

Protecting the Family *Jewells*: The Case for Strict Enforcement of Taxpayer 23-Day Notice for IRS Administrative Summonses

Jeremy E. Carroll*

*ABSTRACT: Congress has granted the Internal Revenue Service (“IRS”) a broad administrative summons power that it can use with almost unlimited discretion to produce records and testimony to investigate taxpayers for incorrect tax returns. While these investigations are intended to be civil in nature, evidence uncovered during the investigation can lead to criminal prosecution. However, section 7609 of the Internal Revenue Code (“IRC”) provides taxpayers some protection by requiring the IRS to give taxpayers 23-days’ notice before they can enforce a summons on third-party records pertaining to the taxpayer. This gives the taxpayer under investigation an opportunity to quash the summons if the taxpayer can convince a judge that the IRS is using their administrative summons for an improper purpose (for example, attempting to uncover criminal tax fraud but claiming that the investigation is civil in nature, or simply using the administrative summons as a form of harassment). Yet when the IRS has failed to give a taxpayer the full 23-day notice, circuit courts have found various methods of excusing the lack of notice, thereby depriving the taxpayer of the protection set forth by Congress. This changed in 2014 with the Tenth Circuit’s decision in *Jewell v. United States*. In *Jewell*, the Tenth Circuit created a circuit split by finding that if the IRS gives a taxpayer less than 23-days’ notice and the taxpayer files a motion to quash the summons, the motion must be granted. This Note argues that the Tenth Circuit is the only court to have thus far come to the correct legal interpretation of IRC § 7609. It explores the legal justification of the Tenth Circuit’s holding as well as substantial public policy reasons for requiring strict enforcement of the 23-day notice requirement.*

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I. INTRODUCTION

The relationship between the Internal Revenue Service ("IRS") and the American public is perhaps one of the strangest relationships between an administrative agency and the public it serves. While the agency is essential for ensuring that the government has the resources needed to provide critical services to the nation (i.e., provide for a national defense) the common public sentiment towards the IRS is somewhere between begrudging acceptance and downright contempt. But why? Certainly part of this dislike lies in the IRS being the public face that takes away part of citizens' paychecks. However, when looked at deeper, many fear that the IRS is an abusive, power hungry, even tyrannical organization.¹

Whether such abuses are real or imagined, it is undeniable that the IRS has been granted certain wide sweeping powers to effectuate its job of collecting accurate taxes and replenishing the nation's coffers. One of the

1. See *infra* note 161 (detailing articles aiming to paint the IRS as "evil").

powers granted to the IRS is the administrative summons. Simply put, the administrative summons grants the IRS the ability to issue summons to taxpayers or third parties in order to investigate taxpayer returns or tax fraud, often without the need to show probable cause.² In order to protect taxpayers from potential abuse of this power, Congress enacted section 7609 of the Internal Revenue Code (“I.R.C.”), which requires the IRS to notify a taxpayer after the IRS has issued an administrative summons to a third party about taxpayer records. This notice must be given at least 23 days before the IRS schedules the records examination.³ This allows the taxpayer to file a motion to quash and seek judicial review if the summons is being issued for an inappropriate reason.

However, circuit courts have been highly reluctant to actually require the IRS to comply fully with the 23-day notice requirement.⁴ When the IRS has given taxpayers less than 23-days’ notice, the courts have used a variety of legal justifications to enforce the summons and forgive the IRS’S error.⁵ Until 2014, no circuit court was willing to hold the IRS accountable with strict compliance of the 23-day notice. As a result, the IRS has been given wide latitude to circumvent one of the very few procedural safeguards put in place by Congress to protect the American public from potential abuse of an already sweeping power.⁶

This changed in 2014, when the Tenth Circuit held that the IRS had to strictly comply with the 23-day notice, and that failure to comply would allow the taxpayer under investigation to successfully quash the summons.⁷ The *Jewell* decision represented a substantial departure from 23-day notice jurisprudence, and created a circuit split, opening the door for the Supreme Court to potentially rule on the issue.

This Note argues that the Tenth Circuit’s strict enforcement of the 23-day notice requirement in *Jewell* is a better legal standard—for public policy reasons not explored in the *Jewell* decision—than decisions of other circuits, which fail to force the IRS to strictly comply with the 23-day notice requirement. Part II explores the history of the creation of the 23-day notice, the circuit court decisions leading up to *Jewell*, and explores the Tenth

2. See *infra* Part III.

3. See 26 U.S.C. § 7609(a)(1) (2012). Hereinafter, title 26 of the United States Code is referred to as the Internal Revenue Code (“I.R.C.”).

4. See *infra* Part II.B.

5. See *infra* Part II.B.

6. To be fair, more often than not it does appear that failure to comply with the strict requirements set forth in I.R.C. § 7609 are the result of mistakes. A good example of this is *Azis v. IRS*. In *Azis*, the IRS agent failed to send the entire notice to the taxpayer and was then out of town for training for nearly a week, resulting in the full notice being sent four days later than required. *Azis v. IRS*, 522 F. App’x. 770, 776–77 (11th Cir. 2013). As this Note will argue, however, that the failure to comply with the 23-day notice is often due to mistakes and not malice does not change the harm to plaintiffs or the potential for abuse.

7. *Jewell v. United States*, 749 F.3d 1295, 1301 (10th Cir. 2014).

Circuit's holding in *Jewell*. Part III explores the reasons that safeguards for administrative summonses, such as the 23-day notice requirement, are important. Specifically, Part III.A explores the privacy concerns related to administrative summons and Part III.B explores the ways in which the administrative summons can circumvent warrants for criminal investigation, calling into question the safeguards put forth by the Fourth Amendment. Part IV.A explores the legal reasoning employed by the Tenth Circuit in its *Jewell* decision, but attempts to analyze the issue with greater depth than the Tenth Circuit. Part IV.B explores public policy reasons for why courts should find that the IRS must strictly comply with the 23-day notice requirement.

II. CREATION OF THE 23-DAY NOTICE REQUIREMENT AND THE JUDICIAL HANDLING OF IRS NONCOMPLIANCE

Section 7602 of the I.R.C. gives the IRS broad powers to issue summons “[t]o examine any books, papers, records, or other data which may be relevant”⁸ to ascertain the veracity of a tax return, the reasons for a taxpayer not making a return, or to generally investigate “the liability of any person for any internal revenue tax.”⁹ This power further allows the IRS to summon any third person who possesses books or materials relating to the business of the taxpayer¹⁰ being investigated, or any third person whom the Secretary¹¹ “may deem proper,” to produce requested materials and testify under oath.¹² This power is often referred to simply as an administrative summons.¹³

8. I.R.C. § 7602(a)(1).

9. *Id.* § 7602(a).

10. It is worth noting that any person is entitled to the protection of I.R.C. § 7609, however, for simplicity, this Note uses the term “taxpayer” to identify the individual being investigated—the individual who would have an interest in quashing a third-party summons.

11. The IRS is a subdivision of the Department of the Treasury. *See* 26 C.F.R. § 601.101(a) (2016). “The term ‘Secretary’ means the Secretary of the Treasury . . .” I.R.C. § 7701(a)(11)(B). However, in practice any agent of the IRS may issue an administrative summons. *See* *Sylvestre v. United States*, 978 F.2d 25, 26–27 (1st Cir. 1992) (detailing the process of how one agent issued a valid administrative summons as part of the agent’s investigation).

12. I.R.C. § 7602(a)(2). What third party may be “proper” can be quite expansive. John Potts Barnes, in discussing I.R.C. § 3615 (1939), one of the earlier predecessors of I.R.C. § 7602, noted that:

A bank with which the taxpayer has done banking business, a telegraph company through which money has been transmitted to the taxpayer, a reporter who has taken stenotype notes of an arbitration proceeding, and an accounting firm which audited the taxpayer’s books and prepared his return, may be required to give testimony concerning, or produce records of, such transactions with the taxpayer, if such transactions have any reasonably apparent relation to the taxpayer’s tax liability.

John Potts Barnes, *Inquisitorial Powers of the Federal Government Relating to Taxes*, 28 TAXES 1211, 1214 (1950) (citations omitted).

13. *See generally* James D. Burroughs, *The Use of the Administrative Summons in Federal Tax Investigations*, 9 VILL. L. REV. 371 (1964) (exploring the general powers and limits of the IRS’s administrative summons).

This Part explores the history of the 23-day notice requirement leading up to the *Jewell* decision. Part II.A explores the Congressional creation of the administrative summons and the 23-day notice requirement. Part II.B explores the three distinct legal reasons circuit courts have used to excuse IRS's failure to comply with the 23-day notice requirement. Part II.C lays out the Tenth Circuit's decision in *Jewell*.

A. CREATION OF THE 23-DAY NOTICE REQUIREMENT

The IRS's power to summon third parties for documents or testimony has existed, in one form or another, since 1918. The Revenue Act of 1918 gave the Commissioner the power

to examine any books, papers, records or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.¹⁴

However, for nearly 60 years, the taxpayer under investigation held no right to be notified that a third-party summons had been issued.¹⁵ While the summoned third party did have a right to contest the summons, realistically, a third party's interest in doing so would likely be minimal.¹⁶

This changed in 1976, when Congress added I.R.C. § 7609, which required the IRS to give notice to the taxpayer who was being investigated within three days of issuing a summons on a third-party record-keeper.¹⁷ The IRS was then required to wait 14 days after giving notice to the taxpayer before

14. NAT'L BANK OF COMMERCE IN N.Y., FEDERAL REVENUE ACT OF 1918: COMPLETE TEXT WITH REFERENCE NOTES, TABLES, AND INDEX 191–92 (1919). This language is relatively consistent with the language used in the 1921 and subsequent acts, and doesn't appear to have changed until the Revenue Act of 1954. I.R.C. §§ 7602–7605 (1954); see Revenue Act of 1921, H.R. 8245, 67th Cong. § 1308 (1921) (detailing the tax code as it existed in 1921); INTERNAL REVENUE CODE AND APPENDIX: COMPLETE WITH 1939 AMENDMENTS 435 (Prentice-Hall, Inc. ed. 1939) (showing additions to the tax code in 1939). There does not appear to be any similar provision specifically allowing the Commissioner, or his agents, to issue summons in earlier acts. WALTER E. BARTON & CARROLL W. BROWNING, BARTON'S FEDERAL TAX LAWS CORRELATED 406–07 (2d ed. 1925); see also generally, Tariff of 1913, H.R. 3321, 63rd Cong. (1913) (setting forth the tax code as it existed in 1913).

15. STAFF OF THE JOINT COMM. ON TAXATION, 94TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, at 364 (Comm. Print 1976), <https://www.jct.gov/publications.html?func=startdown&id=2401>.

16. *Id.* at 364–65.

17. The term “third-party record-keeper” meant that, at the time the act was passed, the IRS only had a duty to notify a taxpayer if the summons was issued to “attorneys, accountants, banks, trust companies, credit unions, savings and loan institutions, credit reporting agencies, issuers of credit cards, and brokers in stock or other securities.” *Id.* at 365.

the agency could obtain the materials subject to the summons.¹⁸ In creating this provision, the congressional Joint Committee on Taxation stated that while they believed the third-party summons was an important investigative tool, new regulations were necessary to ensure that this power did “not unreasonably infringe on the civil rights of taxpayers, including the right to privacy.”¹⁹

In subsequent years, Congress broadened the protections available to the taxpayer by expanding the length of notice to 23 days and also requiring notification of the taxpayer if any third party was subject to a summons²⁰—absent a few specific exceptions allowing the IRS to circumvent giving notice to the taxpayer.²¹ The provision reads as follows:

(a) Notice

In general

If any summons to which this section applies requires the giving of testimony on or relating to, the production of any portion of records made or kept on or relating to, or the production of any computer software source code . . . with respect to, any person (other than the person summoned) who is identified 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 23rd 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 an explanation of the right under subsection (b) (2) to bring a proceeding to quash the summons.²²

Under section 7609’s 23-day notice requirement, if the IRS wishes to issue a summons on a third party under I.R.C. § 7602 to look at records in regards to an investigation being conducted on a taxpayer, it must provide

18. I.R.C. § 7609 (1976); STAFF OF THE JOINT COMM. ON TAXATION, *supra* note 15, at 366.

19. STAFF OF THE JOINT COMM. ON TAXATION, *supra* note 15, at 365.

20. See I.R.C. § 7609 (2012) (illustrating the expansion); Internal Revenue Service Restructuring and Reform Act of 1998, H.R. 2676, 105th Cong. § 3415(c)(6) (removing “recordkeeper” from the statute); see also THEODORE M. DAVID, DEALING WITH THE IRS: LAW, FORMS, AND PRACTICE 135 (2d ed. 2008) (“Section 7609 applies to third-party summonses without regard to whether the summoned party is a record-keeper. Under prior law, notification was limited to third-party record-keepers.”).

