Second Circuit will grant only limited discovery upon a substantial preliminary showing by the taxpayer and will otherwise rely heavily upon disclosure through government affidavits.

C. Fourth Circuit

In *United States v. McGuirt*, the Fourth Circuit ordered the enforcement of section 7602 summonses stating that an enforcement petition accompanied by an affidavit asserting the continuing good faith purpose of the Service prior to any institutional referral for criminal prosecution to the Department of Justice created a prima facie showing sufficient to warrant enforcement.

Although the Court did not cite *Marine Midland*, the case which initiated the practice of examining institutional posture as of the date of consideration of the application for enforcement proceedings, it would appear that the age of the affidavits is irrelevant as long as the affidavit reflects the posture of the Service on the date the matter of enforcement was submitted for consideration by the district court.

141. 437 U.S. at 320.
142. See note 109 supra and accompanying text.
143. See *United States v. Ryan*, 80-1 U.S. Tax Cas. (CCH) ¶ 9269 (S.D.N.Y. 1980). This case analyzes the scope of permissible discovery in enforcement proceedings in the Second, Third and Fifth Circuits. See note 86 supra.
147. *Id.* at 421.
Similarly, in United States v. Equitable Trust Co., the Fourth Circuit noted that the special agent testified that no recommendation had been made by the IRS to the Department of Justice for criminal prosecution. In Equitable Trust it was alleged that the purpose of certain tax investigations was to pressure taxpayers into cooperating in a tax investigation of the intervenor, who was named in the summons but was not the object of the particular examination. In support of this contention, the intervenor alleged that the special agent had discussed immunity with the other taxpayers. The court, however, enforced the summons, stating that

no recommendations have seemingly been made by IRS to the Department of Justice for criminal prosecution of any of the persons under investigation. There are no allegations that the IRS is not interested in the civil aspects of the tax liability of [the parties questioned]. There are only allegations of bad faith because of the failure to warn targets or potential targets, and because of the discussion of immunity. . .

The court admitted that the district court might have required more details from the IRS concerning the particulars of the investigations, but concluded that if there were no basis for the civil tax investigations of the other taxpayers the burden was on intervenor to so demonstrate this.

Both McGuirt and Equitable Trust indicate that when the IRS submits an affidavit asserting that no formal recommendation has been made to the Department of Justice for criminal prosecution, the government has provided sufficient evidence of good faith. There is no discussion in the cases of intra-agency referrals as indications of institutional posture to establish good or bad faith.

The difficulties with a strict application of the LaSalle test and

148. 611 F.2d 492 (4th Cir. 1979).
149. Id. at 500.
150. The sufficiency of such affidavits has been questioned by Judge Widener concurring in United States v. McGuirt, 588 F.2d at 422.

I do not think the affidavits which were the only evidence before the district court, and upon which the cases was decided, meet the requirements of LaSalle because they do not even address the subject of the institutional commitment of the Internal Revenue Service with respect to a prosecution, other than that no recommendation to prosecute had been made, and do not mention any facts from which could be decided the matter of . . . "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."

Id. (citing United States v. LaSalle Nat'l Bank, 437 U.S. at 317).
with ascertainment of institutional posture are illustrated in the
district court case of *United States v. Clark*. In *Clark*, sum-
monses issued after a criminal investigation had ceased were en-
forced after the same criminal investigation was revived. Techni-
cally, the summonses met the objective test of *LaSalle* because
they were issued prior to any recommendation to the Department
of Justice. The *Clark* court stated that it found “no indication that
the IRS, in an institutional sense, has decided to recommend crim-
inal prosecution . . .” The court equated institutional posture,
which is a good faith inquiry, with the objective test that requires
the summonses be issued prior to a formal agency referral from the
IRS to the Department of Justice.

**D. Fifth Circuit**

The Fifth Circuit has determined that the validity of an admin-
istrative summons is measured as of the date of its issuance. Ad-
hering to this proposition, the district courts of the Fifth Circuit
have applied the *LaSalle* test by comparing the date of issuance of
the summons with the date the IRS makes its formal referral to
the Department of Justice.

In *United States v. Ladd*, District Judge Porter validated a
section 7602 summons finding that at the time of issuance, the IRS
had made no recommendation to the Department of Justice. The
court stated that “the controlling date is not the date the agent
recommends prosecution to the IRS, but the date the IRS recom-

151. 80-1 U.S. Tax Cas. (CCH) ¶ 9210 (M.D.N.C. 1979).
152. Id. at 83,328.
153. United States v. Garrett, 571 F.2d 1323, 1326 (5th Cir. 1978). This is a pre-*LaSalle*
decision.
154. *Accord*, United States v. Central Nat'l Bank, 80-1 U.S. Tax Cas. (CCH) ¶ 9284
(N.D. Ohio 1980). A district court in the Sixth Circuit originally required a supplemental
affidavit from the IRS.

In light of the great lapse of time since the hearing . . . it is possible that the institu-
tional posture of IRS has changed with respect to recommending a criminal prosecu-
tion of [the taxpayer]. Therefore, a supplemental affidavit of the investigating agent
should be filed . . . to indicate whether or not the IRS has recommended to the Jus-
tice Department that there be criminal prosecution . . .

Id. at 83,608. However, the court later reconsidered, stating that “the supplemental affidavit
requested is unnecessary since the validity of the summonses is to be determined as of the
date of their issuance.” Id.
mends prosecution to the Department of Justice.” Furthermore, in United States v. Lipshy, the same court determined that “[a] later recommendation will not of itself establish that at the time of issuance the IRS had abandoned its pursuit of civil tax determination.” The district court in Lipshy did not specify any other factors that would establish abandonment nor did it specify the time perspective from which other factors would have to be considered.

Applying the LaSalle test in the manner suggested by Ladd and Lipshy narrows the time at which institutional posture could be examined and therefore makes the good faith inquiry more manageable; however, this method may not yield a satisfactory result in all cases. In United States v. First State Bank, a district court enforced a summons despite the taxpayer’s claim that the investigation was really concerned with narcotics activities. The agent testified that no recommendation for criminal prosecution had been made and the court found nothing in the agent’s diary that would indicate that the investigation was solely criminal in nature. However, the court expressed concern that the agent’s diary did not indicate circumstances which would warrant a seven month delay between the issuance of the summons and the petition for enforcement.

E. Eighth Circuit

In United States v. Schutterle, the Eighth Circuit reviewed taxpayers’ convictions for wilful failure to file income tax returns for three years. The taxpayers at trial made a motion to suppress evidence obtained by means of a section 7602 summons. The

156. Id. at 1161.
157. 79-2 U.S. Tax Cas. (CCH) ¶ 9628 (N.D. Tex. 1979).
158. Id. at 88,283.
160. Id. at 1307. In spite of the Fifth Circuit’s fairly overall objective test, a § 7602 summons was denied enforcement in an examination initiated under the Service’s Taxpayer Compliance Measurement Program (TCMP). In United States v. First Nat’l Bank, 468 F. Supp. 415 (N.D. Tex. 1979), the district court found that the primary purpose of the audit was research into compliance with Code provisions and the secondary purpose was the accuracy of the return. See note 176 infra.
161. 586 F.2d 1201 (8th Cir. 1978).
162. The summons was issued prior to February 28, 1977 and therefore not subject to IRC § 7609, which authorizes notice and right of intervention to parties named in the subpoenaed documents. See notes 24 and 25 supra and accompanying text.
taxpayers also alleged abuse of process with regard to an earlier enforcement proceeding, claiming that the summons had been judicially enforced less than three months after it was issued. The special agent testified at the suppression hearing that he had not recommended criminal prosecution until over a year after the summons had been enforced. Shortly after that recommendation, the IRS forwarded a formal recommendation to the Department of Justice.