21. See I.R.C. § 7609(c)(2)–(3), (f), (g). These include officers or employees of the taxpayer who is being investigated, if the summons has been issued for very specific and limited information gathering, or if a court has determined that there is a reasonable belief that notifying the taxpayer will result in the destruction of the notice. *Id.*

22. *Id.* § 7609(a)(1). For a more thorough discussion of the technical process in an IRS summons, see DAVID, *supra* note 20, at 133–54 (discussing the IRS summons).

the taxpayer with 23-days' notice. Within three days after it has notified the third party that the third party's records or testimony is being summoned, the IRS must notify the taxpayer that they have issued a summons on the third party. This notice must be given to the taxpayer at least 23 days before the records examination. Further, as will be detailed later, I.R.C. § 7609(b)(2) gives the taxpayer 20 days to file a motion to quash after receiving notice of the summons.²³

B. DECISIONS LEADING TO THE CIRCUIT SPLIT

Until the Tenth Circuit's holding in *Jewell*, the circuit courts used varied approaches of analyzing section 7609 to excuse the IRS'S failure to give 23-days' notice. This Part will first look at *United States v. Powell*, where the Supreme Court laid out the factors the IRS had to meet to show a prima facie case for enforcement of an administrative summons. It will then look at how the circuit courts analyzed and applied the *Powell* decision to the 23-day notice requirement before the Tenth Circuit created the circuit split in *Jewell*.

1. The *Powell* Factors

In *United States v. Powell*, the Supreme Court addressed the general nature of the IRS'S administrative summons power and established four factors that the IRS must show to prove a prima facie case to enforce an administrative summons.²⁴ The Court noted that the power was essentially inquisitorial in nature and, therefore, the IRS could "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."²⁵ As such, to establish a prima facie case to enforce the summons, the IRS does not need to show any probable cause.²⁶ Later cases have clarified that instead of probable cause, the IRS only needs to demonstrate good faith when issuing a summons.²⁷

In order to establish a prima facie case for enforcement of their summons, the IRS must: "[1] show 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 Commissioner's possession, and [4] that the administrative steps required by the Code have been followed"²⁸ Collectively, these four requirements are referred to as the *Powell* factors.²⁹

23. I.R.C. § 7609(b)(2).

24. See generally *United States v. Powell*, 379 U.S. 48 (1964).

25. *Id.* at 57 (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950)).

26. *Id.*

27. *United States v. Stuart*, 489 U.S. 353, 359 (1989).

28. *Powell*, 379 U.S. at 57-58.

29. See *United States v. Clarke*, 134 S. Ct. 2361, 2365 (2014) (referring to the "*Powell* factors").

Once the IRS has established a *prima facie* case for enforcing the summons, the evidentiary burden shifts to the taxpayer to prove that one of the *Powell* factors has not been met, or to prove that the IRS is causing “an abuse of the court’s process.”³⁰ The fourth *Powell* factor—that the required administrative steps have been followed—has led to the current discrepancies among the circuits. Specifically, courts are at odds about whether: (1) the 23-day notice requirement is an administrative step; and (2) if it is an administrative step, if it can be forgiven if not strictly followed.

2. The Circuit Courts’ Application of *Powell*

Before the Tenth Circuit’s recent decision in *Jewell*, circuit courts consistently held that the IRS failing to strictly comply with the 23-day notice requirement did not mean that an administrative summons was unenforceable. The circuit courts have applied three distinct rationales to support their decisions.³¹

The first rationale, employed by the Fifth Circuit, holds that strictly enforcing the 23-day notice requirement would elevate form over substance. The Fifth Circuit addressed the *Powell* factors in *United States v. Bank of Moulton*.³² In *Moulton*, the IRS gave proper notice to the taxpayer; however, when the IRS delivered the summons to the bank, the bank made disclosures to an agent in violation of the 23-day waiting period.³³ When the IRS then attempted to enforce the summons in its entirety, the taxpayer contested the enforcement, claiming that the IRS had violated I.R.C. § 7609(d)(1).³⁴ The Fifth Circuit acknowledged that the provisions of section 7609 consisted of administrative steps, but felt that the taxpayer was not harmed. More importantly, the court held that failure to comply with administrative steps

30. *Powell*, 379 U.S. at 58; see also Brief for Appellee at 18–19, *Jewell v. United States*, 749 F.3d 1295 (10th Cir. 2014) (No. 13-6069). “Once the United States has made this minimal showing, the burden shifts to the party opposing enforcement to rebut the good-faith presumption that arises in consequence of the United States’ *prima facie* case.” Brief for Appellee at 18–19, *Jewell*, 749 F.3d 1295 (No. 13-6069) (citing *United States v. Balanced Fin. Mgmt., Inc.*, 769 F.2d 1440, 1444 (10th Cir. 1985)). “Unless the party challenging a summons can show that enforcement would ‘constitute an abuse of the court’s process, or that in issuing the summons the IRS lack[ed] institutional good faith,’ the United States is entitled to enforcement of the summons.” Brief for Appellee at 19, *Jewell*, 749 F.3d 1295 (No. 13-6069) (quoting *Anaya v. United States*, 815 F.2d 1373, 1377 (10th Cir. 1987)) (alteration in original).

31. These rationales were explored by the Tenth Circuit in *Jewell v. United States*, 749 F.3d 1295, 1300–01 (10th Cir. 2014).

32. *United States v. Bank of Moulton*, 614 F.2d 1063, 1066 (5th Cir. 1980).

33. *Id.* at 1064–65 (referring to I.R.C. § 7609(d)(1) (1976)).

34. *Id.* at 1064–65. It should be noted that while the factual issue involved in *Moulton* is slightly different than the other section 7609 cases, that being failure to allow the mandatory time to pass before examining the records, the reasoning of *Moulton* has been applied in numerous subsequent section 7609(a) cases. See *Azis v. IRS*, 522 F. App’x. 770, 777 (11th Cir. 2013) (referencing *Moulton*); *Adamowicz v. United States*, 531 F.3d 151, 161 (2d Cir. 2008) (referencing *Moulton*); *Sylvestre v. United States*, 978 F.2d 25, 27–28 (1st Cir. 1992) (referencing *Moulton*).

did not require them to quash the summons, as this would “elevate form over substance.”³⁵

The second rationale was used by the First Circuit, which held that failure to give a full 23-day notice would not compel the court to quash the summons if the taxpayer was not prejudiced.³⁶ In *Sylvestre v. United States*, the First Circuit used much of the same language that would later be used in the third-party summons cases from the Second, Sixth, and Eleventh Circuits.³⁷ Where the taxpayer was given notice only 21 days before the third-party records were to be examined but managed to bring a timely objection, the court stated that “[i]t is obvious that the purpose of notice . . . is to allow [the taxpayer] the opportunity to invoke his right to intervene and seek to quash the summons before that examination.”³⁸ Because the taxpayer had managed to object to the summons before the records were examined he was deemed to not have been “harmed” by the shortened notice, and subsequently was denied his motion to quash.³⁹

The third rationale has been used by the Second, Sixth, and Eleventh Circuits, which indicated that the 23-day notice requirement is an administrative step, but can be forgiven if the taxpayer is not prejudiced. The reasoning was first employed by the Sixth Circuit in *Cook v. United States*, where the court side-stepped determining if the notice was an administrative step.⁴⁰ The court first found that based on the use of the statutory language that the taxpayer “shall” receive notice 23 days before the summons is effectuated:

Congress has unequivocally commanded that the I.R.S. afford 23 days notice, not something less, to a target of an I.R.S. investigation that a summons has been issued to a third-party recordkeeper to produce the target’s documents. The I.R.S. possesses no discretionary authority to give the subject of an investigation less than 23 days notice.⁴¹

Nonetheless, the court then proceeded to find that, regardless of Congress’ “unequivocal command,” this did not indicate that a summons

35. *Bank of Moulton*, 614 F.2d at 1066.

36. The opinion does not clearly state whether or not the 23-day notice is an administrative step. See generally *Sylvestre*, 978 F.2d 25 (discussing a failure by the IRS to strictly comply with the 23-day notice requirement).

37. *Id.* at 28.

38. *Id.*

39. *Id.*

40. *Cook v. United States*, 104 F.3d 886, 889–91 (6th Cir. 1997). Indeed, the court began its discussion by asking “did the Service’s procedural error constitute a breach of an essential administrative step which compels invalidation of the summons?” *Id.* at 889. This question remains unanswered, as the court never directly stated whether the 23-day notice is an administrative step, but at alternating points in the opinion referred to the notice as either an unequivocal Congressional command to the IRS, a technical stricture, or a technical legal condition. *Id.* at 889–90.

41. *Id.* at 889.

given with less than 23 days' notice had to be quashed.⁴² Although the court expressed frustration with the IRS's failure to give a proper 23-day notice,⁴³ it concluded that if the IRS failed to give the 23-day notice, this would only be grounds to quash a summons if the defendant were sufficiently prejudiced by the delay.⁴⁴ The court worried that to quash a summons merely because the notice was sent late would mean that the IRS would simply have to reissue the summons, this time giving the proper 23-day notice, and this would lead to a waste of judicial resources without a demonstratively different result occurring.⁴⁵ Not surprisingly, because the taxpayer in the case had managed to bring an objection to the third-party summons, the taxpayer was found to not be substantially prejudiced.⁴⁶ The Sixth Circuit's reasoning, that the 23-day notice is required but can be forgiven as long as the shortened notice period did not substantially prejudice the taxpayer, was later adopted by the Second and Eleventh Circuits.⁴⁷

None of the circuits employing the third rationale directly stated that the 23-day notice requirement was an "administrative step,"⁴⁸ yet the opinions from these courts indicate that it is. In *Adamowicz v. United States*, the Second Circuit refers to failure to give a full 23-day notice as part of a general category of "violations of the IRC or tax regulations."⁴⁹ The Eleventh Circuit came the closest to directly identifying the 23-day notice as an administrative step, stating in *Azis v. IRS* that "[b]ecause [the taxpayer] was not sent full copies of the summonses within three days of the banks receiving them, [the IRS] did not comply with the statutory requirements."⁵⁰ Since the administrative steps that the IRS must follow are found in tax regulations or statutory requirements, these circuits appear to acknowledge that the 23-day notice is in fact one of these administrative steps. Indeed, the administrative step in *Powell* was a written notification requirement found in I.R.C. § 7605(b), one that very closely mimicked the language found in I.R.C. § 7609.⁵¹ It is likely,

42. *Id.* ("However, Congress has *not* evidenced an intention to render *void* every third-party summons which does not comply with every technical stricture of section 7609." (emphasis in original)).

43. *Id.* at 890 ("This court is disturbed by a history of I.R.S. irresponsibility in honoring and respecting filing requirements which borders upon an expression of arrogant immunity from executive, legislative, and judicial mandates."). The court even concluded with the warning that it would "review future violations . . . by the I.R.S. . . . with an increasingly critical eye." *Id.* at 890-91.

44. *Id.* at 889.

45. *Id.* at 889-90.

46. *Id.* at 889.

47. *Azis v. IRS*, 522 F. App'x 770, 777 (11th Cir. 2013); *Adamowicz v. United States*, 531 F.3d 151, 161-62 (2d Cir. 2008).