In response to the defendants' contentions, the Eighth Circuit, while acknowledging that LaSalle was decided after the taxpayers' trial, noted that there was sufficient evidence from which to conclude that the LaSalle test was satisfied. Citing LaSalle the Eighth Circuit stated "[j]udicial enforcement of the summons is proper only if it was issued in good faith, before the Service has abandoned in an institutional sense civil tax determination or collection purposes, and prior to any recommendation by the Service to the Department of Justice for criminal prosecution." However, the Schutterle court went on to state "that at the time the summons was enforced the IRS had not abandoned civil tax pursuits and had not committed itself to prosecution."

In United States v. Richter, the taxpayers contended that a district court erred in limiting their ability to prove institutional bad faith by preventing the taxpayers from questioning two special agents about an attempted entry of the taxpayers' home and about surveillance of the taxpayers. The district court also quashed the taxpayers' subpoena for examining the IRS investigatory file, although the district court did examine the file in camera. The taxpayers, while acknowledging that they bore the burden of proving the Service's institutional posture rather than the special agents' personal motives, argued that if taxpayers could not examine IRS investigatory files "the burden of proving a solely criminal 'institutional posture,' which LaSalle placed upon them, was impossible to meet."

The Eighth Circuit affirmed the district court's decision enforc-
ing the summons and found the rulings concerning the conduct of the special agents to be correct. The Eighth Circuit emphasized that its decision was based on evidence established at the suppression hearing and not on the district court’s *in camera* inspection of the IRS case file. The court was further convinced that from the testimony it was established that the Service fulfilled the *LaSalle* test in that no recommendation for criminal prosecution had been made. In effect, the taxpayers failed to negate the existence of a civil tax purpose; therefore, the court granted enforcement.\(^{168}\)

Similarly, in *United States v. Moon*,\(^ {169}\) the Eighth Circuit affirmed enforcement of a summons. In *Moon*, the special agent’s affidavit in support of enforcement indicated that two months after the date enforcement proceedings had been brought, neither he nor the IRS had recommended any criminal prosecution against the taxpayer.\(^ {170}\) The Eighth Circuit found that the Service had established a prima facie case for enforcement consisting of a petition for enforcement and a sworn declaration of the agent.\(^ {171}\) The court stated that the good faith showing required for enforcement could be made with the agent’s affidavit despite the fact that the agent’s personal good faith was less relevant than the Service’s institutional posture.\(^ {172}\)

The Eighth Circuit also approved the district court’s denial of the taxpayer’s motion for discovery. The court relying on *Morgan Guaranty* stated:

> There is no unqualified right to pretrial discovery in a proceeding to enforce an IRS summons and, indeed, discovery is the exception rather than the rule. An application of discovery rules which would destroy the summary nature of enforcement proceedings is not required. The use of traditional pretrial discovery mechanisms in summons enforcement proceedings is limited to those cases where the taxpayer makes a substantial preliminary showing of abuse as a prerequisite to even limited discovery.\(^ {173}\)

The Eighth Circuit’s analysis of *LaSalle* is in accord with the Second Circuit’s in its requirement that a taxpayer make a sub-

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168. *Id.* at 748.
169. 616 F.2d 1043 (8th Cir. 1980).
170. *Id.* at 1045.
171. *Id.* at 1046.
172. *Id.*
173. *Id.* at 1047 (citations omitted).
stantial preliminary showing of institutional bad faith before even limited discovery is granted. Furthermore, with respect to the point in time at which institutional posture is examined, Schutterle, Richter and Moon all indicate the Eighth Circuit's concern for the status of the civil case and possible criminal recommendation at the time of the enforcement proceedings. However, in United States v. National Bank of South Dakota, the Eighth Circuit noted only the time of issuance in reference to the status of any possible criminal investigation, and did not indicate whether any recommendation had actually been made subsequent to the issuance of the summons.

F. Tenth Circuit

A survey of Tenth Circuit decisions concerning investigations in which neither the IRS nor the examining agent had commenced or recommended criminal prosecution supports the conclusion reached by the Third Circuit that a summons issued at this early stage would be "virtually unassailable."

174. It is interesting to note that in United States v. Lipshy, 79-2 U.S. Tax Cas. (CCH) ¶ 9628 (N.D. Tex. 1979) at 88,284, the district court cites Schutterle as supporting the proposition that the controlling date is the date the IRS recommends prosecution to the Department of Justice and not the date the agent recommends prosecution to the IRS.

175. 620 F.2d 193 (8th Cir. 1980).

176. Worthy of note is the district court case of United States v. Flagg, 80-1 U.S. Tax Cas. (CCH) ¶ 9125 (S.D. Iowa 1979). In that case, a summons was issued for an audit initiated by the Service's Taxpayer Compliance Measurement Program (TCMP). The district court found the Service's motive to be research rather than investigative. The agent testified "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 the return was correct." Id. at 83,089. The court however, found that "[t]his is not the same as a dual purpose at the inception of the issuance [of the summons] as contemplated by LaSalle." Id. The district court denied enforcement of the summons.

See United States v. First Nat'l Bank, 468 F. Supp. 415 (N.D. Tex. 1979) decided prior to Flagg, where the district court ruled against enforcement in an identical case. See note 160 supra.

177. See note 109 supra and accompanying text.

For other Tenth Circuit cases upholding IRS summonses after the Service made a prima facie showing, see: United States v. Fahey, 614 F.2d 690 (10th Cir. 1980); United States v. Baker, 80-1 U.S. Tax Cas. (CCH) ¶ 9144 (10th Cir. 1979); United States v. Traynor, 611 F.2d 809 (10th Cir. 1979); United States v. MacKay, 608 F.2d 830 (10th Cir. 1979); United States v. Fetter, 79-2 U.S. Tax Cas. (CCH) ¶ 9675 (10th Cir. 1979); United States v. First Nat'l Bank, 79-2 U.S. Tax Cas. (CCH) ¶ 9674 (10th Cir. 1979).

In discussing the taxpayer's burden of proof, Chief Judge Winner's opinion in United States v. Shivlock, 459 F. Supp. 1383 (D. Colo. 1978), aff'd sub nom. United States v. In-
A prima facie showing, according to the Tenth Circuit, consists of testimony by the agent who issued the summons that no criminal case has been recommended or commenced, and an analysis showing that the IRS has met the good faith requirements of *Powell.* Once this standard is met, and before any recommendation as to a criminal prosecution is made, a civil tax purpose is presumed. For example, in *United States v. Ohmohundro,* a taxpayer argued that the burden of proof had shifted to the government to show a civil tax purpose after the government had "acknowledged that the summoned information may ultimately have some potential use in a criminal context." The Tenth Circuit disagreed and stated that once the Service has made a prima facie showing under *LaSalle* and *Powell,* nothing further is required.

The Tenth Circuit also follows the Second and Eighth Circuits in limiting the scope of discovery in enforcement proceedings. In *United States v. Southern Tanks Inc.,* an investigation was referred to a special agent, following a one year audit by a revenue agent, in order to determine whether criminal violations had occurred. The special agent issued a section 7602 summons to the corporate taxpayer and its president. At an evidentiary hearing before a magistrate, the government satisfied the prerequisites for enforcement of the summons; the defendants nevertheless demanded that the government produce the revenue agent's time sheets in order to determine his level of civil audit activity immediately prior to the referral to the special agent for criminal inves-
tigation. The defendants argued that this information would help establish that the civil tax purpose had been abandoned. The Tenth Circuit, in denying this request, stated that the record supplied sufficient indication of a continuing civil tax purpose and furthermore, that the Service "firmly denied that there had been a recommendation for prosecution made to the Department of Justice or that there was any intention to do so." The court accepted this showing as sufficient to satisfy the *LaSalle* test.