48. *Cook*, 104 F.3d at 889-90; *see also generally Azis*, 522 F. App'x 770 (not reaching a conclusion of whether the 23-day notice is an administrative step); *Adamowicz*, 531 F.3d 151 (doing the same).

49. *Adamowicz*, 531 F.3d at 161.

50. *Azis*, 522 F. App'x at 777.

51. *United States v. Powell*, 379 U.S. 48, 52-54 (1964); *see also I.R.C. § 7605(b)* (2012)

albeit speculative, that the hesitancy to directly state that the 23-day notice is a required administrative step is a result of nothing in the *Powell* decision indicating that an administrative step can be ignored if the result is not prejudicial.⁵²

What distinguishes *Sylvestre* from the third group is that the First Circuit implicitly held that the 23-day notice was not an administrative step. While acknowledging that *Powell* requires all administrative steps to be followed to establish a prima facie case for enforcement of a summons, and equally aware that only 21 days' notice was given, the court accepted as valid the fact that the IRS had established a prima facie case.⁵³ The court therefore shifted the burden of proof to the taxpayer "to refute the elements of the prima facie case or to present sufficient evidence that the court's process, invoked to enforce these summonses, was abused."⁵⁴ Because the court acknowledged that the IRS must follow the administrative steps in order to make a prima facie case, and because the court concluded that the IRS did make a prima facie case, the First Circuit either believes giving a taxpayer notice is not an administrative step, or that the length of time the notice must be given is not a part of the administrative step.⁵⁵

C. THE TENTH CIRCUIT'S RULING IN *JEWELL V. UNITED STATES*

In *Jewell v. United States*, the Tenth Circuit became the first circuit court to hold that a summons could not be enforced if the taxpayer was not given the full 23-day notice required under section 7609(a)(1).⁵⁶ In *Jewell*, the IRS

("No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary, after investigation, *notifies the taxpayer in writing that an additional inspection is necessary.*" (emphasis added)).

52. In fact, quite the opposite seems to be the case. The *Powell* decision examined the sufficiency of notice under I.R.C. § 7605(b), which requires that "only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary." *Powell*, 379 U.S. at 52–53 (quoting I.R.C. § 7605(b)). The administrative step deemed necessary was that the IRS give the taxpayer written notification that they will perform an additional inspection. *Id.* at 57–58. Nothing in the discussion indicates that this step may be forgiven as long as the taxpayer is not prejudiced, for instance, if non-written notification were given. *See id.* (detailing requirements to show a prima facie case for enforcement of an administrative summons).

53. *Sylvestre v. United States*, 978 F.2d 25, 27 (1st Cir. 1992) ("It is evident that these averments by the revenue agent satisfy a prima facie case for the enforcement of these summonses.").

54. *Id.*

55. The other possible, although arguably less flattering, interpretation is *Jewell's*, which "acknowledge[d] that *Powell* requires the government to comply with all of the 'required administrative steps,' but then . . . ignore[d] the fact that the 23-day notice is one of the administrative steps required in the tax code." *Jewell v. United States*, 749 F.3d 1295, 1300 (10th Cir. 2014).

56. *Id.* at 1301.

sent summonses to two banks requesting taxpayer documents, but only gave the taxpayer notice 18 days before the documents were to be obtained.⁵⁷ The taxpayer then filed a timely motion to quash the summons.⁵⁸

The court began its analysis by noting that section 7069(a)(1) states that a summons “shall” be given 23 days before the date of examination and that the term “shall” indicated that the summons was mandatory.⁵⁹ The court then turned to whether the notice was not simply mandatory, but also an administrative step as required to make a *prima facie* case under *Powell*.⁶⁰ The court defined an administrative step as “[p]ertaining to, or dealing with, the conduct or management of affairs” and as the notice was necessary in the management of IRS affairs, it constituted an administrative step.⁶¹ The court found this “technical default” was inadequate to forgive the mistake, as “administrative” is purposefully broad and would include technical requirements.⁶²

After a discussion of the approaches used by the other circuit courts, the Tenth Circuit held that the IRS was required to strictly comply with the 23-day notice in order to have a third-party summons enforced.⁶³ In doing so, the court noted: “we are obliged to follow Supreme Court precedent, even when it might be viewed as ‘inequitable’ or as ‘form over substance.’ In *Powell*, the Supreme Court expressed itself clearly: If the IRS does not comply with the administrative requirements of the Internal Revenue Code, its summonses are unenforceable.”⁶⁴ The court quashed the summons from the IRS and the circuit split was created.⁶⁵

III. THE POWER OF THE ADMINISTRATIVE SUMMONS AND THE POTENTIAL FOR ABUSE

The IRS’s summoning power is broad in scope.⁶⁶ The Supreme Court has noted that the power must be broad by the very nature of tax law

57. *Jewell v. United States*, No. 12-CV-424-JHP, 2013 WL 870079, at *1–2 (E.D. Okla. Mar. 7, 2013). This is the prior case history, as the Tenth Circuit opinion only refers to the fact that the taxpayer was not given notice 23 days before the documents were to be obtained. *Jewell*, 749 F.3d at 1297.

58. *Jewell*, 749 F.3d at 1297.

59. *Id.* at 1298.

60. *Id.* at 1299.

61. *Id.* (quoting I THE OXFORD ENGLISH DICTIONARY 163 (2d ed. 1989)) (alteration in original).

62. *Id.* at 1300.

63. *Id.* at 1300–01.

64. *Id.* at 1300.

65. *Id.* at 1301. The court acknowledged it was creating a circuit split, and was reluctant to do so, stating: “We are hesitant to create a circuit split, but we have little choice because we are obliged to follow the Supreme Court’s holding in *Powell* even if other circuit courts have not.” *Id.* at 1300.

66. See, e.g., *United States v. Clarke*, 134 S. Ct. 2361, 2365 (2014) (“Congress has granted the Service broad latitude to issue summonses . . .”); Leo P. Martinez, *The Summons Power and the Limits of Theory: A Reply to Professor Hyman*, 71 TUL. L. REV. 1705, 1718–19 (1997) (“The

enforcement.⁶⁷ The IRS does not need probable cause when issuing a summons,⁶⁸ the evidence being sought does not have to meet the evidentiary standards of the Federal Rules of Civil Procedure,⁶⁹ and the summons can force non-consensual depositions of any person the IRS believes may have relevant information.⁷⁰ While the Supreme Court initially did not allow an administrative summons to be used for simple “fishing expeditions,” this quickly changed and the Supreme Court has accepted limited “fishing expeditions” when performed in good faith.⁷¹ However, as will be discussed in Part III.B, it is very difficult, perhaps almost impossible, for a taxpayer to prove that the IRS acted in bad faith. As a result, the good faith limitation has little or no practical effect on limiting the IRS’s use of an administrative summons.

With such a broad power to issue summonses to nearly anyone, for nearly any information, there is a real potential for abuse.⁷² In order to fully

administrative summons reflects Congress’s desire to allow the federal government, through the IRS, wide, almost unfettered, power to gather information for the purpose of tax collection.”); Christopher M. Pietruszkiewicz, *Of Summonses, Required Records and Artificial Entities: Liberating the IRS from Itself*, 73 MISS. L.J. 921, 923 (2004) (“The Supreme Court repeatedly holds that the summons authority of the United States is expansive and that statutory construction of this authority should embrace the mandated obligation of the Internal Revenue Service to enforce the tax laws of the United States.” (footnote omitted)).

67. *United States v. Arthur Young & Co.*, 465 U.S. 805, 816 (1984) (“In order to encourage effective tax investigations, Congress has endowed the IRS with expansive information-gathering authority . . .”); *see also generally* Pietruszkiewicz, *supra* note 66.

68. *See supra* notes 25–27 and accompanying text (discussing the Court’s finding in *Powell* that probable cause is not necessary for an administrative summons).

69. *Arthur Young & Co.*, 465 U.S. at 814 (“[A]n IRS summons is not to be judged by the relevance standards used in deciding whether to admit evidence in federal court.”). The Court compared language from the summons power in I.R.C. § 7602(a)(1) that the Secretary is authorized to “‘examine any books, papers, records, or other data which may be relevant or material’ to a particular tax inquiry” with language from Federal Rule of Evidence 401: “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” *Id.* at 813–14 (quoting I.R.C. § 7602(a)(1) (2012)); FED. R. EVID. 401. The Court stated:

The language “may be” reflects Congress’ express intention to allow the IRS to obtain items of even potential relevance to an ongoing investigation, without reference to its admissibility. The purpose of Congress is obvious: the Service can hardly be expected to know whether such data will in fact be relevant until they are procured and scrutinized.

Arthur Young & Co., 465 U.S. at 814 (emphasis omitted).

70. *See* Brian P. Keifer, *Dumping Universal and Westreco Tax Court Discovery Protections on the Ash Heap*, 11 VA. TAX REV. 579, 581 (1992).

71. *See* Kathryn E. Daniels, Note, *Administrative Summonses*, 26 AM. CRIM. L. REV. 1069, 1069–70 (1989) (comparing Fed. Trade Comm’n v. Am. Tobacco Co., 264 U.S. 298 (1924), with *United States v. Morton Salt Co.*, 338 U.S. 632 (1950)).

72. *United States v. Clarke*, 134 S. Ct. 2361, 2367 (2014) (“The power ‘vested in tax collectors may be abused, as all power’ may be abused.” (quoting *United States v. Bisceglia*, 420 U.S. 141, 146 (1975))). In discussing the potential for abuse, and the still present lack of protections to tax payers, one commentator has noted that:

understand whether it is important for courts to strictly enforce the 23-day notice requirement, it is necessary to first understand the potential for abuse present within the IRS's summoning power. This Part examines two areas where this abuse is most clearly evident: privacy rights and criminal investigations.

A. *PRIVACY RIGHTS*

As previously noted, I.R.C. § 7609 was enacted partly in response to Congressional fear that the IRS's summoning power had the potential to infringe upon taxpayers' rights to privacy.⁷³ The Fourth Amendment of the U.S. Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁷⁴

At first glance, it seems that the Fourth Amendment would apply to the IRS when it summons a taxpayer or third party to review the taxpayer's personal records. Arguably these would be "papers and effects" that belong to the taxpayer. Various rulings, however, have chipped away at these protections in a number of meaningful ways. The summons is not considered a "warrant" and does not need probable cause.⁷⁵ Nor does the IRS need to describe, even minimally, what they are looking for.⁷⁶ Instead, the administrative summons functions under rules outside of the normal structure for warrants and other searches. The result of the judicial decisions from *Powell* and its progeny has led Professor Leo Martinez to note that "[t]he combined effect of these decisions is the removal of Fourth Amendment privileges from a taxpayer under investigation by the Service."⁷⁷

Notwithstanding the clear potential for abuse of the summons procedure, the courts have denied taxpayers injunctive relief against harassment by IRS agents. Thus, unscrupulous agents could issue a series of summonses without seeking enforcement but forcing the taxpayer to appear at repeated hearing examinations or risk severe penalties for nonappearance. This harassment ultimately could coerce the taxpayer either to disclose his records, despite the existence of a bona fide defense, or to settle a collateral dispute prematurely.

Note, *Challenging the Tax Summons: Procedures and Defenses*, 19 WM. & MARY L. REV. 771, 775 (1978) (footnotes omitted).

73. STAFF OF THE JOINT COMM. ON TAXATION, *supra* note 15 at 365-66.

74. U.S. CONST. amend. IV.

75. *United States v. Powell*, 379 U.S. 48, 57 (1964).

76. *Id.*; see *supra* note 25 and accompanying text.

77. Leo P. Martinez, *The Summons Power and Tax Court Discovery: A Different Perspective*, 13 VA. TAX REV. 731, 740 (1994). Martinez goes on to argue that "[o]bviously, the lower threshold makes it easier for the Service to acquire taxpayer information and more difficult for the taxpayer to protect the privacy of purportedly personal records." *Id.*

Part of the reason why the administrative summons is not bound by the same restrictions placed on search warrants is that the Supreme Court has consistently found that there is no accountant–client privilege in respect of Fourth Amendment privacy, as compared to the privacy expectations that exist in attorney–client relationships.⁷⁸ While subsequent changes of law have created an accountant–client privilege for the limited purposes of tax advice,⁷⁹ most non-attorney relationships remain unprotected. In practical terms, this means that the taxpayer has next to no privacy rights in their personal financial information that is in the possession of third parties.

Moreover, because the IRS is not restrained from simply administering summonses to banks or other typical third-party record-keepers, summonses can be wide ranging.⁸⁰ Because the effects of an investigation can be wide ranging, and may involve both civil and criminal elements, there are privacy concerns that investigations can lead to embarrassment of the taxpayer within their family and the surrounding community.⁸¹ Just as there are concerns that can arise out of the dignity lost from unlawful searches of one’s home or property, administrative summons have equal potential to harm the dignity of the taxpayer through unjustified searches performed under administrative summonses.

There are legitimate concerns in the area of privacy rights when it comes to IRS summonses. While it is not the purpose of this Note to imply that IRS agents act in bad faith and violate taxpayers’ privacy rights by performing bad faith fishing expeditions, the potential for abuse is evident.

B. CRIMINAL INVESTIGATIONS

Because enforcement of the tax code by the IRS carries with it both civil and criminal implications,⁸² there is a concern that the broad IRS summoning power could be used to circumvent the warrant requirements that protect taxpayers during criminal investigations.⁸³ This concern is partially alleviated by the statutory language of I.R.C. § 7602(d), which prevents the IRS from issuing an administrative summons when “a Justice Department referral is in

78. *Couch v. United States*, 409 U.S. 322, 335 (1973).

79. I.R.C. § 7525(a)(1) (2012) (“With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner . . .”).

80. *See supra* note 12 and accompanying text.

81. Herbert L. Zuckerman, *Tax Fraud Investigations*, 1976 N.J. ST. B.J. 14, 17 (“Probably the basic reason for the plethora of problems may be associated with the scope of a typical tax fraud investigation, which ultimately involves the taxpayer’s family, friends, business associates, banks, accountants and lawyers. There are no easy answers to the embarrassment and other problems presented by such an investigation.”).

82. *United States v. LaSalle Nat’l Bank*, 437 U.S. 298, 308 (1978).

83. Martinez, *supra* note 77, at 740 (discussing the removal of Fourth Amendment protections from IRS administrative summonses).

effect.”⁸⁴ In essence, this prevents the IRS from using its administrative summons to discover evidence of crime when the IRS has recommended to the Justice Department to open “a grand jury investigation of, or the criminal prosecution of, [a taxpayer].”⁸⁵ It also prevents the IRS from issuing an administrative summons to find further evidence of criminal liability once they have received a request from the Attorney General or one of his agents to disclose taxpayer information the IRS currently has available.⁸⁶ In effect, then, an administrative summons cannot be used once it is clear that the investigation of the taxpayer has become criminal in nature.

Prior to the point at which an investigation clearly becomes criminal, however, the IRS has significant power to unearth criminal evidence against the taxpayer, whether by mistake or, possibly, by unscrupulous intent. Whereas even preliminary investigations into almost any other area of criminal liability would require probable cause or a judicially approved warrant, the IRS may issue its far broader administrative summons when there is a reasonable probability that a crime has occurred. The two seminal cases that defined the limits of the IRS administrative summons in criminal investigations are *Donaldson v. United States*⁸⁷ and *United States v. LaSalle National Bank*.⁸⁸ These cases demonstrate that there remains a significant lingering possibility of the IRS abusing the administrative summons in order to further criminal investigations.

1. *Donaldson* and *LaSalle*

In *Donaldson* and *LaSalle*, the Supreme Court ruled on two cases dealing with IRS administrative summonses that the taxpayer argued were criminal in nature. In *Donaldson*, the IRS issued an administrative summons to a taxpayer and a third-party record-keeper for documents and testimony relating to the taxpayer.⁸⁹ The taxpayer filed a motion to intervene, claiming that the IRS had issued the summons “for the express and sole purpose of obtaining evidence concerning any violations of the criminal statutes applicable to the tax laws of the United States”⁹⁰ The Court rejected this assertion, holding that the taxpayer was not under indictment and there had not been a recommendation to prosecute the taxpayer, so it was merely possible that the summons would lead to a criminal investigation.⁹¹ The Court did not

84. I.R.C. § 7602(d)(1) (2012).

85. *Id.* § 7602(d)(2)(A)(i).

86. *Id.* §§ 7602(d)(2)(A)(ii), 6103(h)(3)(B).

87. *See generally* *Donaldson v. United States*, 400 U.S. 517 (1971).

88. *See generally* *United States v. LaSalle Nat'l Bank*, 437 U.S. 298 (1978).

89. *Donaldson*, 400 U.S. at 518–19.

90. *Id.* at 521.

91. *Id.* at 534. Extending this broadly to all taxpayers, the court noted:

That he might be indicted and prosecuted was only a possibility, no more and no less in his case than in the case of any other taxpayer whose income tax return is

determine if an administrative summons would be enforceable if the sole purpose of the summons was to determine criminal liability.⁹² The ultimate result of *Donaldson* was that the IRS could issue an administrative summons, even if the summons would possibly result in criminal prosecution, so long as the summons was in good faith and there had not been a recommendation for a criminal investigation.⁹³ However, *Donaldson* left the question of what constituted “good faith” unresolved.

That question was the focus of the Court’s decision in *LaSalle*, a case in which an IRS agent issued a summons to a third-party record-keeper to discover records relating to a taxpayer’s tax liability for purposes that the lower court found to be entirely criminal in nature.⁹⁴ The Court, in examining good faith, did not address if the IRS agent had acted in good faith. Rather, the Court held that whether there had been good faith could “be answered only by an examination of the institutional posture of the IRS.”⁹⁵ Thus, even if the agent acted in bad faith, if the agency as a whole acted in the good faith assumption that there was a civil aspect to the investigation, the summons could be enforced.⁹⁶ The burden of proving institutional bad faith was on the taxpayer, and the Court noted that it was a “heavy one” that was unlikely to be met.⁹⁷ For practical purposes, then, the *LaSalle* decision meant that while it was hypothetically possible for a taxpayer to prove institutional bad faith, in reality this would almost never succeed unless the IRS had already

undergoing audit. Prosecution will necessarily depend on the result of that audit and on what the examination and investigation reveal.

Id.

92. *Id.* at 531–34. The Court did note that dictum from *Reisman v. Caplin* indicated that an administrative summons would be unenforceable if it were for the sole purposes of investigating criminal liability. *Id.* at 532 (citing *Reisman v. Caplin*, 375 U.S. 440, 449 (1964)). While the Court never directly addressed this issue, it did seem to indicate that, in reality, as long as a criminal prosecution had not been initiated, there would not be a situation where a summons was issued solely for a criminal investigation. *Id.* at 533 (“[I]t has been said, usually citing *Reisman*, that where the sole objective of the investigation is to obtain evidence for use in a criminal prosecution, the purpose is not a legitimate one and enforcement may be denied. This, of course, would likely be the case where a criminal prosecution has been instituted and is pending at the time of issuance of the summons.”).

93. *Id.* at 536. The IRS can issue an administrative summons that *may* result in criminal liability. *LaSalle Nat’l Bank*, 437 U.S. at 308–09 (1978); *Couch v. United States*, 409 U.S. 322, 326 (1973).

94. *LaSalle Nat’l Bank*, 437 U.S. at 299–301. There was ample evidence that the investigation was purely criminal. The agent had requested the assignment to investigate the taxpayer after receiving a tip from a confidential informant. *Id.* at 300. At trial, the agent testified that the assignment was “[t]o investigate the possibility of any criminal violations of the Internal Revenue Code.” *Id.* (alteration in original). Another attorney testified that the agent had told him that the investigation “was strictly related to criminal violations of the Internal Revenue Code.” *Id.* at 303. On review, the appellate court held did not find the lower court’s findings that the investigation was purely criminal in nature clearly erroneous. *Id.* at 305.

95. *Id.* at 316.

96. *Id.* at 318.

97. *Id.* at 316.

recommended criminal prosecution to the Justice Department, or the taxpayer could prove that the IRS had decided to recommend criminal prosecution and had issued the administrative summons anyways.⁹⁸

2. Concerns after *Donaldson* and *LaSalle*

While the *LaSalle* Court made it effectively impossible for a taxpayer to show bad faith, the continued requirement that there must be good faith from the IRS that its investigation is partially civil in nature seems to indicate that the Court disapproves of the IRS using its administrative summons power for purely criminal investigations.⁹⁹ However, after *LaSalle*, the IRS can use its broad administrative power to begin criminal investigations, just so long as it has not recommended a criminal investigation to the Justice Department.¹⁰⁰ Subsequent statutory enactments of the tax code have helped to solidify this ruling into law.¹⁰¹ In *LaSalle*, the Court stated that “[n]othing in § 7602 or its legislative history suggests that Congress intended the summons authority to broaden the Justice Department’s right of criminal litigation discovery or to infringe on the role of the grand jury as a principal tool of criminal accusation.”¹⁰² The *LaSalle* decision shifted the possible infringement of the role of the grand jury out of the hands of the Justice Department and into the hands of the IRS.

To be sure, the *LaSalle* court had to balance two equally important concerns: on one hand were concerns that criminal investigations might be

98. Martinez, *supra* note 77, at 736 (“Therefore, even with an agent’s admitted bad faith, the summons would be upheld unless the Service as an institution had already decided to recommend criminal prosecution to the Justice Department.”); see also Dorothy J. Cramer, Comment, *The Institutional Good Faith Test for Enforcement of an Internal Revenue Service Summons*: United States v. LaSalle National Bank, 56 DENV. L.J. 639, 640 (1979) (“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.”). The *LaSalle* ruling brought with it a flurry of analysis from student writers that goes deeper than I have time to go in this Note. For further discussion, see generally Nancy Graber, Note, *IRS Use of the Civil Summons Power: The Institutional Good Faith Requirement—United States v. LaSalle National Bank*, 28 DEPAUL L. REV. 469 (1979) (discussing *LaSalle* summons requirements); Philip L. Guarino, Comment, *LaSalle Revisited: The Use of Agency Subpoena Powers in Parallel Civil and Criminal Proceedings*, 11 SETON HALL L. REV. 716 (1981) (examining *LaSalle* and arguing that *LaSalle* summons requirements should be applied to the SEC); Monice Rosenbaum, Note, *Institutional Posture: A Measurement for Good Faith in an IRS Summons Enforcement Proceeding*, 9 FORDHAM URB. L.J. 215 (1980) (examining the impact of *LaSalle* on Circuit Courts).

99. *LaSalle Nat’l Bank*, 437 U.S. at 318 (“[Good faith] requires that the Service not abandon in an institutional sense . . . the pursuit of civil tax determination or collection.”).

100. See Nancy I. Kenderdine, *The Internal Revenue Service Summons to Produce Documents: Powers, Procedures, and Taxpayer Defenses*, 64 MINN. L. REV. 73, 74 (1979) (“The Court has quietly transformed the IRS administrative summons from a device used primarily for the purpose of investigating civil tax liability to one that now may be used for the sole purpose of furthering criminal investigations.”); Martinez, *supra* note 77, at 736–37 (“In effect, *LaSalle* expanded the already broad reach of the summons to include criminal investigations by a Service agent.”).

101. Martinez, *supra* note 77, at 737–38.

102. *LaSalle Nat’l Bank*, 437 U.S. at 312.

pursued without the protections afforded by the Fourth Amendment, and on the other hand were concerns about empowering the IRS to perform their duties. In balancing these concerns, the Court concluded that the taxpayer was adequately protected by the “layers of review” within the IRS.¹⁰³ An IRS agent has multiple individuals above him who review any recommendation for referral of a case to the Justice Department.¹⁰⁴ Why this should reassure the taxpayer is not explained. The fact that the IRS can gather criminal evidence from individual agents acting in bad faith, but that non-biased agents will review this evidence before turning this evidence over to the Justice Department, who will then use all the collected evidence to prosecute the taxpayer, seems of little comfort to the taxpayer.¹⁰⁵ It seems unlikely that once criminal evidence is uncovered a reviewing agent will investigate the motives of the investigating agent, or that a reviewing agent would opt to not turn criminal evidence over to the Justice Department regardless of the investigating agent’s motives.