V. Conclusion

While the clearly objective test called for by the *LaSalle* dissenters would have greatly simplified tax administration, the Supreme Court has been unwilling to forego the good faith inquiry into the Internal Revenue Service's use of its section 7602 summons power and has therefore imposed a test of institutional posture. After *LaSalle*, it is clear that the motive of the investigating agent does not control institutional posture, but it is unclear at what level within the IRS institutional posture can be ascertained, or exactly how it should be ascertained. A majority of the circuits have stated that the IRS may make a prima facie showing based upon an enforcement petition accompanied by an agent's affidavit. However, with few exceptions, the circuit courts do not specify what

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183. *Id.* at 83,741.

184. *Id.* at 83,742.

185. 437 U.S. at 316-18, nn.18 & 19.

186. *Id.* at 316.

187. The meaning of the decisive phrase "institutional commitment" was left unclear in the Court's opinion, and presumably will have to be expanded in subsequent cases. What does seem clear is that an exploration into whether there has been an "institutional commitment" provides a fertile ground for dispute between the taxpayer and the Commissioner. If there has been an institutional commitment by the IRS, it most likely will have been evidenced by internal memos, notes of conferences, and the like between various layers of the IRS. Once a taxpayer has made an initial showing of failure by the IRS to satisfy section 7602 (which may be exceedingly difficult to do), he is entitled to an evidentiary hearing and to discovery and cross-examination to determine whether a summons has been issued in good faith. In order to test for the presence or absence of institutional commitment on the part of the IRS, an extensive examination of the Special Agent, the chain of his reviewers and superiors and their files might very well be necessary.


188. The Third Circuit has set forth minimum discovery requirements. See note 86 *supra.*
information must be set forth in the affidavit in order to make a prima facie showing of good faith. Furthermore, in view of the LaSalle requirement that the IRS use its summons power in good faith at all times, it is unclear whether an affidavit attesting to good faith issuance is sufficient. Confining the examination of institutional posture to the time of issuance only, without consideration of pending intra-agency referrals and without examination of institutional posture at the time of enforcement, disregards the fact that there may already be sufficient evidence to warrant a referral for criminal prosecution. Under these circumstances, the additional material sought, although serving a civil tax determination purpose, may also have significant use in a subsequent criminal case, possibly even enlarging the scope of the criminal charges.

The burdens placed upon the taxpayer to prove that the "sole objective of the summons is a criminal purpose" and that the IRS has "abandoned any civil tax purpose in an institutional sense" are almost impossible to overcome in view of the narrow permissible discovery allowed in enforcement proceedings. In the absence of egregious behavior or blatant bad faith on the part of the IRS, taxpayers will seldom, if ever, prevail. In spite of these disproportionate burdens it may be possible in circuits with either wider discovery rules or more specific requirements as to the contents of supporting affidavits or even in those circuits willing to examine

189. 437 U.S. at 318.
191. The Supreme Court characterizes this burden as "heavy." 437 U.S. at 316.
institutional posture at times other than issuance, for taxpayers to be persuaded as to the Internal Revenue Service's genuine good faith. The ultimate goal would be to provide for fair administration of the tax laws without resorting to a purely mechanical or objective test.\textsuperscript{192}

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192. An examination of Second and Third Circuit cases has led one commentator to conclude that

LaSalle has failed to achieve that for which it was intended—a clear and desirably accurate standard for determining when the Internal Revenue Service summons is being used improperly for a purely criminal purpose. The concept of "institutional bad faith" has caused continued confusion. The summons is a civil process which is used in the field by individual agents with specific purposes in mind and not by abstract institutions. Although theoretically a civil thread may be intertwined in every criminal tax investigation, this fact should not foreclose an analysis into the specific purpose for the issuance of a specific summons. Shortly before LaSalle, Congress enacted Title 26, United States Code Section 7609 guaranteeing to taxpayers the power to intervene and object in summons enforcement proceedings brought against third party record keepers. This legislation resulted from a demand that there be independent court review of the Service's use of its summons power. However, the restrictive test formulated in LaSalle may undermine Congress' intent and may result in the paradoxical situation of a Congressionally created remedy for a Court denied right.