While the IRS has a legitimate need to perform its duties, it can readily abuse its administrative summons power. Where the burden is placed on the taxpayer to show institutional bad faith—a very high burden to meet—the IRS administrative summons power might allow a zealous agent to infringe into areas meant to be protected by the Fourth Amendment.¹⁰⁶ And use of the administrative summons is certainly resulting in criminal prosecutions, although it would be inappropriate to claim that any of these were the result of purposeful criminal investigations. The IRS recommended 4,364 criminal

103. *Id.* at 315.

104. *Id.*

105. It seems unlikely that even agents with the best of intentions would fail to turn over a criminal case simply because the agent who initially sent the administrative summons had done so purely with the intent of engaging in a criminal investigation. The agents reviewing whether to recommend the case be criminally prosecuted will be unlikely to even know the intent of the agent who issued the summons. It would be far more protection for the taxpayer if there were layers of review that an agent had to go through before issuing a summons. As it stands now, the layers of review appear to be trending in the wrong direction. Imagine if criminal warrants only went through review after the doors had been kicked in, the home searched, and the evidence gathered.

106. Otis H. Stephens and Richard A. Glenn note that the use of a warrant grew out of the founding fathers’ concern for “the reckless use of ‘general warrants,’ under which British colonial officials often conducted wide-ranging searches of the homes and businesses of colonists.” OTIS H. STEPHENS & RICHARD A. GLENN, *UNREASONABLE SEARCHES AND SEIZURES: RIGHTS AND LIBERTIES UNDER THE LAW* 10 (2006). It is certainly arguable that the broad summons power given to the IRS allows a general warrant of individuals and businesses. It is also worth noting that while the *LaSalle* court discussed the “layers of review” that might mean that the IRS would not recommend a criminal investigation after discovering criminal evidence during an administrative summons, they do not mention any “layers of review” to prevent zealous agents from performing purely criminal investigations. *LaSalle Nat’l Bank*, 437 U.S. at 315–16.

prosecutions to the Department of Justice in 2013.¹⁰⁷ Of those recommendations, 93.1% resulted in convictions.¹⁰⁸

Because of the extreme difficulty of proving institutional bad faith, it appears that a reasonable concern that this power might be used to circumvent the grand jury, probable cause, or necessary warrants is not unfounded. As Part IV argues, it is essential to enforce the mechanisms that are in place to protect taxpayers from administrative abuses.

IV. BRINGING *JEWELL* FURTHER

As previously noted, the Tenth Circuit appeared hesitant to find that the 23-day notice had to be strictly enforced against the IRS.¹⁰⁹ However, this Part will explore why the other circuits should strictly enforce the 23-day notice requirement. This Part first discusses whether the legal reasoning relied upon by the Tenth Circuit in making its decision in *Jewell* is correct. It then takes the analysis further, exploring why the Tenth Circuit's decision leads to positive public policy.

A. EXPANDING ON THE TENTH CIRCUIT'S REASONING IN *JEWELL*

Thus far, the Tenth Circuit has been the only circuit to evaluate the requirements of *Powell* and apply that analysis to the 23-day notice requirement. The basic logic of the Tenth Circuit's opinion proceeds:

1. In *Powell*, the Supreme Court stated that the IRS must comply with all administrative summons to make a prima facie case for enforcing an administrative summons.¹¹⁰
2. I.R.C. § 7609 states that the IRS *shall* give the taxpayer 23 days' notice before procuring testimony or looking at records that have been attained through the use of an administrative summons.¹¹¹
3. When Congress puts "shall" into a statute, it indicates that the requirement is mandatory.¹¹²
4. Under a dictionary definition of administrative step, the 23-day notice requirement is an administrative step.¹¹³

107. INTERNAL REVENUE SERVICE FISCAL YEAR 2013 ENFORCEMENT AND SERVICE RESULTS 8, (on file with author, jrmcrrll@gmail.com).

108. *Id.*

109. *See supra* note 65 and accompanying text (discussing Tenth Circuit's hesitancy in creating the circuit split).

110. *United States v. Powell*, 379 U.S. 48, 57–58 (1964); *Jewell v. United States*, 749 F.3d 1295, 1297–98 (10th Cir. 2014).

111. *Jewell*, 749 F.3d at 1298; *see also* I.R.C. § 7609(a)(1) (2012).

112. *Jewell*, 749 F.3d at 1298 (citing *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999); and *United States v. Myers*, 106 F.3d 936, 941 (10th Cir. 1997)).

113. *Jewell*, 749 F.3d at 1299 (citing *THE OXFORD ENGLISH DICTIONARY* 163 (2d ed. 1989)).

5. Because the 23-day notice was mandatory and an administrative step, and because the IRS had failed to give the full 23-day notice in this case, the IRS had not shown a *prima facie* case for issuing an administrative summons, and therefore the summons could not be enforced.¹¹⁴

This Note has already laid out the reasoning in *Powell*, so the court's interpretation of that case need not be discussed further.¹¹⁵ There does not appear to be disagreement as to the requirements for the first three *Powell* factors; thus the two areas of the *Jewell* decision that harbor room for disagreement are whether the 23-day notice is: (1) mandatory; and (2) an administrative step. Taking the analysis begun by the Tenth Circuit further illuminates that the 23-day notice is both mandatory and administrative.

1. The 23-Day Notice Is Mandatory

The first issue for analysis is whether the 23-day notice is mandatory. If the notice is not mandatory, the IRS is not required to strictly comply with the 23-day notice. However, case law indicates that the 23-day notice is indeed mandatory.

In reasoning that the 23-day notice is mandatory, the Tenth Circuit relied heavily upon a statutory interpretation of the word "shall."¹¹⁶ The court determined that the use of the word "shall" in I.R.C. § 7609(a)(1) indicated a "mandatory intent" from Congress.¹¹⁷ This is the correct finding, as numerous authorities hold that the statutory use of the word "shall" clearly indicates a congressional mandatory intent.¹¹⁸

This does not, however, end the inquiry. Several of the other circuits also held that "shall" indicates mandatory intent.¹¹⁹ So how, then, does the

114. *Id.* at 1300.

115. *Supra* Part II.B.; *see also Powell*, 379 U.S. at 57–58 (“[The IRS] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner’s possession, and that the administrative steps required by the Code have been followed . . .”).

116. *Jewell*, 749 F.3d at 1298–99.

117. *Id.*; *see also* I.R.C. § 7609(a)(1) (2012) (“[T]hen 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 23rd day before the day fixed in the summons as the day upon which such records are to be examined.” (emphasis added)).

118. *See, e.g., Pierce v. Underwood*, 487 U.S. 552, 569–70 (1988) (stating that the use of “shall” indicates “mandatory language”); *United States v. Myers*, 106 F.3d 936, 941 (10th Cir. 1997) (“It is a basic canon of statutory construction that use of the word ‘shall’ indicates a mandatory intent.” (citing NORMAN J. SINGER, 1A SUTHERLAND STATUTORY CONSTRUCTION § 25.04 (5th ed. 1992))); William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Forward: Law as Equilibrium*, 108 HARV. L. REV. 26, 98 (1994) (“‘May’ is usually precatory, while ‘shall’ is usually mandatory.”).

119. *See Cook v. United States*, 104 F.3d 886, 889 (6th Cir. 1997) (“The word ‘shall’ is ‘the language of command’ which usually, although not always, signifies that Congress intended strict and nondiscretionary application of the statute.”).

apparent discrepancy arise that a mandatory requirement is found to be non-mandatory? That is, if the requirement to give 23-days' notice is in fact mandatory for the issuance of an administrative summons, then noncompliance with the requirement should inevitably lead courts to quash the summons. The answer lies in the Supreme Court's history of holding that some "mandatory" requirements are, in fact, far from mandatory.

In a line of criminal cases, the Supreme Court has given some guidance to help in determining if the statutory use of the word "shall" means that strict enforcement of the statute is required. For instance, in *United States v. Montalvo-Murillo*, the Court dealt with a case in which a judge missed the deadline for a mandatory bail hearing.¹²⁰ The relevant statute held that "[t]he judicial officer shall hold a hearing" and do so within certain mandatory deadlines.¹²¹ The Court nonetheless found that a failure to meet this deadline did not mean that the harsh result of letting the accused go was required.¹²² Instead, the Court found that the error was "harmless" and relied on a balancing of the statutory language versus other relevant matters, such as the realistic nature of deadlines in criminal courts and relevant public policy.¹²³ This sort of "balancing" of the statutory language versus other factors has been used in other cases by the Court when the government has failed to reach "mandatory" deadlines.¹²⁴

This line of cases helps explain how some of the circuits arrived at their determination that failure to strictly adhere with the 23-day notice did not mean that the court couldn't enforce the summons if the taxpayer was not substantially prejudiced.¹²⁵ Indeed, the "substantially prejudiced" analysis looks very similar to the "harmless error" analysis applied by the *Montalvo-Murillo* Court.¹²⁶ However, these circuit courts that have used the "harmless error" reasoning failed to take the second step in the analysis.

120. *United States v. Montalvo-Murillo*, 495 U.S. 711, 717-18 (1990).

121. *Id.* at 714 (quoting 18 U.S.C. § 3142(f) (1988)).

122. *Id.* at 717-18.

123. *Id.* at 718-22.

124. *See generally* *Dolan v. United States*, 560 U.S. 605 (2010) (holding that the sentencing court could still hold a restitution hearing even after missing statutory deadline for holding the hearing); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003) (holding that the Commissioner of Social Security did not lose statutory power to "assign each coal industry retiree eligible for benefits under the Act to an extant operating company—a 'signatory operator'—or a related entity, which shall then be responsible for funding the beneficiary's benefits" when assignments were not made by a mandatory deadline).

125. *See supra* notes 44-52 and accompanying text.

126. *Compare* *Montalvo-Murillo*, 495 U.S. at 722 ("Because respondent was dangerous and likely to flee, he would have been detained if his hearing had been held upon his first appearance rather than a few days later. On these facts, the detention was harmless."), *with* *Azis v. IRS*, 522 F. App'x 770, 777 (11th Cir. 2013) ("Moreover, despite the delay, Azis had notice of the summonses and was able to timely file his petition to quash. He has not indicated, much less shown, any other specific harm caused by the shortened time in which to prepare his petition to quash.").

First, as noted by the Tenth Circuit in its analysis, previous cases that have excused mandatory deadlines have largely dealt with situations where the governmental agency missed a deadline but still retained a statutory duty to fulfill the task that was initially required to be completed before the deadline.¹²⁷ That statutory duty is not present in the case of IRS administrative summonses. The IRS retains the power to issue a summons, but is under no statutory duty to do so.¹²⁸

Second, in the Supreme Court cases where the Court held that so-called mandatory deadlines could be excused, the Court concluded that there were important public policy reasons for excusing the missed deadline, such as: ensuring that retired coal miners received benefits,¹²⁹ ensuring that victims of crime received restitution from perpetrators,¹³⁰ and keeping potentially dangerous criminals incarcerated while awaiting trial.¹³¹ Whereas holding the government to its statutory deadlines was forgiven in a number of Supreme Court cases referenced above, strictly enforcing the deadline would have permanently destroyed someone else's rights.¹³² Thus, the Supreme Court found in those cases that the government's failure to meet a mandatory deadline was forgivable because: (1) there were public policy reasons to allow the government to exert its power regardless of the missed deadline, and (2) strictly enforcing the government's deadline would have extinguished some other citizens' rights.¹³³

It is not nearly as clear that there are the same public policy reasons to allow the IRS to enforce administrative summonses without meeting the statutory requirements. While there are certainly plenty of reasons to want the IRS to be able to perform their tasks, there are equal public policy concerns that taxpayers are given ample notice when the IRS is investigating their records.¹³⁴ Further, if the IRS's administrative summons is quashed, there is nothing preventing them from reissuing the summons with the proper 23-day notice, should the IRS decide the investigation is still worth pursuing.¹³⁵ The fact that the IRS can reissue a summons strengthens the argument that there are not the same public policy concerns because strict enforcement of the 23-day notice requirement will not mean that the IRS is incapable of eventually

127. *Jewell v. United States*, 749 F.3d 1295, 1298–99 (10th Cir. 2014) (“In *Barnhart*, the Commissioner of Social Security had a statutory obligation to assign a company that would fund benefits for individuals who had retired from the coal industry and were eligible for benefits. In *Dolan*, the district court had a statutory duty to determine how much the defendant owed in restitution.” (citation omitted)).

128. *See id.* at 1299 (“The IRS could issue the summonses, but it was not required to do so.”).

129. *Barnhart*, 537 U.S. at 152.

130. *Dolan v. United States*, 560 U.S. 605, 607–08 (2010).

131. *Montalvo-Murillo*, 495 U.S. at 722.

132. *See supra* notes 129–30 and accompanying text.

133. *See supra* notes 129–31 and accompanying text.

134. *See infra* Part IV.B.

135. *Cook v. United States*, 104 F.3d 886, 889–90 (6th Cir. 1997).

reviewing the documents that are the interest of the summons. Thus, the IRS is still capable of performing its job, even with strict enforcement of the 23-day notice requirement.

Third, in at least the *Montalvo-Murillo* case, the Court noted the practical difficulties that can occur when meeting deadlines in criminal cases.¹³⁶ The Court noted that “[d]etention proceedings take place during the disordered period following arrest” and between jurisdictional intercommunication by courthouse staff, reviewing if temporary detentions had occurred, and attorney requests for continuances, where deadlines are simply more prone to be missed.¹³⁷ That concern is not present with IRS administrative summonses, in part because the IRS is in complete control of who they issue a summons to, when the summons is issued, and when notice will be given.¹³⁸ So while it may be understandable that a deadline will be missed during a criminal proceeding at no fault of the court, the only entity to blame for a failure to give a timely 23-day notice is the IRS.

When taken as a whole, it seems that the mandatory nature of the 23-day notice is quite different than the mandatory deadlines involved in the line of cases where failure to meet the deadline did not result in governmental default. There are no clear cut policy reasons to excuse the delay, the ability to meet the requirement is fully in the hands of the IRS, and the IRS is under no statutory duty to issue the summons if they fail to comply with the 23-day notice requirement.¹³⁹ However, simply ruling that it is mandatory does not preclude the IRS from making a *prima facie* case for enforcement of a summons.¹⁴⁰ *Powell* only requires that all administrative steps have been followed.¹⁴¹ It follows, then, that even if the 23-day notice requirement is mandatory, if it is only a “technical stricture,”¹⁴² or something in that vein, then it could very well mean that the summons can still be enforced and some other judicial remedy is required for the IRS’s failure to comply with the mandatory nature of the requirement.

2. The 23-Day Notice is an Administrative Step

In the circuit courts’ decisions leading up to *Jewell*, the courts never truly reached a conclusion on whether the 23-day notice was an “administrative step” under *Powell*.¹⁴³ While some courts seemed to indicate that the 23-day

136. *Montalvo-Murillo*, 495 U.S. at 720.

137. *Id.*

138. *See supra* Part III.

139. *See Jewell v. United States*, 749 F.3d 1295, 1299 (10th Cir. 2014) (“The IRS could issue the summonses, but it was not required to do so.”).

140. *See supra* notes 24–27 and accompanying text.

141. *United States v. Powell*, 379 U.S. 48, 58 (1964).

142. *Cook v. United States*, 104 F.3d 886, 889 (6th Cir. 1997).

143. *See supra* notes 48–55 and accompanying text.

notice was an administrative step, they never directly stated that it is.¹⁴⁴ The question, then, if the 23-day notice was an administrative step, remained unanalyzed in depth until the Tenth Circuit's decision in *Jewell*. Even though the Circuit found the 23-day notice was mandatory, it was still unclear whether lack of 23-days' notice would void a prima facie case for enforcement of the administrative summons. The *Powell* Court did not hold that every mandatory step must be followed to enforce an administrative summons, rather, they specifically held that every administrative step had to be followed.¹⁴⁵ It is conceivable, then, that the 23-day notice may be mandatory, but not an administrative step, meaning that some other judicial remedy was available besides quashing the administrative summons.

Determining if the 23-day notice is an administrative step is more difficult for two reasons: (1) the Court did not define "administrative step" in the *Powell* decision;¹⁴⁶ and (2) the *Powell* decision occurred in 1964, 12 years before Congress added section 7609 and required notification to the taxpayer before reviewing taxpayer records held by a third party. If the 23-day notice is an administrative step, it was one that certainly did not exist at the time of the *Powell* decision.¹⁴⁷ While the term "administrative step" is relatively difficult to fully define with any accuracy, the Tenth Circuit was correct in finding that the 23-day notice is an administrative step.

The Tenth Circuit's analysis of whether the 23-day notice is an administrative step is relatively brief. It first identified that a dictionary definition of "administrative step" is "[p]ertaining to, or dealing with, the conduct or management of affairs."¹⁴⁸ It then held that the 23-day notice deals with the conduct of affairs and, even if a technical requirement, the term "administrative step" is broad and would therefore include any such technical requirements.¹⁴⁹ A more in-depth analysis of what constitutes an administrative step reveals that while the use of this term is not fully defined in contemporary legal conversation, the Tenth Circuit made the correct decision in finding that the 23-day notice is an administrative step.

144. See *supra* Part II.B.2.

145. *Powell*, 379 U.S. at 57–58.

146. See *id.* at 58–59. The Court found that the IRS failing to notify a taxpayer in writing that after investigation "further examination" of his records would be necessary would constitute failing to comply with an administrative step. There is no further explanation of what else might constitute failure to comply with an administrative step. *Id.* at 58.

147. See *supra* Part II.A (discussing the creation of the 23-day notice).

148. *Jewell v. United States*, 749 F.3d 1295, 1299 (10th Cir. 2014) (quoting I THE OXFORD ENGLISH DICTIONARY 163 (2d ed. 1989)).

149. *Id.* at 1300 ("Even if the IRS's delay constituted a 'technical default,' the question would be whether the 'technical' notice requirement involves an 'administrative' requirement. The meaning of the term 'administrative' is broad and would include precisely this sort of 'technical' requirement.").

While decisions by the Supreme Court offer little guidance, other federal courts have applied the term in more illuminating examples.¹⁵⁰ Federal courts have held that signing a form agreeing to arbitration,¹⁵¹ bringing a charge against an employer in order to begin an investigation by the National Labor Relations Board,¹⁵² filing a request for a conciliation conference,¹⁵³ or giving notice of an intention to sue¹⁵⁴ are all examples of administrative steps.

What this line of cases demonstrates is that filing a necessary form or giving an individual notice is often viewed as a required administrative step before an investigation or hearing can occur. Applying this in the case of the administrative summons, notification to the taxpayer that the IRS will be summoning third-party records is a required administrative step before the IRS can begin its investigation. The IRS is, after all, beginning an investigation. However, what is not clear from this line of cases is if the 23-day length of the notice is a requisite part of the administrative step. Specifically, is the actual giving of the notice the administrative step? Or, is giving the notice *23 days before review of the records* the administrative step?

One area of law that suggests that the latter is the administrative step is the exhaustion doctrine. The exhaustion doctrine requires that plaintiffs deplete an agency's internal administrative review process before they can seek remedy in federal court for a dispute with an administrative agency.¹⁵⁵ When applying this doctrine, courts often hold that plaintiffs must not only satisfy each administrative step, but also do so in a timely manner.¹⁵⁶ While not directly stating that timeliness is a part of an administrative step, these cases indicate that it is an indispensable part of satisfying an administrative

150. The most notable and repeated use of the term by the Supreme Court is the Court holding that an inventory search of an individual after arrest but before incarceration does not constitute a search that would require a warrant, but is instead an administrative step. *Illinois v. Lafayette*, 462 U.S. 640, 644 (1983). This is of little use, as it applies only to the area of criminal law and does not seem to correlate to required steps within the IRS.

151. *McMullen v. Meijer, Inc.*, 355 F.3d 485, 490 (6th Cir. 2004).

152. *N. Am. Rockwell Corp. v. NLRB*, 389 F.2d 866, 870 (10th Cir. 1968).

153. *S & M Enters. v. United States*, 43 Fed. Cl. 210, 211-12 (Fed. Cl. 1999).

154. *Kennedy v. Whitehurst*, 509 F. Supp. 226, 230 (D.D.C. 1981).

155. Raoul Berger, *Exhaustion of Administrative Remedies*, 48 YALE L.J. 981, 981 (1939); see also Louis L. Jaffe, *The Exhaustion of Administrative Remedies*, 12 BUFF. L. REV. 327, 327 (1963) ("A party will usually be required before challenging the validity of an administrative action to exhaust his administrative remedies.").

156. See, e.g., *Howze v. Jones & Laughlin Steel Corp.*, 750 F.2d 1208, 1210 (3d Cir. 1984) ("A plaintiff under Title VII must file a timely charge with the EEOC before initiating suit in federal court."); *Schanzer v. Rutgers Univ.*, 934 F. Supp. 669, 673 (D.N.J. 1996) ("The exhaustion requirement includes filing timely charges at each administrative step."); *Brookman v. Brady*, No. 90 C 7299, 1992 WL 39033, at *1 (N.D. Ill. Feb. 24, 1992) ("It was also held that where there is an administrative decision unfavorable to the employee and the employee fails to timely proceed through each administrative step, the employee will be found to have waived his court action for age discrimination." (citing *McGinty v. U.S. Dep't of Army*, 900 F.2d 1114, 1117-18 (7th Cir. 1990))).

step. That is, the administrative step is not just giving notice or filing a form, but doing so by the required deadline.

The requirements of the doctrine of exhaustion can be quite severe in application. Courts often hold that the plaintiff must have completely complied with the exhaustion doctrine before being allowed access to the courts.¹⁵⁷ Failure to timely comply with each administrative step can result in a plaintiff being completely barred from bringing action in court.¹⁵⁸

What makes analysis of the exhaustion doctrine particularly applicable to finding that the 23-day notice administrative step does in fact require the timeliness of the summons to be considered an aspect of the administrative step is that the exhaustion doctrine originated as a result of tax cases where the plaintiffs had not fully availed themselves of remedies available through the IRS.¹⁵⁹ It would be inconsistent to find that plaintiffs must meet all administrative steps under the exhaustion doctrine in a timely manner, but to then hold that the IRS need not meet administrative steps in a timely manner when issuing administrative summonses. The IRS has a greater access to legal advice than the common citizen and is more aware of the requirements of the Internal Revenue Code.¹⁶⁰ When the Supreme Court found in *Powell* that to satisfy a prima facie case for enforcement of an administrative summons, the IRS was required to comply with all administrative steps, it meant that the IRS had to comply with the timeliness aspect of an administrative step.

B. PUBLIC POLICY

Until this point, this Note has focused on justifying the Tenth Circuit's finding in *Jewell* that the 23-day notice must be strictly construed through an analysis of cases and jurisprudence. However, there are also significant public policy reasons to support the finding of the Tenth Circuit—public policy reasons that the Tenth Circuit, and indeed the other circuits that have analyzed this issue, have not reached, or, at the very least, not discussed in their opinions. The three most pertinent reasons that this Part will explore are institutional trust from the public, the practical burden placed on taxpayers by not strictly enforcing the 23-day notice requirement, and that strict enforcement is the only method of ensuring that the IRS complies with mandatory requirements created by the Internal Revenue Code.

157. See Jaffe, *supra* note 155, at 328 (“[T]he Supreme Court occasionally applies the rule in an absolute fashion implying that there is no room for discretion. . . . [The interpretations of some courts] have the consequence that the administrative procedure is an absolute requisite of review . . .”).

158. See *Brookman*, 1992 WL 39033 at *1 (holding that failure to timely comply with the administrative steps could result in plaintiff waiving their right to bring suit in court).

159. See Berger, *supra* note 155, at 981.

160. The IRS purports to employ over 1,500 attorneys in their various offices. This obviously outweighs the access to legal advice that the common taxpayer is capable of. *Legal Divisions*, INTERNAL REVENUE SERV., <http://jobs.irs.gov/resources/job-descriptions/legal-divisions> (last visited Jan. 15, 2017).

1. Institutional Trust

The first public policy concern is that failure to require the IRS to meet congressionally-demanded deadlines causes the public to lose trust in the IRS. It would not be hyperbolic to state that the IRS is one of the most distrusted, misunderstood, and feared of all of the government's administrative agencies. One need look no further than the countless articles and internet websites dedicated to exposing the "evil" practices of the IRS.¹⁶¹ Even mainline politicians have called for the complete demolition of the IRS. Reince Priebus, the chair of the Republican National Convention, told Newsmax TV that he is supportive of "ridding ourselves of the IRS,"¹⁶² and Senator Ted Cruz has openly advocated abolishing the IRS as well.¹⁶³ The American dislike has grown so large that comedian John Oliver recently had singer/songwriter Michael Bolton on his HBO show *Last Week Tonight with John Oliver* to sing a ballad to the American people explaining why the IRS is necessary, even if unpleasant to deal with at times.¹⁶⁴ The IRS is an important tool within the nation and there are important public policy reasons to desire public support for the agency.¹⁶⁵ To garner public support, courts must strictly apply the rules and regulations that Congress has written to govern the IRS.

161. See, e.g., Theo Caldwell, *How to Answer the IRS*, DAILY CALLER (May 27, 2013, 12:52 AM), <http://dailycaller.com/2013/05/27/how-to-answer-the-irs> (arguing that in regards to the IRS "[p]eople can see that a necessary evil might be just evil, or at least illegitimate, such that its demands do not carry their previous heft" and worrying that the author might face retaliatory action from the IRS for making the claim); Peymon Mottahedeh, *IRS Continues to Jail Income Tax Return Filers*, FREEDOM L. SCH., <http://www.freedomlawschool.org/educational-materials/irs-myths/irs-continues-to-jail-filers.html> (last updated Apr. 11, 2016) (arguing that filing a voluntary tax return is a form of "self-enslavement" that heightens the chances of criminal investigation and prosecution by the IRS and that the best way to avoid criminal scrutiny is to not file tax returns); Sheldon Richman, *Abolish the Income Tax and IRS*, THE FUTURE OF FREEDOM FOUND. (Oct. 28, 2014), <http://fff.org/explore-freedom/article/abolish-income-tax-irs> ("All taxation is robbery, but the income tax is the most egregious form of all because of this invasion of privacy. Modest reforms will not be enough. Only uprooting the tax system and abolishing the evil IRS will do.").

162. *RNC's Reince Priebus: Abolish the IRS, 'Rehaul' Tax System*, NEWSMAX (June 24, 2014, 4:00 PM), <http://www.newsmax.com/Newsmax-Tv/Reince-Priebus-RNC-John-Koskinen-Lois-Lerner/2014/06/24/id/578996>.

163. Philip Elliott, *Ted Cruz's Plan to Abolish the IRS Is Unlikely to Ever Happen*, BUS. INSIDER (Mar. 25, 2015, 4:01 PM), <http://www.businessinsider.com/ted-cruzs-plan-to-abolish-the-irs-is-unlikely-to-ever-happen-2015-3> ("The Texas Republican is pledging to scrap the tax-collecting agency as he runs for the GOP presidential nomination in 2016. He joins potential contenders and the Republican National Committee itself in the decidedly longshot push to dismantle the unquestionably unpopular IRS.").

164. Last Week Tonight, *The IRS: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Apr. 12, 2015), https://www.youtube.com/watch?v=Nn_Zln_4pA8. Whether this distrust by the American public is warranted or not is well beyond the reach of this Note, and indeed is something that will likely be debated well into the future.

165. In its budgetary reports the IRS seems to acknowledge this need, stating in the opening paragraph of one summary: "The IRS continues to focus on strengthening the public's confidence in its effective administration of the Nation's tax system." U.S. DEPT. OF THE TREASURY, INTERNAL REVENUE SERV., IRS BUDGET IN BRIEF FY 2016 1 (2015), <https://www.irs.gov/PUP/newsroom/IRS%20Budget>

Reasonable minds can disagree on whether alternative methods of tax collection should be implemented, but unless there is a total recall of the tax system the IRS remains an indispensable tool for collecting revenue. Money spent on the IRS is money well spent, as an increased budget allows the IRS to ensure that taxes are filed correctly and the revenue the U.S. receives is accurate.¹⁶⁶ In fact, for every dollar spent on the IRS budget, a projected six dollars in revenue is generated.¹⁶⁷ As one tax attorney noted, “The Internal Revenue Service . . . is one of those rarities in Washington: a bureaucracy that pays for itself many times over.”¹⁶⁸

While this might seem to indicate that increasing the IRS’s budget would be desirable, the IRS’s budget has been cut by 17% since 2010.¹⁶⁹ One reason that the IRS’s budget continues to shrink, when all quantitative data seems to indicate that the budget should be growing, is that when politicians look to cut government spending, they are more likely to cut spending from agencies and programs that have little favor with the public. It is hard to imagine that many politicians would insist on cutting the IRS’s budget when doing so would not only be damaging to the United States’ ability to generate revenue but would also be politically disfavored by voters.¹⁷⁰

To ensure that the IRS is capable of performing its duties, then, the public must trust the agency. One step to increase public trust in the IRS is strictly requiring the agency to comply with the rules and regulations set forth by Congress, such as the 23-day notice requirement. Justice Frankfurter once commented that “[t]he history of liberty has largely been the history of observance of procedural safeguards.”¹⁷¹ Procedural safeguards are what our country relies upon to reassure citizens that our governmental organizations have not become tyrannical. The necessity of procedural safeguards is so ingrained into the public psyche that we put faith in safeguards that don’t

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166. See David Cay Johnston, *Honey, They Shrank the IRS*, REUTERS (Jan. 17, 2012), <http://blogs.reuters.com/david-cay-johnston/2012/01/17/honey-they-shrank-the-irs> (“IRS data show that auditors assigned to the 14,000 or so largest corporations found \$9,354 of additional tax owed for every hour spent testing tax returns in the 2009 fiscal year. The highest-paid IRS auditors make \$71 an hour. Based on a 2,080-hour work year, that works out to around \$19 million of lost revenue annually for every senior corporate auditor position cut from the payroll.”).

167. U.S. DEP’T OF THE TREASURY, *supra* note 165, at 4.

168. Zuckerman, *supra* note 81, at 14.

169. CHUCK MARR & CECILE MURRAY, CTR. ON BUDGET & POLICY PRIORITIES, *IRS FUNDING CUTS COMPROMISE TAXPAYER SERVICE AND WEAKEN ENFORCEMENT* 1–2 (2016), <http://www.cbpp.org/sites/default/files/atoms/files/6-25-14tax.pdf>.

170. While academics disagree as to the extent that public opinion influences politicians, it is hard to argue that it has no effect at all. For a discussion on the effect of public opinion on politicians, see generally Paul J. Quirk, *Politicians Do Pander: Mass Opinion, Polarization, and Law Making*, 7 FORUM 1 (2010) (arguing that politicians are highly motivated by public opinion).

171. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 354 (1974) (quoting *McNabb v. United States*, 318 U.S. 332, 347 (1943)) (alteration in the original).

even exist, such as the common myth that undercover police must tell you that they are a cop if you ask them.¹⁷²

In fact, one of the latest outrages that has caused public trust to falter in the IRS was a widespread belief that the IRS was unfairly burdening conservative groups that were applying for 501(c)(4) tax-free status.¹⁷³ However, the bipartisan Congressional Permanent Subcommittee on Investigations found that there was no bias present, and the alleged bias was partially caused by of a lack of objective procedural guidelines for reviewing requests for 501(c)(4) status.¹⁷⁴ The subcommittee report recommended that “[t]he IRS should replace the ‘facts and circumstances test’ with objective standards and bright line rules that would produce more consistent, timely, transparent, and predictable treatment of 501(c)(4) applications.”¹⁷⁵ Ultimately, then, the controversy that led to widespread outrage was partially the result of a lack of objective, clear procedural safeguards put in place for the IRS.

What the 501(c)(4) debacle illustrates is that without clear procedural safeguards there is the potential for administrative fallacy that leads the public to believe that the IRS is purposefully abusing its powers, even when this abuse may simply be the result of mistakes within the organization. Administrative summonses are potentially ripe for mismanagement or outright abuse, which could lead to greater public mistrust. Yet there are already procedural safeguards in place for the administrative summons—notably, the 23-day notice requirement. But without enforcement of this procedural safeguard, it is essentially meaningless. How might public distrust grow from discovery that not only does the IRS break the procedural safeguards established by Congress to protect the privacy of the taxpayer from abusive administrative summons, but that this practice has been repeatedly allowed and accepted by the court system?¹⁷⁶ By adopting the rule that the 23-day notice must be strictly enforced, the court system gives the IRS clear procedural guidelines and helps strengthen public support for the agency.

172. This myth is so prevalent, and such a part of pop culture, that Snopes.com had to debunk it. The site noted that “this bit of hooker lore is widely believed, and reliance upon it gets a number of girls arrested who might otherwise have passed on the trick.” David Mikkelson, *Are You a Cop?*, SNOPE (Jan. 12, 2010), <http://www.snopes.com/risque/hookers/cop.asp>.

173. See Patrick Howley, *Bombshell Report: IRS Targeted ‘Icky’ Conservative Groups*, DAILY CALLER (Dec. 22, 2014, 7:56 PM), <http://dailycaller.com/2014/12/22/bombshell-report-irs-targeted-icky-conservative-groups> (claiming that the IRS targeted conservative groups for extra scrutiny to prevent them from gaining 501(c)(4) status at the direction of top management IRS officials).

174. U.S. SENATE PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, IRS AND TIGTA MANAGEMENT FAILURES RELATED TO 501(C)(4) APPLICANTS ENGAGED IN CAMPAIGN ACTIVITY 2 (2014).

175. *Id.* at 9.

176. See *supra* note 73 and accompanying text (noting that Congress specifically passed the notice requirement in order to safeguard taxpayers’ privacy).

2. Practicality

The First, Second, Tenth, and Eleventh Circuits have all taken a stance that the failure to comply with the required 23-day notice for administrative summons can be forgiven as long as the taxpayer is not prejudiced by the default.¹⁷⁷ This seems, on the outset, reasonable. If the taxpayer has not been harmed by a failure to give a full 23-day notice, why quash the summons? The fault in this logic, however, comes from the proof needed to show that the taxpayer was not prejudiced. Specifically, the very fact that the taxpayer managed to file a motion to quash the summons is viewed by most courts as proof that he was not overly prejudiced.¹⁷⁸ The problem with this logic is that it does not take into account that a taxpayer may very well be harmed by even a slight delay in notification, even if the taxpayer manages to file a motion to quash. While the taxpayer is supposed to be given 23-days' notice, once notice is received, the taxpayer only has 20 days to initiate a motion to quash.¹⁷⁹ If the IRS delays too long in the notice, however, the taxpayer may have less than the full 20 days to respond to the administrative summons. This is exactly what happened in *Jewell*, where the taxpayer was given only 18 days to respond before the summons' hearing date.¹⁸⁰ This sort of situation can result in occurrences where a taxpayer has been damaged by a reduced ability to prepare a defense but nonetheless is viewed as unprejudiced by the court because he managed to file a motion to quash before the summons hearing. This could harm the taxpayer in one of several ways:

First, the reduced time to file a motion to quash could impair the taxpayer's ability to find and select a suitable attorney. The average individual likely does not have a tax attorney on call. Once the taxpayer receives notification that the IRS is seizing third-party records in connection with the taxpayer, the taxpayer has, at best, 20 days (assuming that the IRS has complied with this requirement) to perform research on available tax attorneys, make contact with those attorneys, meet with the attorney the taxpayer ultimately hires, and have the attorney draft and file a motion to quash. This can significantly burden a taxpayer, especially a taxpayer who is

177. *Azis v. IRS*, 522 F. App'x 770, 777 (11th Cir. 2013); *Adamowicz v. United States*, 531 F.3d 151, 161–62 (2d Cir. 2008); *Cook v. United States*, 104 F.3d 886, 889 (6th Cir. 1997); *Sylvestre v. United States*, 978 F.2d 25, 28 (1st Cir. 1992).

178. See, e.g., *Azis*, 522 F. App'x at 777 (“Moreover, despite the delay, *Azis* had notice of the summonses and was able to timely file his petition to quash.”); *Sylvestre*, 978 F.2d at 28 (“[The taxpayer] was able to, and did, timely move to quash the summonses.”); *Cook*, 104 F.3d at 889 (“In the instant case, the *Cooks* were not precluded from filing their timely motion to quash the summons prior to the date set for the production of the *Sikkenga* account records in possession of the bank despite the government’s untimely notice.”).

179. I.R.C. § 7609(b)(2)(A) (2012) (“[A]ny person who is entitled to notice of a summons under subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given . . .”).

180. *Jewell v. United States*, No. CIV-12-1124-C, 2013 WL 752625, at *1–2 (W.D. Okla. 2013).

unaware of what to consider when selecting a suitable attorney to represent them. Moreover, taxpayers in rural areas may have difficulty getting ahold of qualified tax attorneys. Meeting with attorneys may require traveling or access to funds that could be difficult for taxpayers to produce. The increased pressure of having a limited time to reply to a summons may force taxpayers to select their attorney less carefully, opting for the cheapest or most accessible attorney as compared to the most qualified.

Second, the reduced time to file a motion to quash could hurt taxpayers who represent themselves pro se and need as much time as they can get to prepare themselves. In 2013, National Taxpayer Advocate, a subsection of the IRS, issued its annual report to Congress.¹⁸¹ They analyzed 117 cases dealing with IRS summons enforcement from June 1, 2012, to May 31, 2013.¹⁸² The taxpayer appeared pro se in 91 of the 117 cases.¹⁸³ The annual report does demonstrate that taxpayers are highly likely to represent themselves in proceedings to quash an administrative summons. Taxpayers who are unaccustomed to the law can make mistakes that could substantially damage their case at any level of the proceedings, including the initial filings.¹⁸⁴ Any reduced time that occurs as a result of the IRS's failure to comply with the full 23-day notification could prejudice a taxpayer representing themselves, even if they do manage to timely file a motion to quash, because any amount of additional time would likely help an inexperienced pro se litigant research and develop their motion to quash.

Third, perhaps the best evidence that the full 23 days is necessary to adequately provide taxpayers time to find a suitable attorney and file a motion to quash is simply in congressional action. Congress increased the required notice provision from 14 days to 23 days, clearly showing it felt that taxpayers

181. See generally 1 NAT'L TAXPAYER ADVOCATE, TAXPAYER ADVOCATE SERV., 2013 ANNUAL REPORT TO CONGRESS (2013), <https://taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/Volume-1.pdf>.

182. *Id.* at 362.

183. *Id.* at 365. It is impossible to say what reasons lead an overwhelming number of taxpayers to represent themselves, but the result is evident. Of the 117 cases analyzed the IRS prevailed in full in 111 cases and in part on 2. *Id.* at 365–66. The National Taxpayer Advocate also noted that given the IRS'S high chances of winning on appellate levels, of the 117 cases examined, there were only eight appeals filed. *Id.* at 370 n.73. As a result of the unlikelihood of winning on appeal, adequate representation at the initial stages of the intervention proceedings is essential to taxpayer success. This Note is not claiming that the high number of taxpayers representing themselves is the result of a shortened period of time to respond to an administrative summons. Indeed, even if a taxpayer were forced based off of shortened notifications to file a motion to quash, they could still seek counsel before their case was heard.

184. The annual report in fact provides an adequate example of such, in which a lower court held a taxpayer was not allowed to invoke the Fifth Amendment during a contempt hearing because he had failed to invoke the Fifth Amendment when he represented himself pro se at the initial enforcement hearing. *Id.* at 367 (citing *United States v. St. John*, 111 A.F.T.R.2d (RIA) 2013-1653 (M.D. Fla. 2013), *adopting in part* 111 A.F.T.R.2d (RIA) 2013-719 (M.D. Fla. 2012)). While the appellate court reversed, finding that the taxpayer could invoke the Fifth Amendment for the first time during the contempt hearing, it is unlikely that this mistake would have occurred at all if the taxpayer had been adequately represented by counsel. *Id.*

required more time to respond to third-party summonses.¹⁸⁵ It is not apparent why Congress gave the taxpayer extra time to respond to an IRS administrative summons and increased the length of time that a taxpayer is required to be notified. It might be an understanding of the complexities of tax law that face a taxpayer who is required to respond to the summons. It might also be some attempt to limit the IRS's already expansive powers. Regardless of Congress's purpose for lengthening the notice requirement, it was unlikely an arbitrary decision. Allowing the IRS to circumvent the 23-day notice requirement allows the IRS to frustrate Congress's intent.

It may seem as though this part is quibbling, arguing that a day or two of notice might lead to unseen prejudice against the taxpayer. Indeed, in most of the circuit cases the IRS was only deficient by a day or two, which would not even impact the 20-day period the taxpayer has to respond to the administrative summons.¹⁸⁶ However, *Jewell* makes clear that there are occurrences where the IRS delays to the point where it actually deprives the taxpayer of his full 20 days to respond, let alone his required 23-day notice. While this was not the situation faced by the circuit courts that forgave deficiencies in notice as long as the taxpayer was not prejudiced, the result of their reasoning is that a taxpayer such as that in *Jewell* would likely not be able to show prejudice simply because he or she had in fact responded to the summons in time to have his or her case heard by the court. The danger with this reasoning is that it does not adequately consider the unseen prejudice that can occur by not giving a taxpayer the time to research, contact attorneys, or prepare filings pro se—a time given to him or her by Congress.

3. The Result of Strict Enforcement

One of the arguments used by courts to excuse IRS failure to comply with the 23-day notice is that it would be futile to quash the summons, as this would only result in the IRS reissuing the summons, this time with the 23-day notice. The Sixth Circuit stated in *Cook* that “it would have been an exercise in futility for the district court to quash the summons here . . . because such an order would merely have compelled the I.R.S. to re-issue the summons to the bank.”¹⁸⁷ However, this argument does not take into account the fiscal realities faced by the IRS. Forcing the IRS to reissue summonses may indeed

185. See *supra* Part II.A. It is worth noting that for a civil subpoena an individual typically only has 14 days to object, whereas Congress has specifically afforded the taxpayer 20 days to respond to an IRS administrative summons. FED. R. CIV. P. 45(d)(2)(B). This seems to indicate that Congress is purposefully giving individuals more time to prepare a motion in the realm of tax investigations as compared to civil suits. Regardless of the reason, it is arguable that when Congress has given different time periods to respond to a summons or notice in different areas of law, this is done intentionally.

186. For example, in *Sylvestre*, the taxpayer was given 21-days' notice instead of the required 23. *Sylvestre v. United States*, 978 F.2d 25, 28 (1st Cir. 1992).

187. *Cook v. United States*, 104 F.3d 886, 889–90 (6th Cir. 1997).

be the only method to insure that the IRS complies with the 23-day notice, as budgetary concerns affiliated with both litigation and reissuing of summonses will lead to the IRS to engage in self-policing to ensure strict compliance with the 23-day notice.

The IRS works off of a limited budget¹⁸⁸ and this budget has been consistently cut over the last several years.¹⁸⁹ The simple and obvious truth is that issuing summonses costs money, via materials spent on the summons, postage or other delivery methods, and time of the agents creating and issuing summonses. While this cost is surely not overwhelming, for large scale organizations such as the IRS, this waste can add up.¹⁹⁰ Further, litigation costs are certainly not “insignificant.” The IRS already attempts to save time, and money, by strategically deciding which taxpayers they are going to investigate. As noted by Marvin Garbis, “IRS agents will not waste valuable time building a case if serious difficulties are anticipated. It is much more feasible for the Service to focus upon another taxpayer who is more willing to cooperate and who defends an investigation for tax fraud with only passive resistance.”¹⁹¹

Until the Tenth Circuit’s holding in *Jewell*, there was little reason for the IRS to not litigate a taxpayer’s motion to quash an administrative summons on the ground that the IRS had defaulted on the 23-day notice. The Courts were more than likely to excuse the deficiency and taxpayers rarely appealed beyond the initial hearing.¹⁹² However, this changes if the IRS knows that the Courts will strictly apply the 23-day notice requirement. The costs of litigating motions to quash that the IRS knows will be upheld and the costs associated with reissuing summonses would become unnecessary institutional waste. This could lead to important internal changes, including the institution of stricter policies requiring IRS agents to adhere to the 23-day notice requirements, and it could also affect bargaining power for individual taxpayers.

It is interesting to note that in the Sixth Circuit’s *Cook* decision, the court displayed a frustration with the IRS’S failure to meet statutory deadlines and other legal requirements.¹⁹³ The court noted that the IRS had a history of ignoring such deadlines that approached “an expression of arrogant

188. In 2015 the IRS’S budget was just under 12 billion dollars, of which around 600 million was dedicated to investigations. U.S. DEP’T. OF THE TREASURY, *supra* note 165, at 5, 12.

189. See MARR & MURRAY, *supra* note 169 and accompanying text.

190. Private sector employers are well aware how even small amounts of employee time add up in the aggregate, and are continually inventing new ways to remove even the smallest amounts of lost employee labor. An extreme example of such efforts can be seen by WaterSaver Faucet company, which came under fire for limiting employee bathroom breaks to six minutes a day in an effort to save money by reducing labor waste. Patrick M. Sheridan, *Company Limits Bathroom Breaks to 6 Minutes a Day*, CNNMONEY: THE REAL ECONOMY (Aug. 5, 2014 5:07 PM), <http://money.cnn.com/2014/07/15/smallbusiness/bathroom-time-penalty>.

191. Marvin Garbis, *Defenses and Discovery in Tax Fraud Investigations*, 10 CUMB. L. REV. 655, 655 (1980).

192. NAT’L TAXPAYER ADVOCATE, *supra* note 181, at 370 n.73.

193. *Cook v. United States*, 104 F.3d 886, 890 (6th Cir. 1997).

immunity” and cautioned the IRS that “this opinion must not be construed as investing the I.R.S. with a license to ignore statutory deadlines or to negligently violate other legal requirements.”¹⁹⁴ The court’s words of warning notwithstanding, the decision undoubtedly showed that the IRS was free to violate the 23-day notice requirement with little to no repercussion. While the court displayed frustration, it failed to see the solution that was standing right before them. By actually holding the IRS to the 23-day notice requirement, it could have forced the IRS to change its internal policies about deadline compliance.

V. CONCLUSION

Congress enacted section 7609 of the I.R.C. to provide taxpayers statutory protections against the IRS’S broad administrative summons power. However, a long history of judicial leniency in allowing the IRS to not comply with the 23-day notice requirement has eroded this protection. *Jewell* stands as a turning point in 23-day notice jurisprudence. For the reasons outlined above, specifically legal reasoning and public policy concerns, the *Jewell* decision works to help both taxpayers and the IRS. The Supreme Court has yet to directly address the decisions of the Circuit Courts regarding this issue. However, should that day arise, the Court should carefully consider that the Tenth Circuit’s decision in *Jewell* is better suited for protecting that American public, and indeed, for protecting the IRS from itself.

194. *Id.*